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CIRCUIT COURT

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

**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.**

**WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a
BRICKSTREET MUTUAL INSURANCE COMPANY'S PETITION FOR APPEAL**

**Petition for Appeal from Orders dated May 4, 2010, and June 29, 2010,
in Civil Action No. 09-C-275 (Judge David H. Sanders)
in the Circuit Court of Jefferson County, West Virginia**

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I. NATURE OF PROCEEDING AND RULING BELOW

Respondent and Plaintiff below, Summit Point Raceway Associates, Inc. ("Summit Point"), seeks insurance coverage that it never purchased. West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet") brings this Petition for Appeal to correct clear error by a trial court in providing such free insurance to Summit Point. Specifically, the trial court erroneously held in a declaratory judgment action that: 1) BrickStreet was required to make a "commercially reasonable" offer of optional, additional insurance coverage for "deliberate intent" claims or actions during the time period from January 1, 2006, through June 30, 2008; 2) the statutory mandate creating BrickStreet and setting forth its duties required BrickStreet to make a "commercially reasonable" offer of optional, additional insurance coverage for "deliberate intent" claims or actions during the time period from January 1, 2006, through June 30, 2008; and, 3) the Part Two – Employers Liability Insurance policy language was ambiguous, even though it was approved by the West Virginia Office of Insurance Commissioner and utilized by nearly all, if not all, carriers providing workers' compensation insurance in West Virginia. The trial court in the matter below has violated fundamental principles of law and assigned duties and obligations to BrickStreet that are contrary to West Virginia statute and common law. The trial court in the matter below has further violated fundamental principles of law regarding interpretation of insurance policy language and failed to apply the plain meaning of the insurance policy. The trial court also erred in holding BrickStreet responsible for damages in excess of the workers' compensation insurance policy limits.

Summit Point filed a claim under its Workers' Compensation and Employer's Liability insurance policy with BrickStreet for the workplace injuries sustained by its employee, Brandon

Gregory, in an incident that occurred on February 27, 2007. The workers' compensation claim was accepted by BrickStreet and paid in full. Subsequently, Summit Point sought a defense of and indemnification for a "deliberate intent" lawsuit brought against it by Mr. Gregory. Mr. Gregory was injured while in the course and scope of his employment with Summit Point. 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.

Summit Point then pursued a civil action against BrickStreet. Summit Point sought a declaratory judgment regarding whether the workers' compensation insurance policy at issue provided coverage for "deliberate intent" claims or actions. Summit Point also asserted that BrickStreet violated the West Virginia Unfair Trade Practices Act ("UTPA") and acted in "bad faith" in the handling of its claim for coverage for Mr. Gregory's lawsuit against it. Additionally, Summit Point claimed that BrickStreet breached the insurance contract based on BrickStreet's denial of its requests for a defense of and indemnification for Mr. Gregory's lawsuit against it. During discovery in the underlying lawsuit, Summit Point moved for partial summary judgment, essentially asserting that BrickStreet had a statutory obligation to make a "commercially reasonable" offer of coverage for "deliberate intent" claims or actions. Summit Point also argued that the insurance policy language at issue excluding claims for "deliberate intent" claims or actions was ambiguous. Consequently, Summit Point asserted that, by operation of law, BrickStreet must provide coverage to Summit Point for Mr. Gregory's "deliberate intent" lawsuit. BrickStreet opposed Summit Point's motion and filed a counter motion for partial summary judgment. The trial court granted Summit Point's motion for partial summary judgment.

The trial court committed clear error in granting Summit Point's motion for partial summary judgment. The trial court's holding is flawed because, under the statutory mandate creating BrickStreet and setting forth its obligations, BrickStreet assumed the obligations of the West Virginia Workers' Compensation Commission ("WCC") in the same manner as those obligations existed for the WCC -- nothing more. Under the WCC, coverage for "deliberate intent" claims or actions was a voluntary coverage that an employer could choose to purchase or not. The trial court's holding is flawed, not only because it ignores the Legislature's total statutory scheme for restructuring this state's workers' compensation system, but because the linchpin for this presumed statutory mandate rests upon a legal principle set forth in Bias v. Nationwide Mut. Ins. Co., 365 S.E.2d 789 (W. Va. 1987). Bias has been effectively superseded by the more recent holding in Luikart v. Valley Brook Concrete & Supply, Inc., 613 S.E.2d 896

(W. Va. 2005). Furthermore, the statutory language does not clearly state that BrickStreet was obligated to make a "commercially reasonable" offer or obtain a "knowing and intelligent" waiver of supplemental "deliberate intent" insurance to each insured employer whose insurance coverage novated to BrickStreet.

Additionally, the trial court committed clear error when it held that the Part Two -- Employers Liability Insurance policy language was ambiguous. The trial court held, in the Discussion of Law portion of its Order, that no exclusion for "deliberate intent" existed in the policy, although it recognized the existence of the exclusions in the Background portion of its Order. Furthermore, the trial court did not apply the correct policy language. As a result, the trial court held that Summit Point could reasonably expect insurance coverage for "deliberate intent" claims or actions based on the title for the Part Two insurance coverage.

The trial court also committed clear error when it found that BrickStreet was obligated to indemnify Summit Point for all damages, regardless of insurance policy limits. The trial court's grant of Summit Point's motion for partial summary judgment was clear error.

BrickStreet requests that this Court grant this Petition for Appeal to correct the trial court's summary judgment rulings, which affect not only BrickStreet, but all workers' compensation insurers in the State of West Virginia. As discussed in greater detail below, the trial court's Order is contrary to law and should be reversed by this Court.

II. STATEMENT OF FACTS

A. Introduction

Brandon Gregory was injured when he caught his hand in a wood planer on February 27, 2007, while working for Summit Point. (Docket 2). Mr. Brandon made a claim for workers' compensation benefits and received workers' compensation benefits under Summit Point's Workers' Compensation and Employers Liability insurance policy with BrickStreet. BrickStreet paid that claim in full. (Docket 31-34). Mr. Gregory also filed a lawsuit asserting liability against Summit Point under the five-part test outlined in West Virginia Code § 23-4-2(d)(2)(ii). (Docket 2; Docket 31-34, Exhibit A). This type of action is also known as a "deliberate intent" or Mandolidis¹ action. Summit Point sought a defense, and indemnification, from BrickStreet for Mr. Gregory's lawsuit against it under its insurance policy with BrickStreet, even though it paid no premium for such coverage. (Docket 2).

