

No. 101414

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

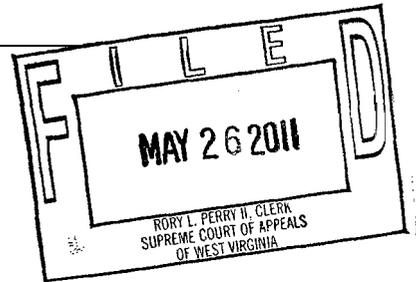
WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY d/b/a BRICKSTREET
MUTUAL INSURANCE COMPANY,

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
REPLY BRIEF

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. INTRODUCTION

In an effort not to repeat information and arguments contained in its Petition for Appeal and Supplemental Appeal Brief, West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet") refers this Court to the facts, assignment of errors, standard of review, issues, and arguments in its Petition for Appeal, and the arguments asserted in its Supplemental Appeal Brief. In this reply brief, BrickStreet responds to arguments raised in Summit Point Raceway Associates, Inc.'s ("Summit Point") Supplemental Appeal Brief and in the brief of purported *amicus curiae*.

II. POINTS AND DISCUSSIONS OF THE LAW

A. **The plain meaning of the pertinent statutory language as a whole does not require that an offer be made.**

In its Supplemental Appeal Brief, Summit Point lists a number of rules of statutory interpretation. BrickStreet agrees that the rules cited by Summit Point are indeed the rules of statutory construction. However, Summit Point incorrectly applies the rules that it cites. Furthermore, the statute does not identify a procedure for any offer as required under West Virginia law. Summit Point also omits important and relevant rules of statutory construction.

1. **Applying the rules of statutory construction Summit Point cites, W.Va. Code § 23-4C-6 does not require that an offer be made.**

Summit Point argues that the phrase "shall offer" requires BrickStreet to offer, in accordance with Bias v. Nationwide Mut. Ins. Co., 365 S.E.2d 789 (W. Va. 1987), "deliberate intent" coverage. As a basis for this argument, Summit Point relies on rules of statutory construction. Summit Point essentially argues that the Legislature intended the words of the statute to require an offer as contemplated in Bias because the Legislature chose to use the phrase "shall offer" rather than omitting the phrase altogether or using other language stating that

BrickStreet was only to assume the duties and obligations of the Workers' Compensation Commission ("WCC"). Summit Point incorrectly asserts that there is no textual support for BrickStreet's argument that its duties were only those of the WCC, and thus, employers could voluntarily purchase insurance coverage for "deliberate intent" just as employers did under the WCC.¹ Summit Point argues that "[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."²

Despite citing the rules of statutory construction, Summit Point argues, and would have this Court rule, contrary to those rules. Summit Point would have this Court consider only two words of the entire statute, ignoring the twenty-four remaining words in the sentence containing the phrase "shall offer," the seventy remaining words contained in the entire statutory provision, and the language contained in Chapter 23 in its entirety. See W. Va. Code § 23-4C-6.

Taking the statutory language as a whole, it is clear that the phrase "shall offer" refers to the time period for which BrickStreet must assume the "assets, obligations and liabilities" of the WCC. Id. The statutory language states specifically:

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. The state treasurer and all other departments, agencies and boards shall cooperate to ensure this novation occurs in an expedient and orderly fashion.

Id. The first sentence of the statute outlines BrickStreet's duties – those of the WCC. The second sentence outlines the time period for which these duties are required to be undertaken. The third sentence requires the necessary governmental agencies to assist with the transfer of the

¹Under the WCC, the Employers Excess Liability Fund ("EELF") was a voluntary coverage that an employer could choose to participate in. See W.Va. Code §§ 23-4C-2 and 23-4C-4.

² See Syl. Pt. 5, Foster Foundation v. Gainer, 2011 WL 867343 (March 10, 2011).

assets, obligations and liabilities from the WCC to BrickStreet. The statute does not mandate any Bias-type procedure. The statute does not outline any procedure or form for an offer of “deliberate intent” insurance coverage. The statute does not require any waiver of “deliberate intent” insurance coverage, nor does it outline what occurs if an insured does not respond to an offer of “deliberate intent” coverage at all.

