

No. 101414

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

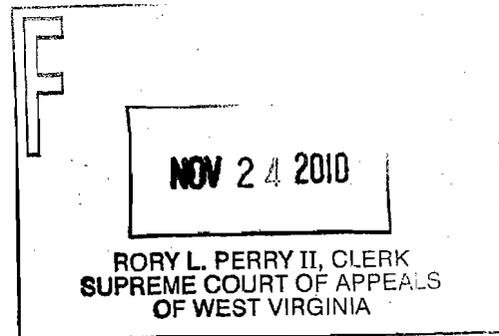
**WEST VIRGINIA EMPLOYERS' MUTUAL  
INSURANCE COMPANY d/b/a  
BRICKSTREET MUTUAL INSURANCE COMPANY,**

*Petitioners/Defendants below,*

v.

**SUMMIT POINT RACEWAY ASSOCIATES, INC.,**

*Respondent/Plaintiff below.*



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**RESPONSE IN  
OPPOSITION TO PETITION FOR APPEAL**

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Petition for appeal from Jefferson County Circuit Court  
Hon. David H. Sanders, civil action. no. 09-C-275

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## **II. Kind of Proceeding and Nature of Ruling in the Lower Tribunal**

Defendant/Petitioner West Virginia Employers' Mutual Insurance Company a/k/a Brickstreet Mutual Insurance Company ("Brickstreet") appeals a May 4, 2010 Summary Judgment Order and a June 29, 2010 Agreed Judgment Order of the Circuit Court of Jefferson County West Virginia, the Honorable David H. Sanders ("the Circuit Court"). The Circuit Court held that Brickstreet breached its duty to defend and indemnify its insured, Plaintiff/Respondent Summit Point Raceway Associates, Inc. ("Summit Point") against a deliberate intent lawsuit filed by one of Summit Point's employees and that Brickstreet is liable for the costs of defense and settlement amounts paid by Summit Point to its employee. The Circuit Court never certified its ruling as final, but instead scheduled the remaining counts raised by Summit Point (bad faith and unfair trade practices) for trial in February, 2011.

## **III. Statement of the Facts of the Case**

### **A. The underlying litigation**

On February 27, 2007 Summit Point employee Brandon Gregory ("Gregory") severely injured his hand while working in Summit Point's wood flooring shop. The Occupational Safety and Health Administration ("OSHA") investigated Summit Point's workspace after Gregory's injury and cited Summit Point for infractions involving improper training and energy control procedures. Gregory filed suit against Summit Point on March 4, 2008, alleging that Summit Point, along with its president and the wood flooring shop supervisor injured him with deliberate intent pursuant to West Virginia's "deliberate intent" statute, W. Va. Code §23-4-2(d)(2)(ii).

At the time of Gregory's injury, Summit Point was insured by Brickstreet under policy no. WC 10001513-03. *See* Policy, attached to Complaint as Exhibit A. Summit Point notified

Brickstreet of the deliberate suit against it in writing on April 14, 2008, and asked Brickstreet to assume the costs of defense. May 4, 2010 Summary Judgment Order, p. 4. Receiving no response, Summit Point sent the letter again to Brickstreet, this time by certified mail, on June 24, 2008. *Id.* Once again, however, Brickstreet failed to respond. On July 29, 2008, Summit Point sent yet another letter to Brickstreet again asking Brickstreet for a coverage determination. *Id.*, pp. 4-5. On August 14, 2008, over 120 days after Summit Point's initial written request for coverage, Brickstreet finally responded in writing by denying coverage on the grounds that Gregory's suit fell within the following exclusion in Summit Point's policy:

WEST VIRGINIA INTENTIONAL INJURY EXCLUSION ENDORSEMENT

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.

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.

Policy, WC 99 03 06; Order, p. 4. By this time, Summit Point long since had been forced to pay for its own defense. *Id.* After the Circuit Court ruled that the OSHA citations were dispositive

for purposes of Gregory's deliberate intent suit (essentially foreclosing any defense that Summit Point might have), Summit Point was forced to settle Gregory's claims unfavorably.