B. The Privatization of Workers' Compensation Insurance

Important to the analysis in this matter is how BrickStreet came into existence and how the insurance policy language at issue was adopted by the West Virginia Office of Insurance Commission ("OIC"). In 2005, the West Virginia Legislature determined that the West

¹ Mandolidis v. Elkins Indus., 246 S.E.2d 907(W Va. 1978)

Virginia's workers' compensation fund, administered by the WCC, was deficient and a detriment to West Virginia, and consequently determined that workers' compensation insurance coverage should be made available by private insurers, similar to the workers' compensation system that exists in more than forty other states. See W. Va. Code §23-2C-1, *et seq.*

In furtherance of the privatization effort, the Governor of the State of West Virginia signed a Proclamation on December 8, 2005, establishing January 1, 2006, as the first day of business for BrickStreet. [Exhibit 1]. From January 1, 2006, through June 30, 2008, BrickStreet was the sole insurer for workers' compensation coverage in the State of West Virginia. Id.; W.Va. Code §23-4C-6. After June 30, 2008, other private insurers could offer workers' compensation coverage in West Virginia. Id.

C. The Policy

In addition to workers' compensation coverage, under the former workers' compensation system administered by the WCC, an employer could voluntarily subscribe to the Employers Excess Liability Fund ("EELF") and obtain coverage for "deliberate intent" actions against it. W.Va. Code §§23-4C-2; 23-4C-4. Employers could elect not to purchase coverage for "deliberate intent" actions at all. An employer could also elect to purchase coverage for "deliberate intent" actions from a private insurer rather than participate in EELF. See Erie Insurance Property & Casualty Co. v. Stage Show Pizza, 553 S.E.2d 257 (W.Va. 2001). From January 1, 2006, through June 30, 2008, BrickStreet also wrote coverage for "deliberate intent" actions if an employer requested such coverage. However, from January 1, 2006, through June 30, 2008, BrickStreet was not the sole insurer offering coverage for "deliberate intent" actions. Other private insurers offered coverage for "deliberate intent" actions during the time period in which BrickStreet was the sole workers' compensation insurance provider. Id.

The insurance policy at issue is the standard National Council of Compensation Insurers ("NCCI") workers' compensation policy that is in use in over thirty (30) states and has been adopted by the OIC for use in West Virginia. (Docket 31-34, Exhibit A). In fact, all workers' compensation carriers in West Virginia must use this NCCI policy unless they receive a specific exemption from the OIC. See 85 CSR 3 at Section 10.3. The NCCI policy provides workers' compensation insurance (known as Part One of the policy) and also contains Part Two — Employers Liability Insurance. Part Two of the policy contains exclusions which clearly and unambiguously exclude coverage for "deliberate intent" actions.

D. The Novation

West Virginia employers did not become BrickStreet policyholders through the traditional application, offer and acceptance process surrounding most insurance purchases. Instead, at 12:00 a.m. on January 1, 2006, all policies issued by the WCC "novated" or statutorily transferred to BrickStreet. W.Va. Code § 23-4C-6; Governor Manchin's December 8, 2005, Proclamation attached as Exhibit 1. BrickStreet provided the same coverage to each employer as had been provided under the WCC (See W.Va. Code §§ 23-4C-6; 23-4C-2). For example, if an employer participated in EELF which provided coverage for "deliberate intent" actions under the WCC, then BrickStreet provided coverage for "deliberate intent" actions to the employer by attachment of Broadform Employer's Liability Coverage, Endorsement WC 99 03 04. If the employer did not participate in EELF under the WCC, then the newly novated BrickStreet policy specifically excluded coverage for "deliberate intent" claims through a West Virginia Intentional Injury Exclusion Endorsement, Endorsement WC 99 03 06. (Docket 31-34, Exhibit A) Notice was sent to each employer advising of this circumstance on January 2, 2006.

(Docket 31-34, Exhibit C). Thus, novation from WCC to BrickStreet maintained the insured's status quo with regard to coverages that it had purchased from the WCC.

On April 12, 2006, BrickStreet sent a second letter to each policyholder, again advising of the availability of "deliberate intent" coverage for claims brought under W. Va. Code §23-4-2 (d)(2)(ii). (Docket 31-34, Exhibit D). This letter described additional types of coverage that could be purchased by employers, and stated that these "coverage options [are] available to supplement your workers' compensation policy." Id. (emphasis added). The supplemental coverage options included:

WV Broad Form Employers Liability [which] was formerly known as Employers' Excess Liability Fund Coverage. It provides coverage for West Virginia Annotated Code §23-4-2 (d)(2)(ii) for an additional charge.

Id. This letter explained that "[e]ach of the coverages listed above require underwriting approval prior to extending the coverage," Id., further indicating that the described coverage options were not part of the standard workers' compensation policy and that such coverage options were not automatically provided or offered.

Summit Point did not participate in EELF under the WCC prior to BrickStreet's inception. (Docket 31-34, Exhibit B). Therefore, the coverage did not novate to BrickStreet when BrickStreet assumed the WCC's obligations to insure West Virginia employers, including Summit Point. Summit Point did not purchase from BrickStreet the optional, additional Broadform insurance coverage which would apply to the "deliberate intent" action brought by Mr. Gregory against Summit Point. (Docket 31-34, Exhibit A). Consequently, BrickStreet denied that it owed a duty to defend and indemnify Summit Point for Mr. Gregory's lawsuit against it. (Docket 31-34, Exhibit A).

E. The Trial Court's Rulings.

On May 4, 2010, the trial court entered an Order holding that coverage for Mr. Gregory's "deliberate intent" claim existed under the BrickStreet workers' compensation insurance policy because: 1) BrickStreet was required to make a "commercially reasonable" offer of the Broadform insurance coverage, and obtain a "knowing and intelligent" waiver of such insurance coverage under Bias, infra; 2) BrickStreet was required to make a "commercially reasonable" offer under the statutory mandate creating BrickStreet and setting forth its obligations and duties; 3) BrickStreet failed to make a "commercially reasonable" offer, and thus, by operation of law, the Broadform coverage was included in the insurance policy; 4) the Part Two – Employers Liability policy language was ambiguous; 5) because the policy language was ambiguous, the coverage was included in the insurance policy; and, 6) BrickStreet was obligated to pay all of Summit Point's damages regardless of insurance policy limits. (Docket 65-66).