Summit Point tries to argue that the Legislature clearly meant that BrickStreet must make a Bias-type offer by including the phrase “shall offer” in W. Va. Code § 23-4C-6 because it omitted the phrase “shall offer” in analogous circumstances involving the West Virginia Board of Risk and Insurance Management (“BRIM”) and medical malpractice insurance.

Some background is needed to fully understand Summit Point’s argument in this regard. Several years ago, a medical malpractice crisis existed in West Virginia. See W.Va. Code § 33-20F-2. Some medical malpractice insurers refused to sell insurance in West Virginia. For the insurers who were willing to sell medical malpractice insurance in West Virginia, the cost of premiums was too high. Consequently, some physicians were unable to afford or purchase medical malpractice insurance. In response, the Legislature assigned the task to BRIM to make medical malpractice insurance available to those physicians. The Legislature also set forth guidelines for a Physician’s Mutual Insurance Company (“PMIC”). After the PMIC was established, the medical malpractice insurance coverage provided by BRIM was to be transferred to the PMIC. Summit Point asserts that the Legislature transferred the obligations to provide medical malpractice insurance under W. Va. Code § 33-20F-9(b)(1) and (2) from BRIM to the PMIC without requiring any Bias-type offer because the Legislature did not use the word “offer” in the statutory provision.

According to Summit Point, then, the BRIM/PMIC statute does not require a Bias-type procedure because it does not use the magic words “shall offer.” But, the WCC/BrickStreet statute requires a Bias-type procedure because it uses the magic words “shall offer.” In reality, neither statute requires a Bias-type offer because neither statute includes language identifying a Bias-type procedure such as that outlined in W.Va. Code §33-6-31d. Neither statute includes language identifying the form or procedure for an offer of coverage as outlined in W.Va. Code §33-6-31d. Neither statute includes language requiring any waiver of insurance coverage nor outline what occurs when an insured does not respond to an offer of insurance coverage. Summit Point is trying to make the same old argument: “shall offer” are magic words that mean a Bias-type procedure relating to “deliberate intent” insurance coverage. However, Summit Point’s argument fails. Our Legislature knows how to explicitly mandate a procedure for an offer when it wants such a procedure. See W.Va. Code §33-6-31d. Yet, the Legislature did not incorporate into W.Va. Code §23-4C-6 any procedure for BrickStreet to make any type of offer, or obtain a waiver, of “deliberate intent” insurance coverage.

Summit Point further argues that the Legislature did not require BRIM to make an offer of medical malpractice insurance because BRIM did not have a monopoly on the medical malpractice insurance market, but rather was an instrument to assist where the costs of such insurance was prohibitive. Similarly, however, BrickStreet did not have a monopoly on the “deliberate intent” insurance market. From January 1, 2006, through June 30, 2008, BrickStreet merely was the sole workers’ compensation insurance provider. It was not the sole “deliberate intent” insurance provider. Other private insurers offered “deliberate intent” insurance coverage during that time period. See Erie Insurance Property & Casualty Co. v. Stage Show Pizza, 553 S.E.2d 257 (W.Va. 2001). Using Summit Point’s reasoning then, BrickStreet could not have

been required to offer “deliberate intent” coverage because it did not have a monopoly of the “deliberate intent” insurance market.

Summit Point further argues that there were no workers’ compensation carriers other than BrickStreet from whom employers could obtain advice concerning their employment risks. This argument is ridiculous in light of the manner in which employers obtained advice about their insurance risks under the WCC. Since the time that the Employers Excess Liability Fund (“EELF”) was established under the WCC, employers could voluntarily participate in EELF, purchase coverage through a private insurer (See Stage Show Pizza, supra.), or not purchase the coverage at all. An employer could seek advice about its employment risk from private insurers. The same options existed when the WCC’s obligations novated to BrickStreet: an employer could purchase broadform coverage under the BrickStreet insurance policy, purchase “deliberate intent coverage through another private insurer, or not purchase the coverage at all. Thus, Summit Point’s arguments fail.