### **B. Brickstreet's origins**

Like other West Virginia employers, Summit Point was insured under the former West Virginia Workers' Compensation Commission ("WCC") prior to Brickstreet's existence. In 2005, the Legislature created Brickstreet, a private company, to replace the WCC and to offer workers compensation and related insurance. Upon Brickstreet's creation, those employers formerly insured by the WCC became Brickstreet insureds. W. Va. Code §23-2C-15(a).

As the sole successor to the WCC, Brickstreet admittedly had a two and a half year monopoly in the workers compensation insurance field. Petition, p. 5. This monopoly ensured that Brickstreet would be profitable during its initial years of operation. However, Brickstreet's monopoly came with certain obligations: it was required to offer other types of insurance coverage incidental to standard workers compensation insurance. The Legislature had previously drafted Article 4C of Chapter 23 of the West Virginia Code, entitled "Employers Excess Liability Fund," expressly "to permit the establishment of a system to provide insurance coverage for employers subject to this chapter [23] who may be subjected to liability under section two, article four of this chapter, for any excess of damages over the amount received or receivable under this chapter." W. Va. Code §23-4C-1. The section mentioned, §23-4-2, is the deliberate intent statute which codified exceptions to employers' workers compensation-based immunity.<sup>1</sup> See Powroznik v. C. & W. Coal Co., 445 S.E.2d 234, 235 (W. Va. 1994) ("the

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<sup>1</sup> A deliberate intent action is also known as a Mandolidis action after Mandolidis v. Elkins Industries, Inc., 246 S.E.2d 907 (W.Va. 1978), the case that created an exception to an employer's workers' compensation-based immunity in cases in which employers acted with deliberate intent

Employers' Excess Liability Fund (EELF) created under W.Va.Code, 23-4C-1, *et seq.* . . . was designed to protect employers from excess damages arising out of deliberate intent cases").

When creating Brickstreet, the Legislature added a section to Article 4C clearly defining Brickstreet's duty with respect to deliberate intent coverage:

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

W. Va. Code § 23-4C-6. *See also* W. Va. Code § 23-2C-3(a)(1)(B) (requiring Brickstreet to "Provide employer's liability insurance . . . including . . . employer excess liability coverage as provided in this chapter"). Therefore, by plain, unambiguous statutory command, the Legislature required Brickstreet to offer deliberate intent coverage to its insureds at least until June 30, 2008.

### C. Summit Point's policy with Brickstreet

Summit Point's policy with Brickstreet provided two types of coverage: Part One, workers' compensation insurance; and Part Two, Employers Liability Insurance. The policy covered the period between January 1, 2007 and July 1, 2007, and provided injury coverage in the amount of \$100,000.00 for each accident. Policy, Information page.

No Brickstreet agent ever met with or explained the policy to Summit Point, Order, p. 3. and Brickstreet admits it made "no offer of coverage, be it for workers' compensation coverage,

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resulting in employee injury. The West Virginia legislature codified the Mandolidis exception to employer immunity in §23-4-2(d)(2), finding that the employer loses his immunity if the Plaintiff proves that the employer injured him with specific intent, §23-4-2(d)(2)(i), or if the Plaintiff satisfies the five factor test found in §23-4-2(d)(2)(ii) concerning intentional exposure to a known unsafe working condition in violation of safety rules or standards.

‘deliberate intent’ coverage, or any other type of coverage.” Brickstreet’s Opposition to Summit Point’s Motion for Partial Summary Judgment (designated as record doc. no. 5), pp. 9-10.