The trial court provided ten days for the parties to resolve the damages issues. The parties agreed that, pursuant to the trial court's ruling, the damages would amount to \$1,201,080.30, although objections were preserved regarding whether the trial court's rulings were in accordance with West Virginia law. The trial court entered the Agreed Judgment Order on June 29, 2010. The combination of these two Orders results in a final judgment regarding the declaratory judgment action.

III. TRIAL COURT'S ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO SUMMIT POINT AND AGREED JUDGMENT ORDER

The trial court concluded as a matter of law that, under Bias v. Nationwide Mut. Ins. Co., 365 S.E.2d 789 (W. Va. 1987) BrickStreet had a duty to make a "commercially reasonable" offer of the optional, additional Broadform insurance coverage. (Docket 65-66). The trial court further held that BrickStreet was required to obtain a "knowing and intelligent" waiver of the

optional, additional Broadform insurance coverage. Id. The trial court also held that the statutory mandate creating BrickStreet and setting forth its duties required it to make a “commercially reasonable” offer. The trial court held that BrickStreet’s notifications to employers of the insurance coverages by letters dated January 2, 2006, and April 12, 2006, were not sufficient to constitute a “commercially reasonable” offer. The trial court held that BrickStreet’s failure to make a “commercially reasonable” offer, and obtain a “knowing and intelligent” waiver, resulted in the inclusion of “deliberate intent” coverage in the BrickStreet workers’ compensation insurance policy by operation of law. Id.

The trial court also held that the policy language was ambiguous essentially because the title of the Part Two – Employers Liability coverage would lead an employer to believe that it had coverage for “deliberate intent” actions. (Docket 65-66). This holding applies to every insurance carrier utilizing the NCCI workers’ compensation policy and every employer insuring with those companies.

In the May 4, 2010, Order, as a result of its ruling regarding coverage for “deliberate intent”, the trial court also held that BrickStreet breached the insurance policy contract and was liable for all of the damages and losses, regardless of policy limits, Summit Point incurred as a result of BrickStreet’s coverage determination. The trial court provided ten days for the parties to resolve the damages claim amicably before it would consider the damages claims at a hearing.

On June 29, 2010, the trial court entered the Agreed Judgment Order in which the parties agreed that, pursuant to the trial court’s ruling, the damages would amount to \$1,201,080.30, although objections were preserved regarding whether the trial court’s rulings were in accordance with West Virginia law.

IV. STANDARD OF REVIEW

In Murray v. State Farm Fire and Casualty Co., 509 S.E.2d 1 (W.Va. 1998) (quoting Payne v. Wilson, 466 S.E.2d 161, 165-6 (W.Va. 1995)), the Supreme Court of Appeals of West Virginia held that:

[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal.

Id. at 6. Additionally, as to review of summary judgment, the Supreme Court of Appeals of West Virginia held that:

[i]n reviewing summary judgment, this Court will apply the same test that the circuit court should have used initially, and must determine whether "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law."

Id. (citing Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 133 S.E.2d 770 (W.Va. 1963).

The appropriate standard of review in this matter is a *de novo* review of the trial court's rulings

V. ASSIGNMENTS OF ERROR

BrickStreet assigns the following errors of law:

- A. The trial court erroneously concluded that, as a matter of law, under Bias v. Nationwide Mut. Ins. Co., 365 S.E.2d 789 (W. Va. 1987), BrickStreet had a duty to make an offer of the optional, additional Broadform insurance coverage. The trial court erroneously relied on Bias which has been superseded by this Court's more recent holding in Luikart v. Valley Brook Concrete & Supply, Inc., 613 S.E.2d 896 (W. Va. 2005). The trial court also failed to take into consideration the overall context in which the novation of this workers' compensation coverage to BrickStreet transpired. BrickStreet was novating to someone else's insurance obligation (i.e., the WCC's insurance obligations).

- B. The trial court erroneously held that W.Va. Code §23-4C-6, the statutory mandate creating BrickStreet and setting forth its obligations and duties, required it to make a “commercially reasonable” offer of the optional, additional Broadform insurance coverage and obtain a “knowing and intelligent” waiver for such coverage. The statutory language does not contain any requirement to make an offer as required under Bias, supra.
- C. The trial court also erroneously held that the policy language was ambiguous essentially because the title of the Part Two – Employers Liability coverage, would lead an employer to believe that it had coverage for “deliberate intent” actions. In its Discussion of Law, the trial court erroneously held that the policy did not contain an exclusion for “deliberate intent” although it recognized such an exclusion in the Background portion of the Order. Id. Furthermore, the trial court did not apply the correct policy language. The trial court did not apply West Virginia law governing insurance policy interpretation and did not consider the plain meaning of the insurance policy language in accordance with Aluise v. Nationwide Mutual Fire Insurance Co., 625 S.E.2d 260, 267 (W.Va. 2006) and Keefe v. Prudential Insurance Co., 172 S.E.2d 714, 716 (W.Va. 1970).
- D. The trial court also erroneously held that BrickStreet breached the insurance policy contract and was liable for all damages and losses, regardless of policy limits, Summit Point incurred as a result of BrickStreet’s coverage determination.

VI. POINTS AND DISCUSSIONS OF THE LAW

- A. **The June 29, 2010, Order combined with the Court’s May 4, 2010, Order constitute a final order in its nature and effect; therefore, the Petition for Appeal is appropriate**

This Petition for Appeal is appropriate because the May 4, 2010, and June 29, 2010, Orders combined constitute a final judgment which is appealable under West Virginia Rules of Civil Procedure Rule 54(b), although the UTPA and common law bad faith claims are still pending. Rule 54(b) states:

Judgment upon multiple claims or involving multiple parties –
When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which

adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

W.Va. R. Civ. Pro., Rule 54(b). The Supreme Court of Appeals of West Virginia has held that, even if an order does not contain the certification language under Rule 54(b), an order may be considered final if the order approximates a final order in its nature and effect. Hubbard v. State Farm Indemnity Company, 584 S.E.2d 176 (W.Va. 2003); Durm v. Heck's, Inc., 401 S.E.2d 908 (W.Va. 1991). In order to determine whether an order approximates a final order in its nature and effect where multiple claims exist, the court must consider whether the judgment completely disposes of at least one substantive claim. Id.