2. Bias is superseded and Bias-type offers have only been related to uninsured/underinsured motorists’ insurance coverage.

Summit Point continuously relies on Bias, arguing that it is still good law. However, this Court specifically held in Luikart v. Valley Brook Concrete & Supply, Inc., 613 S.E.2d 896 (W. Va. 2005) that Bias was superseded by statute. In order to bolster its argument that Bias is still good law, Summit Point cites a number of cases in which Bias was cited favorably by the Supreme Court of Appeals of West Virginia.

Each of the cases cited by Summit Point involves uninsured or underinsured motorists’ coverage, a fact which supports BrickStreet’s argument in its Supplemental Appeal Brief, pp. 2-8, that in West Virginia statutes, regulations, and case law, a Bias-type procedure is not required in any context other than uninsured/underinsured motorists’ insurance coverage. This Court has

not addressed Bias in any context other than uninsured or underinsured motorists' insurance coverage. The West Virginia Legislature has not outlined an "offer" as required in Bias in any other context other than the uninsured/underinsured motorists' insurance context. Furthermore, of the cases cited by Summit Point that were decided by this Court, the cases were decided prior to this Court's holding in Luikart that Bias has been superseded. What follows is an analysis of the cases cited by Summit Point to support its arguments in this regard.

a. **Westfield Insurance Co. v. Bell**

Summit Point cites to Westfield Insurance Co. v. Bell, 507 S.E.2d 406 (W.Va. 1998), in support of its argument that Bias is still good law regarding whether a Bias-type offer must be made. In Bell, the Court considered whether a form used by Westfield to offer uninsured/underinsured motorists' insurance coverage was sufficient to comport with the requirements of a commercially reasonable offer. The form used by Westfield was not the form promulgated by the West Virginia Office of Insurance Commissioner ("OIC"). Westfield's form was used after this Court issued the holding in Bias and prior to the time the OIC promulgated its form to be used when making an offer of uninsured/underinsured motorists' insurance coverage under W.Va. Code §33-6-31d. The Court considered whether Westfield's offer of uninsured/underinsured motorists' insurance coverage was a commercially reasonable offer in accordance with Bias because the OIC form was not in place at the time Westfield used its own form. The Court held that Westfield's form constituted a commercially reasonable offer. Importantly, this case was decided prior to this Court's holding in Luikart that Bias was superseded.

b. Cox v. Amick

Summit Point also cites to Cox v. Amick, 466 S.E.2d 459 (W.Va. 1995), in support of its argument that Bias is still good law regarding whether a Bias-type offer must be made. Cox deals with whether uninsured/underinsured motorists' insurance coverage was offered and whether certain individuals traveling in a vehicle were insureds under the applicable insurance policy. The Court recites a history of Bias, and then the pertinent statutory language, noting that the "legislature clarified its intent when it enacted W.Va. Code §33-6-31d which outlines how the insurer must offer the optional uninsured and underinsured coverage." Id. at 466. This Court did not rely on Bias in Cox. Rather, Cox's citation of Bias was merely part of a recitation of the history of the requirement to make an offer of uninsured/underinsured motorists' insurance coverage. Furthermore, Cox also was decided prior to this Court's holding in Luikart that Bias was superseded.

c. Parham v. Horace Mann Insurance Co.

Additionally, Summit Point cites to Parham v. Horace Mann Insurance Co., 490 S.E.2d 696 (W.Va. 1997), in support of its argument that Bias is still good law regarding whether a Bias-type offer must be made. At issue in Parham was whether an appropriate jury instruction had been given regarding the burden of proof as to whether a commercially reasonable offer and a knowing intelligent waiver had been made for underinsured motorists' insurance coverage. Again, the context was limited to uninsured/underinsured motorists' insurance coverage. Additionally, the real issue in this case was: which party has the burden of proof that a commercially reasonable offer has been made, not whether Bias is still good law. Moreover, Parham was decided prior to this Court's holding in Luikart that Bias was superseded.

d. Jewell v. Ford

Summit Point further cites to Jewell v. Ford, 567 S.E.2d 602 (W.Va. 2002), in support of its argument that Bias is still good law regarding whether a Bias-type offer must be made. Jewell involved uninsured motorists' insurance coverage and whether the form used by the insurer to offer the coverage complied with W.Va. Code §33-6-31d. Furthermore, this case also was decided prior to this Court's holding in Luikart that Bias was superseded.

e. LaRocco v. Old Republic Insurance Co.