**D. The Circuit Court’s Orders**

On May 4, 2010, the Circuit Court held that, because Brickstreet was required by statute to offer deliberate intent insurance, this Court’s decision in Bias v. Nationwide Mut. Ins. Co., 365 S.E.2d 789 (W.Va.1987) required Brickstreet to offer the insurance in a commercially reasonable manner. Order, p. 8. The Circuit Court noted that, under Bias, if an insurer does not make a commercially reasonable offer of statutorily mandated coverage (and obtain a knowing and informed waiver if the offer is refused), the coverage is deemed to be included in the insured’s policy by operation of law. Order, p. 11. Brickstreet admitted that it did not make any offer (let alone a Bias-compliant offer). Therefore, it followed that deliberate intent insurance was included in Summit Point’s policy as a matter of law. Order, p. 11.

The Court also found that deliberate intent coverage was included in Summit Point’s policy due to ambiguities in Part Two – the Employers Liability Coverage portion – of the Policy. The Court found that Brickstreet’s attempted exclusion was insufficient because it did not clearly specify what it was excluding. Order, p. 12. Therefore, because exclusions are strictly construed against the insurer and because, in cases of ambiguity, an insured’s reasonable expectations of coverage apply, the Court held that deliberate intent coverage was included in Summit Point’s policy as a matter of law. The Court further found that, because Summit Point’s damages flowed proximately from Brickstreet’s wrongful refusal to defend and indemnify Summit Point, Brickstreet was liable for all consequential damages, including attorneys fees and costs and settlement amounts in excess of the \$100,000 policy limits.

On June 29, 2010, the Circuit Court entered an agreed judgment order setting the amount damages with respect to those issues, and noted that it would schedule the remaining counts for trial. Nowhere in either the summary judgment or agreed judgment order did the Court certify that its judgments were final pursuant to Rule 54 of the West Virginia Rules of Civil Procedure.

#### **IV. Discussion of Law**

##### **A. Standard of Review**

Because the Circuit Court's decision concerned the interpretation of a contract and the interpretation of a statute, this Court's review is *de novo*. Syl. pt. 1, Carper v. Watson, 697 S.E.2d 86, 89 (W.Va. 2010) (de novo review of questions "involving an interpretation of a statute") (citation omitted); Payne v. Weston, 466 S.E.2d 161, 165-66 (W. Va. 1995) ("The interpretation of an insurance contract . . . is reviewed de novo . . .") (citation omitted).

This Court's review is also guided by long-standing precedent in this State mandating that insurance policy language be construed liberally in favor of the insured. Prete v. Merchants Property Ins. Co. of Indiana, 223 S.E.2d 441, 443 (W.Va. 1976) ("The guiding principle of construction in cases of insurance contracts requires us to construe the language liberally in favor of the insured") (citations omitted). Exclusions in insurance policies "will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Jenkins v. State Farm Mut. Auto. Ins. Co., 632 S.E.2d 346, 350 (W.Va.2006) (citation omitted). An insurance company "seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." Id. (citation omitted). *See also* Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc., 553 S.E.2d 257, 261

(W.Va.2001) (where policy provision “will largely nullify the purpose of indemnifying the insured, the application of that provision will be severely restricted”) (citation omitted).

**B. Brickstreet’s appeal is premature.**

“The usual prerequisite” for this Court’s “appellate jurisdiction is a final judgment, final in respect that it ends the case.” C & O Motors, Inc. v. West Virginia Paving, Inc., S.E.2d 905, 909 (W. Va. 2009) (citation omitted). A case is final “only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.” Id. (citations omitted). This “rule of finality” is not discretionary: it is a statutory mandate designed to prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation. Id. (citations and internal punctuation omitted). The instant litigation clearly is not final because the litigation has not terminated. As Brickstreet admits, Summit Point’s bad faith and unfair trade practices claims are still pending before the Circuit Court. Petition, p. 11. Rule 54 of the West Virginia Rules of Civil Procedure, allows a circuit court to direct entry of a final judgment, even where such judgment does not terminate the litigation with respect to all parties and claims, only if the court expressly determines that “there is no just reason for delay and upon an express direction for the entry of judgment.” If the Court does not make such a determination, any order “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 . . . .” W. Va. R. Civ. P. 54(b). This Court has “not, however, strictly adhered to the requirements of a Rule 54(b) certification in order to invoke Rule 54(b).” Hubbard v. State Farm Indem. Co., 584 S.E.2d 176, 183 (W. Va. 2003). Even if an

order does not contain Rule 54(b)'s language, it may be considered a final order if it "approximates a final order in its nature and effect." Id.