In Hubbard, Gregory Alli, who suffered from mental disabilities, took a car belonging to his parents and drove from his home in New Jersey to West Virginia. Mr. Alli was arrested and subsequently released to his parents. On the return trip to New Jersey, Mr. Alli's parents stopped to retrieve the car which Mr. Alli originally took. At that time, Mr. Alli stole a car belonging to Roy Pitts. Mr. Alli was subsequently involved in an automobile accident with Margaret Hubbard while driving Mr. Pitts' car.

Ms. Hubbard sued Mr. Alli and his parents. Mr. Alli's parents' car was insured by State Farm Indemnity. State Farm Indemnity did not tender a defense to the Allis. Ms. Hubbard obtained a default judgment against the Allis. The parties entered into an agreement, assignment, and covenant not to execute which included a provision permitting a judgment to be taken against the Allis for \$300,000.

Pursuant to the agreement and assignment, Ms. Hubbard sought a declaratory judgment against State Farm Indemnity asserting that State Farm Indemnity provided insurance coverage

for accidents arising out of the use of the insured vehicle. Ms. Hubbard's theory was that Gregory's use of Mr. Pitts' car arose out of the use of the Allis' car when they stopped to pick up the car that Gregory originally took.

Mr. Pitts' car was insured by State Farm Mutual Insurance Company. Ms. Hubbard also sought a declaratory judgment against State Farm Mutual asserting that the insurance policy for Mr. Pitts' car provided coverage to Mr. Alli because Mr. Pitts impliedly permitted Mr. Alli to use the car when he left his keys in the ignition. State Farm Mutual and State Farm Indemnity filed separate motions for summary judgment.

The lower court denied State Farm Mutual's motion and granted summary judgment to Ms. Hubbard holding that State Farm Mutual was obligated to defend Gregory under the terms of Mr. Pitts' insurance policy. No other ruling was made regarding the claims against State Farm Mutual.

Via a separate order, the lower court granted summary judgment to Ms. Hubbard against State Farm Indemnity holding that coverage existed and State Farm Indemnity had an obligation to defend the Allis for Ms. Hubbard's lawsuit against them. The lower court also held that State Farm Indemnity must pay the \$300,000 set forth in the agreement and assignment. State Farm Mutual and State Farm Indemnity appealed the summary judgment rulings.

In considering the order granting summary judgment against State Farm Indemnity, the Supreme Court of Appeals of West Virginia held that the order was a final order, even though it lacked the express Rule 54(b) certification, because it was final in its nature and effect as to one claim in the civil action – the declaratory judgment claim – despite the fact that the bad faith claim was still pending. The order contained the trial court's determination that a duty to defend and indemnify was owed and awarded damages as to the declaratory judgment. The Supreme

Court of Appeals of West Virginia held that, because coverage was determined to exist and resultant damages were awarded, the order could be construed as final on the declaratory judgment claim. Consequently, the Court determined that the appeal was appropriate.

Similarly, in the instant matter, the combination of the May 4, 2010, and June 29, 2010, Orders constitute a final order because a determination regarding the declaratory judgment claim has been made. Although the UTPA and bad faith claims are still pending, these issues are independent of the determination whether BrickStreet owed a duty to defend and indemnify Summit Point for Mr. Gregory's lawsuit against it. The trial court made a determination that BrickStreet owed a duty to defend and indemnify Summit Point, and awarded damages. Consequently, the combination of the two Orders constitutes a final order and this Petition for Appeal is appropriate.

B. BrickStreet's obligations were identical to those of the WCC

BrickStreet's obligations related to "deliberate intent" (EELF) coverage were identical to the WCC's obligations, which were to make the coverage available to those employers who voluntarily elected to purchase the coverage. W.Va. Code §23-4C-6 sets forth the obligation placed on BrickStreet related to "deliberate intent" (EELF) coverage:

Upon the termination of the commission [WCC], 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 WCC terminated on December 31, 2005, at 11:59 p.m. See Exhibit 1.

The first sentence of W.Va. Code §23-4C-6 sets forth BrickStreet's duties at the termination of the WCC: BrickStreet assumed the obligations of the WCC in the same manner

as those obligations existed for the WCC. Under the WCC, EELF was a voluntary coverage that an employer could choose to purchase:

The employers' excess liability fund shall consist of premiums paid to it by employers who may voluntarily elect to subscribe to the fund for coverage. . . .

For the purpose of creating the employers' excess liability fund, each employer who elects to subscribe to the fund shall pay premiums based upon and being a percentage of the payroll of the employer determined by the board of managers. . . .

W.Va. Code §§ 23-4C-2; 23-4C-4 (emphasis added). BrickStreet assumed the coverage for "deliberate intent" actions that the former EELF provided in the same manner in which the WCC underwrote the coverage: as a voluntary coverage that an employer could choose to purchase.

The second sentence of W.Va. Code §23-4C-6 set forth the time period for which BrickStreet must undertake these duties: from January 1, 2006², through June 30, 2008. So, for the time period of January 1, 2006, through June 30, 2008, BrickStreet's obligations were those of the WCC and nothing more. No requirement to make an offer as required under Bias, supra. is imposed on BrickStreet or any private carrier today.

In accordance with W.Va. Code §§ 23-4C-2 and 23-4C-6, BrickStreet's sole obligation was to make "deliberate intent" coverage available for purchase by an insured who elected to purchase it, exactly as was required of the WCC under the state run system. No requirement, such as that imposed for underinsured motorists' coverage, was ever imposed on either private carriers or the WCC under the state run system for "deliberate intent" coverage, and is not imposed on BrickStreet or any private carrier today.

²See Exhibit 1.

Furthermore, the West Virginia Supreme Court of Appeals expressly rejected the notion that an insurer has an obligation to extend an offer to purchase “deliberate intent” coverage in Luikart, supra and concluded that no such obligation exists. The trial court’s reliance on Bias is misplaced because the Supreme Court of Appeals of West Virginia held in Luikart that Bias was superseded by statute. Furthermore, the plain meaning of the statutory language, taken as a whole, provides that BrickStreet was under no obligation to extend an offer of “deliberate intent” coverage.