Summit Point also cites to LaRocco v. Old Republic Insurance Co., 2009 WL 3169176 (S.D.W.Va. September 28, 2009), in support of its argument that Bias is still good law regarding whether a Bias-type offer must be made. At issue in LaRocco was whether a woman was entitled to uninsured motorists' insurance coverage purchased by her employer while on a personal trip and riding in a personal automobile.³ Ms. LaRocco asserted she was still entitled to uninsured motorists' insurance coverage under her employer's commercial automobile insurance policy because she was an insured under the policy or by operation of law because Old Republic had to make a commercially reasonable offer of uninsured motorists' insurance coverage. The United States District Court for the Southern District of West Virginia ("Southern District Court") cited Bias to note that this Court had held that W.Va. Code §33-6-31b required a commercially reasonable offer of and knowing, intelligent waiver of, uninsured motorists' coverage. The Southern District Court also cited to Bias to note that it is the insurer's burden of proof that the coverage was offered and, if the insurer did not meet its burden, the coverage was included by operation of law. The Southern District Court analysis focused on the requirements

³ There was also an issue of whether Plaintiff was entitled to coverage under her employer's commercial umbrella insurance policy. However, the Bias reference made by the United States District Court for the Southern District of West Virginia was only in reference as to whether Plaintiff was entitled to uninsured motorists' insurance coverage under her employer's commercial automobile liability insurance policy.

of W.Va. Code §33-6-31b. At issue was whether W.Va. Code §33-6-31b required that the liability coverage limits and the uninsured motorists limits be of equal dollar amounts or equal quality of coverage. The Southern District Court noted that this issue was not decided under West Virginia law and refused to rule on this issue when it could resolve the case via another issue. The Southern District Court never referred to or even noted the requirements of W.Va. Code §33-6-31d or that Bias had been superseded in its analysis. The Southern District's Court's analysis did not involve Bias or whether a commercially reasonable offer was made. The focus of the Court's analysis was whether Ms. LaRocco was an insured. The Southern District Court held that Ms. LaRocco was not an insured as named or defined in the employer's automobile liability insurance policy. Because the Southern District Court determined that Ms. LaRocco was not a named insured or an insured by definition, she was not entitled to liability insurance coverage under her employer's commercial automobile insurance policy. Consequently, the corresponding coverage, whether by coverage amount or quality of coverage, under uninsured motorists' insurance coverage was zero as well. The reference to Bias was unimportant to the Court's analysis. Moreover, LaRocco, being a federal decision, is not binding on this Court. This Court has ruled that Bias is superseded in Luikart. Additionally, the context is again limited to the uninsured/underinsured motorists' insurance coverage context.

f. Webb v. Shaffer

Finally, Summit Point also cites to Webb v. Shaffer, 694 F.Supp.2d 497 (S.D. Va. 2010), in support of its argument that Bias is still good law regarding whether a Bias-type offer must be made. At issue in Webb was whether a commercially reasonable offer of underinsured motorists' coverage had been made. The Southern District Court cited Bias as part of the history of law regarding commercially reasonable offer. Furthermore, the Southern District Court noted

that both parties agreed that Bias was controlling, thus, the Court did not question whether Bias had been superseded. The Southern District Court did not rely on Bias alone in its analysis. The Court also relied on W.Va. Code §§33-6-31b and d. Regardless, Webb being a federal decision, is not binding on this Court. Moreover, this Court has ruled that Bias is superseded in Luikart. Furthermore, the context is again limited to the uninsured/underinsured motorists' insurance coverage context.