In Hubbard, a case involving coverage claims and breach of contract claims, this Court permitted a Rule 54(b) appeal from the lower court's summary judgment order concerning coverage despite the fact that the bad faith issues remain to be litigated. The Court found that "[b]ecause the . . . order could be construed as final as to the coverage and duty to defend claims, [the appellant] could have taken a petition for appeal to this Court from the summary judgment rendered against it on these claims." Id., 584 S.E.2d at 184.

At first blush, this language seems to permit Brickstreet's appeal. However, the Hubbard Court noted that use of Rule 54(b) "should not be routine and should be reserved only for the infrequent harsh case." Id. at n. 16. Hubbard's complicated fact pattern involved multiple insurance companies litigating different liability issues. The lower court erroneously found that summary judgment against one insurer prohibited reconsideration of a summary judgment order against the other insurer. Id. at 180. Because there was no Rule 54(b) certification by the lower court and because the time for reconsideration under Rule 60 had passed,<sup>2</sup> one insurer found itself bound by what appeared to be an interlocutory decision against another insurer. Rule 54(b) certification was necessary under the facts of Hubbard to resolve the appellate rights of the different insurers.

There are no similarly harsh facts in this case. This case is a familiar breach of contract/bad faith case by one aggrieved insured against one insurer. Brickstreet has not asked

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<sup>2</sup> The Hubbard appellants' Motion for Rule 60 relief was denied, and their petition for a writ of prohibition was also denied. 584 S.E.2d at 180.

the Circuit Court to alter or amend its orders nor has it moved for Rule 54(b) certification. If Hubbard is extended to the facts of this case, then every case in which a plaintiff files both coverage and bad faith counts – nearly every case in which an insured sues an insurer – will be subject to Rule 54(b) appeal, thus contradicting Hubbard's instruction that such appeals should be limited to the infrequent harsh case.

The Circuit Court's orders resolve only one part of this litigation, leaving other parts to be determined. Until all are determined, Brickstreet does not have the right to appeal and this Court should decline to hear Brickstreet's appeal. James M.B. v. Carolyn M., 193, W. Va. 289, 292, 456 S.E.2d 16, 19 (1995) ("With rare exception, the finality rule is mandatory and jurisdictional").

- C. The Circuit Court correctly found that Brickstreet's failure to make a commercially reasonable offer of deliberate intent coverage resulted in that coverage's inclusion in Summit Point's policy as a matter of law.**

The Plaintiff's argument is straightforward. West Virginia Code § 23-4C-6 required Brickstreet to "offer insurance to provide [deliberate intent] benefits. . . until at least the thirtieth day of June, two thousand eight."<sup>3</sup> Because the offer was mandated by statute, previous decisions by this Court required the offer to be made in a specific, commercially reasonable way and any rejection of the offer had to be knowing and informed. Bias v. Nationwide Mut. Ins. Co., 365 S.E.2d 789, 791 (W.Va.1987) (superceded by statute with respect to underinsured motorists coverage), states that:

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<sup>3</sup> With respect to Summit Point's coverage claim, Brickstreet states that its duties began January 1, 2006 and ended on June 30, 2008. Because the underlying claim (Gregory's injury) arose on February 27, 2007, it is undisputed that the claim falls within the period of time described by the statute.

Where an offer of optional coverage is required by statute, the insurer has the burden of proving that an effective offer was made . . . and that any rejection of said offer by the insured was knowing and informed. . . . The insurer's offer must be made in a commercially reasonable manner, so as to provide the insured with adequate information to make an intelligent decision. . . . The offer must state, in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved."