OIC General Counsel Mary Jane Pickens sheds light on this issue. Ms. Pickens explains that she “served as the OIC’s General Counsel during the privatization effort and participated in the Special Session of the Legislature that resulted in the enactment of Senate Bill 1004.” (Docket 55-57, Exhibit A). Ms. Pickens proceeds to explain that BrickStreet became “the only private carrier licensed to write workers’ compensation insurance in West Virginia” during the January 1, 2006 through June 30, 2008 time period. Id. at ¶5. She also notes that during this same time period, “BrickStreet was not the only carrier licensed to write coverage for so-called deliberate intent law suits (*sic*) brought under W. Va. Code § 23-4-2(d). Instead, other private carriers had written this coverage for years prior to the privatization of workers’ compensation in West Virginia, and continued to write it during the January 1, 2006 through June 30, 2008 time period.” Id. at ¶6. Ms. Pickens further explains that “Prior to January 1, 2006 a West Virginia employer could voluntarily subscribe to the Employers Excess Liability Fund (“EELF”) and obtain coverage for deliberate intent actions against it.” Id. at ¶7. She continued this explanation by stating, “Through the EELF, the State of West Virginia was obligated to provide deliberate intent coverage to any West Virginia employer that voluntarily and affirmatively selected such deliberate intent coverage.” Id. at ¶8.

After providing the necessary background to the circumstances that existed at the time of the novation, Ms. Pickens further explains: "Upon privatization, the State of West Virginia's obligations under the EELF novated to BrickStreet. BrickStreet was obligated to continue to make deliberate intent coverage available to any West Virginia employer that voluntarily and affirmatively elected to purchase such coverage through June 30, 2008. **This is the OIC's interpretation of W. Va. Code §23-4C-6.**" Id. at ¶9 (emphasis added). Consistent with this interpretation, Ms. Pickens goes on to explain:

Materials generated by the OIC relating to the privatization of workers compensation, including but not limited to the May 23, 2008 Memo issued to the "Attendees of April 8, 2008 Carrier Conference re: Deliberate Intent" indicated that BrickStreet was required to offer deliberate intent coverage through June 30, 2008. The intent of these OIC directives was to communicate that BrickStreet was obligated to continue the State of West Virginia's practice of making coverage available to those employers who voluntarily elected to purchase such coverage through that date.

The OIC did not intend to communicate that BrickStreet was obligated to make a "commercially reasonable" offer to every West Virginia employer. It is the opinion of the OIC that Bias v. Nationwide Mutual Insurance Co., 365 D.E.2d 789 (W. Va. 1987) is not applicable to BrickStreet's obligations under W. Va. Code §23-4C-6.

Id. at ¶¶10 & 11.

Ms. Pickens' affidavit constitutes relevant evidence of the interpretation of the specific statute in controversy by the agency charged with its administration. The OIC's interpretation of a statute which it administers is entitled to deference in West Virginia courts. State ex rel Crist v. Cline, 632 S.E.2d 358, 367-68 (W. Va. 2006). See Bogges v. Workers' Compensation Division, 541 S.E.2d 326 (W. Va. 2000); State ex rel ACF Industries, Inc. v. Vieweg, 514 S.E.2d 176 (W. Va. 1999).

T.J. Obrokta, Senior Vice President and General Counsel for BrickStreet was directly involved in all aspects of the privatization effort and Legislative session and sheds some light on the intent of the statutory language:

... the obligations under the article that had been with the State of West Virginia transferred to BrickStreet. The obligation to the State of West Virginia was to offer ELF (sic) coverage for those who voluntarily wanted to purchase it as set forth in an earlier section of this article.

So the obligation for BrickStreet was to simply continue what the State of West Virginia had been doing prior to privatization.

... for those employers that had purchased ELF (sic) coverage under the state system, they automatically were given similar coverage by BrickStreet on 1/1/06. They did not have to reapply. Those policies which would have been a subset of all the policies novated to BrickStreet.

... for someone who lived this entire experience from the drafting of the first bill through today, I can tell you that it's my understanding of that language in the code is extraordinarily consistent with what I've described here today. And believe it's consistent with the intent of how this system was privatized. There was never any indication that we were to do more than what the state system did.

(Docket 55-57, Exhibit B at 28-30, 82).

The trial court erred in rejecting the evidence submitted by the two entities most directly involved in the privatization of West Virginia's workers' compensation system and wrongly determining that BrickStreet had an obligation to make a "commercially reasonable" offer of Broadform insurance coverage. In applying statutory language, when a statute is clear and unambiguous, the statute language should be applied. Michael v. Appalachian Heating, LLC., __ S.E.2d __ WL 2346274 (June 11, 2010). The plain meaning of the statutory language, taken as a whole, provides that BrickStreet was under no obligation to extend an offer of "deliberate intent" or Broadform coverage.

The effect of the trial court's ruling could arguably be to extend "deliberate intent" insurance coverage to over 30,000 employers in the State of West Virginia who had not chosen such coverage and had not paid for such coverage. Allowing the trial court's ruling to stand would give an absurd result of which the West Virginia Legislature could not have conceived. See Bluestone Paving, Inc. v. Tax Commissioner of the State of West Virginia, 591 S.E.2d 242 (W.Va. 2003).

C. **Bias is not applicable to the privatization of workers' compensation and compliance with all of Bias was a practical impossibility**

1. **Bias is not applicable to the privatization of workers' compensation**

Neither Bias nor any statute other than W.Va. Code §23-4C-6, are applicable to the Workers Compensation and Employers Liability Policy at issue here. BrickStreet was not required to make a "commercially reasonable" offer of "deliberate intent" coverage, or to obtain a "knowing and intelligent rejection" or waiver of such coverage as defined in Bias. Neither W.Va. Code §23-4C-2 nor §23-4C-6, nor any other statute enacted by the Legislature regarding the transfer of obligations and liabilities of the WCC to BrickStreet, nor any regulation promulgated by the OIC pursuant to these statutes, imposes the obligations of the Bias case on the system for purchasing "deliberate intent" insurance coverage.

W.Va. Code §33-6-31d(a) specifically provides that optional limits of UM and UIM coverage required by W.Va. Code §33-6-31 shall be made available to the named insured at the time of the initial application for liability coverage and upon any request of the named insured; that the limits shall be made available on a form prepared and made available by the Insurance Commissioner; that the contents of the form shall be as prescribed by the Commissioner; that the form shall specifically inform the named insured of the coverage offered and the rate calculation, including all levels and amounts of such coverage available and the number of vehicles subject

to the coverage. In addition, pursuant to subsection (b) of W.Va. Code §33-6-31(d), the insurer must provide the form to each applicant by delivering the form to the applicant or by mailing the form to the applicant together with the initial premium notice. Per subsection (c), the insurer who has issued a motor vehicle insurance policy in effect on the effective date of the statute must mail or otherwise deliver the form to any person who is designated in the policy as a named insured. Further, subsection (e) requires the insurer to make such forms available to any named insured who requests different coverage limits on or after the effective date of the statute. There are no comparable requirements even mentioned in W.Va. Code §23-4C-6.