Summit Point's reliance on these cases is misplaced. The cases Summit Point cites that are decided by this Court are prior to Luikart and this Court's holding that Bias is superseded by statute. The cases Summit Point cites that are decided by the United States District Court for the Southern District of West Virginia incorrectly rely on Bias and are not binding on this Court. Furthermore, all of these decisions are limited to the uninsured/underinsured motorists' insurance coverage context. See Luikart, *supra*. In West Virginia statutes, regulations, and case law, a Bias-type procedure is not required in any context other than uninsured/underinsured motorists' insurance coverage. A Bias-type procedure is not identified in W.Va. Code §23-4C-6 for "deliberate intent" insurance coverage.

3. Chapter 23 of the West Virginia Code does not provide a procedure for any offer of "deliberate intent" insurance coverage.

Summit Point argues alternatively that BrickStreet had a duty to make some offer even if it was not a Bias-type offer. Summit Point omits an important rule of statutory construction: those items not included expressly in a statute are excluded (doctrine of *expressio unius est exclusio alterius*) (See Gibson v. Northfield Ins., 631 S.E.2d 598 (W.Va. 2005)). Additionally, in Luikart, this Court held that an insurer is not required to notify any person of optional insurance coverages unless as required by this section, meaning as contained in the statutory provision. See Id.; See also Burrows v Nationwide Mut. Ins. Co., 600 S.E.2d 565, 571 (W.Va.

2004) (discussing W.Va. Code §33-6-31d(e) and reiterating that the duty to offer optional coverage is limited to those specific circumstances contained within the statutory language [§33-6-31d(e)]). The statute omits key language for this Court to accept Summit Point's arguments. W. Va. Code § 23-4C-6 does not expressly include any description, outline or form for any offer, whether a Bias-type offer or not, of "deliberate intent" insurance coverage. Indeed, the Legislature does not mandate in any portion of Chapter 23 any description, outline or form for an offer of "deliberate intent" insurance coverage. Clearly, the Legislature knows how to explicitly mandate a procedure for an offer when it wants such a procedure. See W.Va. Code §33-6-31d. Yet, the Legislature did not incorporate into W.Va. Code §23-4C-6 any procedure for BrickStreet to make any type of offer of "deliberate intent" insurance coverage. In the absence of an explicit procedure of any kind, the word "offer" means only one thing: to make available for purchase. BrickStreet made "deliberate intent" coverage available for purchase under the broadform endorsement.

Summit Point omits another important rule of statutory construction: when a statute is clear and unambiguous, one should apply the statute and where not clear, in construing a statute, one should ascertain and give effect to the intent of the Legislature (See Michael v. Appalachian Heating, LLC., 701 S.E.2d 116 (W.Va. 2010) (citations omitted)). The plain language of the statute, the "textual support" in Summit Point's phraseology, specifically states that BrickStreet assumed the duties of the WCC and nothing more. To the extent that this Court deems the statutory language is unclear, then this Court should ascertain and give effect to the intent of the Legislature. In doing so, this Court should consider the language contained in Chapter 23 which contains the WCC's duties and obligations as transferred to BrickStreet in its entirety. Under the WCC, EELF was a voluntary coverage that an employer could choose to participate in.

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. The WCC was not required to offer EELF to employers. The statute does not expressly include any description, outline or form for an offer of "deliberate intent" insurance coverage. The express, plain language of the statute, the "textual support," does not outline any "offer" including that mandated by Bias. Given the complete absence of any statutory framework requiring a specific manner and/or form of an offer, it is clear that the Legislature did not intend that an offer of "deliberate intent" coverage be made when it passed W. Va. Code § 23-4C-6.

B. The policy language unambiguously excludes coverage for any action brought under W. Va. Code §23-4-2, including "deliberate intent" actions.