Brickstreet admittedly never made an offer of any sort (let alone an offer describing the nature, limits and costs of the coverage), and never obtained a knowing and informed waiver or rejection of deliberate intent coverage from Summit Point. May 4, 2010 Order, p. 10 (finding "no evidence of a knowing and informed rejection of deliberate intent coverage by Summit Point").<sup>4</sup>

Bias describes what happens when an insurer fails to make a statutorily mandated offer:

"When an insurer is required by statute to offer optional coverage, it is included in the policy by operation of law when the insurer fails to prove an effective offer and a knowing and intelligent rejection by the insured."

Bias, syl. pt. 2. The result in this case follows irresistibly from a combination of § 23-4C-6 and Bias: because Brickstreet failed to make its statutorily required offer of deliberate intent coverage to Summit Point, the coverage is included in Summit Point's policy by operation of law.

**1. Brickstreet's is not the WCC: it is a private company with additional, statutorily mandated obligations.**

Brickstreet argues that it did not have to offer deliberate intent coverage because its obligations were identical to the WCC's obligations. Petition, pp. 14-21. Because Summit Point did not voluntarily choose deliberate intent coverage under the old WCC, Brickstreet contends that Summit Point similarly did not have coverage after novation to Brickstreet. This argument must fail because it simply ignores the plain language of §23-4C-6. Brickstreet's obligations

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<sup>4</sup> In fairness, Brickstreet has never argued before the Circuit Court or this Court that it ever obtained a waiver of deliberate intent coverage, knowing or otherwise, from Summit Point.

were not identical to the WCC's. Brickstreet was given a new specific obligation after novation: "Upon the termination of the commission, all assets, obligations and liabilities resulting from this article are transferred to the successor of the commission. *Thereafter*, the company [Brickstreet] shall offer insurance to provide for the benefits required by this article . . ." W. Va. Code § 23-4C-6 (emphasis added). This obligation to offer deliberate intent insurance did not exist (and could not have existed) until after the WCC's termination; therefore, it could not have been an obligation of the WCC. It is a new, clear, statutory obligation of Brickstreet.

Brickstreet is not the WCC. It is a newly created private entity. W. Va. Code §23-2C-3(a)(1) ("On or before July 1, 2005, the executive director may take such actions as are necessary to establish an employers' mutual insurance company as a domestic, *private*, nonstock, corporation . . .") (emphasis added). As a private entity with a near monopoly, Brickstreet was given the opportunity to make a great deal of money.<sup>5</sup> However, as a private company, it also had to follow the same insurance law that every other private company follows. Brickstreet had no right to ignore the plain commands of Bias and § 23-4C-6, and the Circuit Court correctly enforced Brickstreet's compliance. Willey v. Bracken, — S.E.2d —, 2010 WL 4025599 (W.Va. 2010) ("if a statute is plain, this Court lacks authority to construe its provisions, and we must, instead, apply its clear terms") (citation omitted).

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<sup>5</sup> Apparently Brickstreet did make a great deal of money. See BrickStreet Financials at <https://www.brickstreet.com/General/Pages/Newsroom.aspx> (noting a \$113,600,000.00 profit in 2008). Brickstreet's profitability undermines an argument it suggested below (but not on appeal) that an adverse ruling would constitute a significant financial burden. Additionally, Brickstreet's window of exposure under Bias and W.Va. Code §23-4C-6 is now closed. Summit Point likely was one of the few employers injured by Brickstreet's failure to defend claims arising between January 1, 2006 and June 30, 2008. By statute, claims arising after that point would not be subject to Bias-type arguments.