The West Virginia Legislature was aware of the requirements for the “offer” of UM and UIM coverage in W.Va. Code §33-6-31d at the time it enacted W.Va. Code §23-4C-1, *et seq.*, yet it declined to mandate the same requirements for an “offer” of “deliberate intent” coverage for BrickStreet. A rule of statutory construction which must be considered here is that “in the interpretation of statutory provisions the familiar maxim *expression unius est exclusion alterius*, the express mention of one thing implies the exclusion of another applies.” Syl. Pt. 3, Manchin v. Dunfee, 327 S.E.2d 710 (W.Va. 1984). In Burrows v. Nationwide Mutl Ins. Co., 600 S.E.2d 565 (W.Va. 2004), the Supreme Court of Appeals of West Virginia applied this principle to reach the conclusion that, had the Legislature deemed the removal of a named insured an event significant to trigger the requirement that optional UIM coverage be made available to existing insureds, the statute would have expressly directed insurers to distribute the insurance form to the remaining insureds upon the occurrence of such an event. In the present case, had the Legislature deemed it necessary that the offer of optional “deliberate intent” coverage be made in the same manner and method as UM or UIM coverage, W.Va. Code §23-4C-6 would have expressly directed BrickStreet to use the same type of insurance form. It did not.

"The Legislature, when it enacts legislation, is presumed to know of its prior enactments." See Stone Brooke Ltd. P'ship v. Sisinni, 688 S.E.2d 300, 310 (W.Va. 2009) (quoting Syl. Pt. 12, Vest v. Cobb, 76 S.E.2d 385 (W.Va. 1953)). See also Newark Ins. Co. v. Brown, 624 S.E.2d 783, 789 (W.Va. 2005) (quoting Syl. Pt. 2, Hall v. Baylous, 153 S.E. 293 (W.Va. 1930)) ("[T]he Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended."). The differences between W.Va. Code §33-6-31d and W.Va. Code §23-4C-6 are significant. While the UM/UIM statute provides details of coverage requirements, specific limits, optional limits, premium adjustments depending upon limits, offer upon initial application, the offer form and the waiver, W.Va. Code §23-4C-6 does not address even one of these items.

Moreover, the Legislature did not incorporate into W.Va. Code §23-4C-6 the requirement of the Bias case that an offer of optional coverage "state, in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved." Bias, at 791. When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. See Kessel v. Monongalia County Gen. Hosp. Co., 648 S.E.2d 366 (W.Va. 2007) (citing Syl. Pt. 2, in part, Stephen L.H. v. Sherry L.H., 465 S.E.2d 841 (W.Va. 1995)).

Given the complete absence of any statutory framework remotely similar to the UM and UIM framework, it is clear that the Legislature did not intend the holdings in Bias to apply to either BrickStreet or the privatization of the State's workers' compensation system.

2. Compliance with all of Bias was a practical impossibility

As stated, West Virginia employers did not become BrickStreet policyholders through the

traditional application, offer and acceptance process surrounding most insurance purchases. Instead, at 12:00 a.m. on January 1, 2006, all policies issued by the WCC “novated” or statutorily transferred to BrickStreet at the termination of the WCC. See Exhibit 1; W.Va. Code §23-4C-6. This begs the question of how and when BrickStreet could have fully complied with Bias.

In Cox v. Amick, 466 S.E.2d 459 (W.Va. 2005), the West Virginia Supreme Court reversed the trial court ruling that each individual insured under one insurance policy had to be offered the opportunity to purchase or rejected UIM coverage. In reaching this decision, the Court observed that “as a practical matter, it would be very time consuming and unreasonable to expect an insurer to offer every person who would be an insured under the policy the optional coverage and then ascertain whether the optional coverage was rejected.” Id. at 466.

The West Virginia Legislature could not have intended a Bias-type offer to be extended to over 30,000 employers where BrickStreet novated to someone else’s insurance obligations (i.e., the WCC’s insurance obligations). It is an understatement to say that it would have been “very time consuming and unreasonable” to expect BrickStreet to have made Bias-type offers and secured waivers for optional coverage for “deliberate intent” claims from over 30,000 employers in West Virginia, when the workers’ compensation coverage novated to BrickStreet. The WCC terminated at 11:59 p.m. on December 31, 2005, and BrickStreet assumed the coverage, as it existed, at 12:00 a.m. on January 1, 2006. See Exhibit 1; W.Va. Code §23-4C-6. To require BrickStreet to make a Bias-type offer in the instant in which it novated to someone else’s insurance obligations would end in an absurd result that the West Virginia Legislature could not have contemplated. See Bluestone Paving, Inc. supra.

D. The trial court committed clear error when it concluded that the pertinent workers' compensation insurance policy language was ambiguous and thus provided coverage for "deliberate intent" actions

In determining what policy language means, it is well-settled law in West Virginia that language in an insurance policy should be given its plain, ordinary meaning. 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)). Further, "[w]here 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." Id. The trial court erred when it held that the policy language contained in Part Two – Employers Liability Insurance coverage was ambiguous. The trial court did not consider the plain meaning of the all of the policy language. The plain meaning of the policy language clearly states that "deliberate intent" actions are not covered under the policy.

1. **The plain meaning of the insurance policy language is that coverage does not apply to any "deliberate intent" claims or actions.**

The policy plainly states that "deliberate intent" actions are not covered under the policy.

The policy language provides:

**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 last 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).

The policy also contains an endorsement, Endorsement No. WC 99 03 06, which excludes coverage for “deliberate intent” actions. The endorsement language states:

WEST VIRGINIA INTENTIONAL INJURY EXCLUSION ENDORSEMENT

This endorsement applies only to the insurance provided by the policy because West Virginia is shown in Item 3.A. of the Information Page.

Item 1. of Section F. Payments You Must Make of Part One (Workers Compensation Insurance) of the policy is replaced by:

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.

(Id., Endorsement No. WC 99 03 06). The policy endorsement language plainly and unambiguously states that the “deliberate intent” actions arising out of W.Va. Code § 23-4-2 are not covered.