Summit Point argues that the policy language excluding coverage for "deliberate intent" actions is ambiguous, although it admits that "deliberate intent" coverage may be excluded from an employers liability policy. See Stage Show Pizza, supra. Summit Point argues that the endorsement excluding coverage for "deliberate intent" was not part of the standard policy submitted by the National Counsel on Compensation Insurance ("NCCI"), but a separate endorsement that BrickStreet drafted. BrickStreet admits that it drafted the endorsement that excludes coverage for all claims or actions brought under W. Va. Code §23-4-2, regardless of whether the action is brought under subsection (d)(2)(i) or (d)(2)(ii)⁴ (Designation of Record No. 5, Exhibit A, Endorsement No. WC 99 03 06). Summit Point argues that, because these subsections are not separately noted, then the exclusionary language is ambiguous.

⁴ Subsection (d)(2)(ii) relates to the five-part "deliberate intent" test.

West Virginia is a rare state in that it allows “deliberate intent” actions. Thus, BrickStreet drafted endorsements providing coverage for “deliberate intent” claims or actions and excluding coverage for “deliberate intent” claims or actions depending upon the needs and/or desires of its insureds. Summit Point attempts to misdirect the Court by making an issue of this fact. Summit Point is plain wrong. The policy specifically states that no actions brought under W.Va. Code §23-4-2, whether under subsection (d)(2)(i) or (d)(2)(ii), are covered under the policy.

BrickStreet has already addressed the plain meaning of the endorsement excluding coverage for “deliberate intent” claims or actions in detail in its Supplemental Appeal Brief and, in accordance with this Court’s Order, does not repeat itself here. BrickStreet refers the Court to its discussion in Section D of its Supplemental Appeal Brief. Additionally, BrickStreet refers the Court to the arguments of the West Virginia Insurance Federation.

C. The policy language speaks for itself, and what BrickStreet employees knew, or should have known, is irrelevant to this case.

TKS Contracting, Inc., H. Talbott Tebay and H. Talbott Tebay, DDS, Ltd. (collectively “TKS Contracting”) filed a Motion for Leave to File Brief as Amicus Curiae. To the extent that this Court considers TKS Contracting’s arguments in the proposed amicus brief, BrickStreet addresses the arguments herein.

TKS Contracting attempts to persuade this Court that the insurance policy language at issue in this appeal is ambiguous. It seeks to do so by placing before this Court irrelevant deposition testimony of BrickStreet employees from a civil action pending in the Circuit Court of Jackson County, West Virginia. TKS Contracting argues that the policy language at issue is ambiguous because some of the BrickStreet employees that were deposed in the Jackson County,

West Virginia action do not fully understand the policy's reference to West Virginia Code § 23-4-2.

TKS Contracting's arguments are irrelevant to this Court's analysis. "Where the provisions of 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." Cox v. Amick, syl. pt. 4, 466 S.E.2d 459 (W. Va. 1995). It is also well-settled law that "[l]anguage in an insurance policy should be given its plain, ordinary meaning." Id. at syl. pt. 5. . This Court has also held that "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination" Murray v. State Farm Fire & Casualty Co., 509 S.E.2d 1 (W. Va. 1998) (quoting Payne v. Wilson, 466 S.E.2d 161, 165-56 (W. Va. 1995)).

When considering the plain meaning of the unambiguous insurance policy language, it is irrelevant what anyone, including a BrickStreet employee, believes the policy language means. The policy language means what the policy language means. BrickStreet addresses TKS Contracting's arguments in this regard in its Opposition to TKS Contracting, Inc., H. Talbott Tebay and H. Talbott Tebay, DDS, Ltd.'s Motion for Leave to File Brief as Amicus Curiae in Support of Appellee Summit Point Raceway Associates, Inc. ("BrickStreet's Opposition Brief"). In order to not repeat itself, BrickStreet refers this Court to Section II.A. of BrickStreet's Opposition Brief.

D. The "reasonable expectations" doctrine does not apply because the policy language is unambiguous.

TKS Contracting further attempts to argue in its amicus brief that the "reasonable expectations" doctrine applies and employers had a reasonable expectation of coverage. However, TKS Contracting applies the incorrect standard. BrickStreet has addressed the

“reasonable expectations” doctrine and when it should be applied in its Petition for Appeal, Section D.3. and in Section D of its Supplemental Appeal Brief. BrickStreet also addressed the correct standard under the “reasonable expectations” doctrine in its BrickStreet’s Opposition Brief, Section II.B. Therefore, BrickStreet does not address this argument here.