**2. An affidavit by an employee of the Office of the Insurance Commissioner solicited *ex parte* in private litigation may not be used in an attempt to contradict clear statutory language and case law.**

In an effort to avoid the clear requirements of W. Va. Code § 23-4C-6 and Bias, Brickstreet relies on an April 5, 2010 affidavit from the West Virginia Office of Insurance Commissioner's ("OIC") general counsel, Mary Jane Pickens, stating that the OIC does not interpret §23-4C-6 to require Brickstreet to offer deliberate intent coverage in a Bias-compliant manner. Exhibit A to doc. no. 9 designated by Brickstreet. Although it is perhaps unseemly that a private company such as Brickstreet can successfully solicit *ex parte* an affidavit from a sitting government employee during pending civil litigation, the affidavit is nothing more than Ms. Pickens's private opinion. The affidavit cannot be an expression of OIC policy because it does not comply with West Virginia's Administrative Procedures Act ("the APA"), W. Va. Code §29A-1-1 *et seq.*

Under the APA, administrative agencies such as the OIC are required to follow a set of statutorily defined procedures before making any "statement of policy or interpretation of general application and future effect . . . affecting private rights, privileges or interests." §29A-1-2(i); §29A-3-1. For example, agency rules must be filed in the State Register or they will be deemed "void and unenforceable and shall be of no further force and effect." §29A-2-5. The agency must allow an opportunity for public comment, and must attach "a fiscal note" to its proposed rule itemizing the costs to the state and persons affected by the rule. §29A-3-4, 5 & 8.

Ms. Pickens's affidavit, which discusses sections of the West Virginia Code in an obvious attempt to influence this litigation in Brickstreet's favor, purports to affect negatively Summit Point's claims and right to insurance. Thus the affidavit falls under the definition of a

rule subject to the APA because it is intended to be a statement and interpretation of general application (it describes itself as “the opinion of the OIC” without limitation, ¶11) which affects private rights and interests. §29A-1-2(i). However, a review of the State Register, available at <http://www.sos.wv.gov/administrative-law/register/Pages/2010-Historical.aspx>, shows no record of the affidavit at or before the time it was included in this case, no public comment information and no fiscal notes. It seems clear that the affidavit did not comply with the APA, nor, likely, was it intended to so comply. Therefore, to the extent that the affidavit is intended to be an expression of OIC policy, it is void for violating the APA<sup>6</sup> and it becomes nothing more than one attorney’s personal opinion.

Even assuming *arguendo* that the affidavit were a properly promulgated OIC interpretation, it would still be void because it conflicts with a clear and unambiguous statute. W. Va. Code 23-4C-6 states that Brickstreet “shall offer” deliberate intent insurance. To offer something is to “present[] something for acceptance.” BLACK’S LAW DICTIONARY, p. 111 (Deluxe 7th ed. 1999); *see also* <http://dictionary.reference.com/browse/offer> (defining “offer” as “to present for acceptance or rejection.” That is the obvious, familiar meaning of “offer.” Therefore, when the statute required Brickstreet to offer deliberate intent insurance, Brickstreet was required to present the insurance to Summit Point for its acceptance or rejection. Ms. Pickens’s affidavit, on the other hand, argues that “offer” really means something like “provide

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<sup>6</sup> Agencies are also allowed to adopt “interpretive rules,” *i.e.* a rule “intended by the agency to provide information or guidance to the public regarding the agency’s interpretations, policy or opinions upon the law enforced or administered by it.” §29A-1-2(c). These rules are subject to less formality, however, by definition, they are “not intended by the agency to be determinative of any issue affecting private rights, privileges or interests.” *Id.* Interpretive rules may not regulate private conduct, nor are they allowed in any way to “affect[] any legislative or judicial determination regarding the prospective effect of such rule.” *Id.* Clearly then, the affidavit, which is designed to affect the outcome of this case and Summit Point’s rights to insurance, cannot be an interpretive rule.

the same coverage previously provided.” This interpretation has no basis in law, fact or lexicography and, because it contradicts the plain meaning of the statute, it is not entitled to deference from this Court. *See e.g. State, ex rel. Crist v. Cline*, 632 S.E.2d 358, 367-68 (W.Va. 2006) (insurance commissioner’s interpretation given deference only “so long as it is consistent with the plain meaning of the governing statute”) (citations omitted); *Lovas v. Consolidation Coal Co.*, 662 S.E.2d 645, 649-50 (W.Va. 2008) (Whenever an administrative agency’s interpretation conflicts with the statute, “there is no question . . . that the statute must control”) (citations omitted).<sup>7</sup>