There are several issues with the trial court’s discussion and holdings regarding the policy language. The trial court recited the wrong policy language in its Discussion of Law portion of its Order. The trial court recited the correct policy language in the Background

portion of its Order. (Docket 65-66, p. 4). The policy language quoted in the Background portion of its Order is that of the endorsement exclusionary language above. Yet, in the Discussion of Law portion of its Order, the trial court specifically states: “but there is no exclusion for ‘deliberate intent’ or ‘broad form’ coverage in Part Two, and no reference to the deliberate intent statute.” (Docket 65-66, p. 12). Clearly, this is plain wrong.

Furthermore, the trial court cites exclusionary language for intentional acts in the Discussion of Law portion of its Order. Id. However, this language is not the language applicable to the instant action. The endorsement language quoted above stands in the place of the exclusionary language. The trial court misstated the policy provisions at issue.

The trial court also holds that, because the policy provisions (Part One and Part Two) appear to follow the statutory language where BrickStreet is required to “offer” workers’ compensation and EELF coverage, the title of the Part Two – Employers Liability Insurance coverage is ambiguous. Consequently, the trial court held that the reasonable expectations of Summit Point were that it had coverage for “deliberate intent” actions. The trial court did not apply the plain meaning of the policy language in accordance with West Virginia law. Rather, the trial court limited its review to the title of a provision rather than the policy provision’s language, and its ruling that the policy language is ambiguous is clear error.

Every workers’ compensation insurer in West Virginia is required to use the NCCI insurance policy which, according to the trial court, contains an ambiguous provision as to “deliberate intent” coverage. The result of the trial court’s ruling, if allowed to stand, will affect every insurer in West Virginia who sells workers’ compensation insurance.

2. The insurance policy exclusion regarding “deliberate intent” claims or actions is valid and enforceable because the exclusion is conspicuous, plain, clear, and unambiguous

The trial court erroneously held, as discussed above, that the policy did not contain an exclusion for “deliberate intent” claims or actions. However, the insurance policy clearly excludes coverage for “deliberate intent.” Insurers providing insurance coverage for certain types of occurrences may avoid liability on that insurance policy through the operation of an exclusion. Such exclusions are valid and enforceable so long as the exclusion is conspicuous, plain, clear, and unambiguous and is placed in such a fashion as to make obvious its relationship to other policy terms, and must bring such provisions to the attention of the insured. National Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W.Va. 1987).

A policy term is conspicuous if it is “clearly visible or obvious...[w]hether a printed clause is conspicuous as a matter of law...depends on the size of the typeface.” Luikart, supra, citing Black’s Law Dictionary 329 (8th ed. 2004). Where exclusionary language is “set apart from the other language by an emboldened subheading entitled “Exclusions”...the only conclusion that can be reached by the use of the boldface language is that it was, indeed, conspicuous.” Id. Further, while a policy may be voluminous, an insurer provides sufficient guidance to an insured to locate exclusions, thus rendering them conspicuous, where: 1. exclusions are referenced within the “Schedule of Forms and Endorsements”, which serves as a table of contents for the policy; 2. the relevant section regarding coverage was separately numbered within the document; and, 3. the table of contents also delineated the separate sections within the policy, including the coverage contained therein and the declarations page. Id.

This policy substantially resembles those aspects of the policy in Luikart. First, the exclusionary language is referenced in list form on the “EXTENSION OF INFORMATION

PAGE – LIST OF FORMS AND ENDORSEMENTS” in upper case letters. (Exhibit A, p. 1, Docket 31-34). Second, the relevant sections here are separately identified on the “EXTENSION OF INFORMATION PAGE – LIST OF FORMS AND ENDORSEMENTS” by Form Number, and are separately identified within the policy by Form Number and Name with emboldened subheadings. (*Id.*, p. 6). Third, the “EXTENSION OF INFORMATION PAGE – LIST OF FORMS AND ENDORSEMENTS” delineates the separate sections within the policy, and identifies in express terms the existence of a “WV Intentional Injury Exclusion Endorsement.” (*Id.*, p 6).

The exclusionary language is valid and enforceable because the exclusionary language is conspicuous, plain, clear, and unambiguous.

3. The reasonable expectations doctrine does not apply where the policy language is not ambiguous.

The trial court erroneously held that the Employers Liability Insurance coverage applies for “deliberate intent” actions under the subject insurance policy because, as a consequence of the title of the coverage combined with the statutory language, Summit Point reasonably expected that it was insured for “deliberate intent” actions. The doctrine of reasonable expectations is limited to those instances in which the policy language is ambiguous. National Mutual Insurance Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W.Va. 1987); Soliva v. Shand, Morahan & Co., 345 S.E.2d 33 (W.Va. 1986). As discussed above, the policy language is not ambiguous. The plain meaning of the policy language clearly states that “deliberate intent” actions are not covered under the policy. Therefore, Summit Point’s alleged reasonable expectations are irrelevant, and the trial court erred in holding that Summit Point reasonably expected that it was insured for “deliberate intent” actions.

E. The trial court committed clear error when it held that BrickStreet was responsible for all damages regardless of the insurance policy limits.

The trial court erroneously held that, because coverage existed under the policy, Summit Point is entitled to the cost of defense and the full amount of settlement with Mr. Gregory although the settlement amount exceeds the policy limits for Part Two – Employers Liability insurance coverage. BrickStreet specifically denies that Summit Point is entitled to any damages because coverage does not exist under the subject insurance policy as demonstrated by the previous arguments, and therefore, no duty to defend or indemnify was owed. Furthermore, if damages were applicable, which BrickStreet specifically denies, Summit Point is not entitled to any settlement amount that exceeds the policy limits. There is no West Virginia directly law on point regarding these circumstances. However, there are some West Virginia cases that are instructive.

The plain meaning of the policy should be applied in accordance with Aluise v. Nationwide Mutual Fire Insurance Co., supra and Keefer v. Prudential Insurance Co., supra. If coverage were determined to exist for “deliberate intent” actions under Part Two – Employers Liability insurance coverage, then the policy limit for such coverage is clearly \$100,000 as noted on the Declarations Page. (Docket 31-34, Exhibit A, Dec page). The cost of defense is not included in the policy limit; therefore, defense costs would apply in addition to the \$100,000 policy limit for the injury sustained by Mr. Gregory. Summit Point would only be entitled to its costs in defending Mr. Gregory’s action against it and \$100,000 for the alleged damages sustained by Mr. Gregory.