E. Part Two – Employers Liability Insurance coverage is not illusory because the coverage applies to a reasonably anticipated risk.

TKS Contracting also asserts in its amicus brief that, if Part Two – Employers Liability Insurance coverage does not apply to “deliberate intent” actions, then the coverage is illusory. As addressed in detail in Section II.C. of BrickStreet’s Opposition Brief, TKS Contracting did not provide complete information to this Court regarding the deposition testimony of Thomas J. Obrokta, Jr., BrickStreet’s Senior Vice President and General Counsel. TKS Contracting omitted the portions of Mr. Obrokta’s testimony in which he provided examples where Part Two would apply. Furthermore, this issue is not properly before this Court because Judge Sanders did not hold that the insurance coverage was illusory. BrickStreet refers this Court to its Opposition Brief regarding these arguments.

To the extent that this Court considers the issue of whether Part Two – Employers Liability Insurance is illusory, BrickStreet asserts that Part Two – Employers Liability Insurance is not illusory because it provides coverage for some circumstances. No case law exists in West Virginia specifically defining what “illusory” means. However, the Seventh Circuit, particularly the state of Indiana, has dealt with this issue in a number of cases. See, for example, Schwartz v. State Farm Mutual Automobile Insurance Co., 174 F.3d 875 (7th Cir. 1999) and Monticello Insurance Co. v Mike’s Speedway Lounge, Inc., 949 F.Supp. 694 (S.D.Ind. 1996). In Schwartz, the Seventh Circuit defined “illusory” as follows:

An insurance provision is considered illusory if “a premium was paid for coverage which would not pay benefits under any reasonably expected set of circumstances. [citations omitted] If a provision covers some risk reasonably anticipated by the parties, it is not illusory.

Schwartz at 879. Other jurisdictions have relied upon Indiana’s definition of illusory, although the jurisdictions have varied in the determination of how illusory coverage is resolved.

In Schwartz, at issue was whether an exclusion in an underinsured motorists’ coverage provision was applicable. In the policy in question, one of the definitions of an underinsured vehicle excluded from underinsured benefits any vehicles with the same limits or more than the injured party. The Schwartz Plaintiffs had purchased the minimum liability limits allowed in Indiana and asserted that no one would have limits that were less than the limits they had purchased. Thus, they claimed the underinsured motorists’ coverage was illusory. However, the Court considered the other definitions and provisions in the underinsured motorists’ provision in the policy and held that the remainder of the underinsured motorists’ coverage provision covered at least one reasonably anticipated risk, and thus, was not illusory.

In the instant action, a reasonably anticipated risk is covered. Mr. Obrokta provided an example where Part Two -- Employer’s Liability Insurance coverage would apply: when an employee brings a family member, such as a child, to work and the family member witnesses an injury to the employee. As a result, the family member sustains an injury or emotional distress. The family member’s injury would be covered under Part Two -- Employer’s Liability Insurance coverage. See Thomas J. Obrokta, Jr. deposition transcript, pp. 141-143, Appendix Exhibit A. Part Two plainly and unambiguously does not provide coverage for “deliberate intent” lawsuits, but it does provide coverage for the types of claim described above. It is not illusory coverage.

III. PRAYER FOR RELIEF

BrickStreet requests that this Honorable Court 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.

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

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No. 101414

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.**

CERTIFICATE OF SERVICE

I, Angela D. Herdman, hereby certify that service of the foregoing **West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company's Reply Brief**, has been made upon the following counsel of record by depositing a true and exact copy through the regular course of the United States mail, postage prepaid, on this 26th day of May, 2011, addressed as follows:

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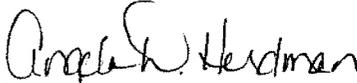
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EXHIBITS
ON
FILE IN THE
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