**3. Bias applies to Brickstreet as it applies to every other insurer and every other statutorily mandated offer of insurance.**

Although Brickstreet argues that Bias “is not applicable to the privatization of workers’ compensation,” Petition, pp. 19-21, Bias’s syllabus points are very clear:

1. Where an offer of optional coverage is required by statute, the insurer has the burden of proving that an effective offer was made, and that any rejection of said offer by the insured was knowing and informed.
2. When an insurer is required by statute to offer optional coverage, it is included in the policy by operation of law when the insurer fails to prove an effective offer and a knowing and intelligent rejection by the insured.

Bias, syl. pts. 1 & 2. These syllabus points are not limited to offers of uninsured or underinsured motorists coverage. They are not limited to any other offers of insurance. They are stand-alone

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<sup>7</sup> Ms. Pickens’s affidavit also conflicts with the OIC’s own previous public statements. On its website the OIC states that “BrickStreet Insurance is required by the provisions of W. Va. §23-4C-6 to offer insurance to provide for the benefits required by Article 4C until at least June 30, 2008. . . .” OIC FAQ (available at [http://www.wvinsurance.gov/LinkClick.aspx?fileticket=X\\_HWH95bhus%3d&tabid=73&mid=768](http://www.wvinsurance.gov/LinkClick.aspx?fileticket=X_HWH95bhus%3d&tabid=73&mid=768); *see also* Memo to Attendees of April 8, 2008 Carrier Conference re: Deliberate Intent (“BrickStreet is required by law to offer coverage for deliberate intent until at least June 30, 2008”) available at <http://www.wvinsurance.gov/LinkClick.aspx?fileticket=vY7xeghs4m4%3d&tabid=73&mid=768>.

points of law applicable to all statutory offers of insurance. Tellingly, Bias uses the indefinite pronoun “an” to refer to *any* offer of insurance that an insurer might be required by statute to make. *See e.g. Maupin v. Sidiropolis*, 600 S.E.2d 204, 209-10 (W.Va. 2004) (“Typically . . . ‘an’ is construed as making general, rather than specific, references to its words of modification”) (citations omitted); Tracy v. Cottrell ex rel. Cottrell, 524 S.E.2d 879, 895 (W.Va.1999) (“the adjective ‘a’ . . . is commonly called the ‘indefinite article,’ . . . because it does not define any particular person or thing”) (citation omitted and internal punctuation altered).

A cursory review of the West Virginia Code shows that the Legislature used the term “shall offer” in many other instances in addition to §23-4C-6. *See e.g. W. Va. Code, § 23-4B-9* (Coal-Workers’ Pneumoconiosis Fund); *W. Va. Code, § 29-12B-6* (health care provider professional liability prior acts coverage); *W. Va. Code, § 33-6-31f* (uninsured and underinsured motorists’ coverage); *W. Va. Code, § 33-6-37* (coverage for the non-cancelled part of combination coverage); *W. Va. Code, § 33-16D-7* (small employer accident and sickness insurance); *W. Va. Code, § 33-16-31* (other health benefit plans to small employers); *W. Va. Code, § 33-20D-3* (malpractice tail insurance); and, *W. Va. Code, § 33-48-8* (model coverage for uninsurable individuals). Brickstreet’s duty under §23-4C-6 and Bias, therefore, is not an aberration: it is a duty well-known to the law of West Virginia, and a duty explicitly imposed on Brickstreet and any other insurer who is required by statute to offer coverage. *See also Riffle v. State Farm Mut. Auto. Ins. Co.*, 186 W.Va. 54, 55, 410 S.E.2d 413, 414 (1991) (“The plain language of Bias provides that if an insurer fails to prove an effective offer and a knowing waiver of the statutorily required coverage, then that coverage becomes part of the policy by operation of law”).