Additionally, while no West Virginia law on point exists, Judge Stamp in the United States District Court for the Northern District of West Virginia addressed the issue of whether settlement amounts in excess of policy limits are owed by the insurer. See Johnson ex rel. Estate of Johnson v. Acceptance Insurance Co., 292 F.Supp.2d 857 (N.D.W.Va. 2003). Johnson involved the death of a resident in a facilitated care home. The facility maintained insurance through Acceptance Insurance Company and the policy contained a liability limit of \$1,000,000. The facility's insurer denied coverage. The parties ultimately entered into a settlement agreement in the amount of \$2,500,000. Judge Stamp determined that coverage existed under the subject insurance policy, and the insurer had a duty to defend and indemnify its insured. However, Judge Stamp determined that the plaintiff could recover the amount of the settlement only as far as the policy limits allowed. Judge Stamp considered the law in other jurisdictions in light of the lack of West Virginia law on point. Judge Stamp found it persuasive that allowing recovery in excess of policy limits was to allow an insured and an injured party to agree to a settlement which unilaterally extended an insurer's liability, relying on In re Tutu Water Wells Contamination Litig. 78 F.Supp.2d 423 (1999) and Willcox v. American Home Assurance Co., 900 F.Supp. 850 (S.D.Tex. 1995). Id. at 867.

In reviewing other jurisdictions' handling of this issue, the jurisdictions appear to be split as to whether an insurer is obligated to pay a settlement in excess of policy limits, and for varying reasons. See 49 A.L.R.2d 694. This Court should hold that an insurer is not obligated for settlement amounts in excess of policy limits, the rule that is followed in Minnesota and Kansas. See Mannheimer Bros. v. Kansas Casualty & Surety Co. 184 N.W. 189 (Minn. 1921); Winchell v. Norris, 633 P.2d 1174 (Kan.App. 1981).

In Mannheimer Bros., Mr. Hillstrom and Mr. Hanscom were injured when the automobile in which they were traveling was involved in a collision with a Mannheimer Brothers truck, which was insured through Hartford. Mr. Hillstrom and Mr. Hanscom filed suit against Mannheimer Brothers for their injuries. Mannheimer Brothers notified Hartford of the suit and Hartford denied a duty to defend and indemnify. Mannheimer Brothers retained its own counsel and the injury actions went to trial which resulted in a judgment for Mr. Hillstrom in the amount of \$12,633.62 and for Mr. Hanscom in the amount of \$2,630.73. Mannheimer Brothers filed a civil action that Hartford was responsible for both judgments. The lower court found that coverage for the injury claims existed under the Hartford insurance policy. The court also held that Hartford was responsible for the entirety of the Hanscom judgment and only \$5,000.00 for the Hillstrom judgment because the per person bodily injury liability limit under the Hartford policy was \$5,000.00. The lower court also held that Hartford was responsible for the entirety of the defense costs incurred by Mannheimer Bros. Mannheimer Brothers appealed asserting that Hartford was responsible for the entire judgment including the amount in excess of the policy limit because it wrongfully denied any duty to defend. The appellate court upheld the lower court's decision.

The Mannheimer Bros. court reasoned that the policy language identifying the policy limit for injury to any one person at \$5,000.00 was unambiguous and should be applied:

This limitation is unambiguous and free from doubt and cannot be added to without making a new contract for the parties. The question presented is controlled by the general rule that the measure of damages for breach of a contract for the payment of money is the amount agreed to be paid with interest. The fact in this case that defendant's obligations under the contract extended beyond the payment of the amounts stated and included the promise to conduct the defense of the action cannot be held to

enlarge the limitation as to the amount fixed as reimbursement for injuries to persons. The failure to defend exposed defendant only to the additional liability for the cost and expense which plaintiff was put to by reason of defendant's breach of the contract in that respect.

Id. at 191. The insured was compensated for its out-of-pocket costs for defending itself plus the amount that it could have expected under the contract had Hartford determined that coverage existed.

Additionally, the Court of Appeals of Kansas, relying on Mannheimer Bros. in Winchell, supra considered the same issue. In Winchell, Mr. Winchell was injured in an automobile accident with Mr. Norris. The vehicle in which Mr. Norris was traveling was insured by Meridian Mutual. Mr. Winchell filed suit against Mr. Norris. Meridian Mutual denied a duty to defend and indemnify. Mr. Norris retained personal counsel who filed an answer. Personal counsel withdrew and Mr. Norris did not retain other counsel or respond to Court orders to participate in discovery. Consequently, the Court entered a default judgment against Mr. Norris for \$19,710.95. The per person bodily injury liability limit under the Meridian Mutual insurance policy was \$10,000.

Mr. Winchell obtained a garnishment order against Meridian Mutual for the amount of the judgment and Meridian Mutual appealed. In a case of first impression, Kansas considered various jurisdictions' position regarding whether an insurer was obligated to pay settlements or judgments in excess of policy limits when the insurer denied the duty to defend. The Winchell court held that an insurer is not liable for the excess amount of a judgment above insurance policy limits, relying on the reasoning in Mannheimer Bros.

In this matter, alterations to a contract by Summit Point and Mr. Gregory, without the consent of a party to the contract, meaning BrickStreet, is contrary to public policy and general contract law in West Virginia. Like in Mannheimer Bros. and Winchell, the plain meaning of the insurance policy language should be applied. The policy limits, if coverage were applicable, are clearly \$100,000.00. (Docket 31-3, Exhibit A). If this Court determines that coverage existed for Mr. Gregory's claims against Summit Point, then Summit Point, under the UTPA and bad faith portions of the lawsuit still pending before the trial court, has recourse to recover its out-of-pocket costs (economic damages, annoyance, aggravation, and inconvenience, and attorneys' fees) under Hayseeds, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73 (W.Va. 1986), just like in Mannheimer Bros. and Winchell.

Thus, if this Court determines that coverage exists under the BrickStreet workers' compensation policy for Mr. Gregory's claim against Summit Point, then the damages should be limited to Summit Point's costs to defend itself and the policy limits of the contract between Summit Point and BrickStreet, which is \$100,000.00.

VII. PRAYER FOR RELIEF

BrickStreet requests that this Honorable Court accept this Petition for Appeal, and reverse the May 4, 2010, and June 29, 2010, Orders of the trial court, which together constitute the final Judgment Order of the Circuit Court of Jefferson County.

VIII. REQUEST FOR ORAL ARGUMENT

BrickStreet respectfully requests oral argument on this Petition and the issues identified herein.

Respectfully Submitted,

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

BY: SPILMAN THOMAS & BATTLE, PLLC



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