The Legislature was presumed to know Bias's holdings when it enacted West Virginia Code §23-4C-6 in 2005, and it must be presumed to have intended to obligate Brickstreet to follow Bias. Syl. pt. 4, in part, Charleston Area Medical Center, Inc. v. State Tax Dept. of West Virginia, 687 S.E.2d 374 (W.Va.2009) (it is “presumed that the legislators who drafted and passed [a statute] were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common . . .”) (citations omitted).<sup>8</sup>

**4. Compliance with Bias was not a practical impossibility.**

Brickstreet's final argument with respect to Bias is that compliance with Bias was practically impossible. This is so, according to Brickstreet, because it would have been “very time consuming and unreasonable” for Brickstreet to have made Bias-compliant offers to and secured waivers from 30,000 West Virginia employers between the time the “WCC terminated at 11:59 p.m. on December 31, 2005 and [the time] Brickstreet assumed coverage, as it existed, on 12:00 a.m. on January 1, 2006.” Petition, p. 22.

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<sup>8</sup> Brickstreet also refers in passing to Luikart v. Valley Brook Concrete and Supply, Inc., 613 S.E.2d 896 (W. Va. 2005). Although Brickstreet does not discuss Luikart in the argument portion of its Petition, it argued below that Luikart stands for the proposition that an insurer has no statutory duty to offer stop gap or deliberate intent coverage. However, the Luikart case makes no reference to W. Va. Code §23-4C-6 or Brickstreet's duties, and for good reason: the statute didn't exist at the time the case arose and neither did Brickstreet. Luikart involved a declaratory judgment action by an employer against a private insurance company arguing that a commercial general liability policy, issued by the insurer, should cover a deliberate intent action filed against the employer. The deliberate intent action arose in 1999, when the insured's employee was killed on the job. 613 S.E.2d at 899. However, unlike in this case, the insurer in Luikart was under no statutory duty to offer deliberate intent coverage under its commercial general liability policy. Brickstreet did not exist in 1999 and no code section required a non-existent Brickstreet, or anyone else, to offer deliberate intent coverage in 1999. Therefore, when Luikart arose, the insured employer could point to no statutory duty to offer stop gap coverage in effect at the time of its policy with its insurer. Id. at 902-03. The difference between Luikart and this case is obvious: after the Luikart case arose, the Legislature created Brickstreet and passed §23-4C-6 requiring Brickstreet to offer deliberate intent coverage to its insureds, including Summit Point. This placed the offer squarely within the plain language of the Bias syllabus points.

It is not clear why Brickstreet limits its offer window to the one minute period before its existence. It surely could have mailed a Bias-compliant offer (stating “in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved”) to its insured after it was created. The offer itself would have been easy to construct: Brickstreet’s own Rates and Rating Manual, **see Addendum 1**, provides a table listing deliberate intent coverage amounts and corresponding premiums calculated automatically as a percentage of the base premium. *Id.*, p. 22. It therefore would have been a simple matter to offer the premium and coverage amount to each employer.<sup>9</sup> Instead, Brickstreet never made Bias-compliant offers of deliberate intent insurance at any time because it wrongly believed that it didn’t have to.

The “very time consuming and unreasonable” language Brickstreet relies on comes from Cox. v. Amick, 466 S.E.2d 459 (W. Va. 2005) which Brickstreet cites for the proposition that offering optional coverage to and obtaining rejections from every insured under a given policy is unreasonably burdensome. Petition, p. 22. However, Cox is critically distinguishable because the insurer in Cox did in fact make a Bias-complaint offer to and receive a knowing rejection from the policyholder. *Id.* at 465. The issue before the Court was whether the insurer is required to make a Bias offer to other insureds under the policy in addition to the policyholder. The Court found that multiple Bias offers are not required: once one named insured on the policy makes an election of coverage pursuant to a Bias, that election binds all other insureds under the policy. *Id.* at 466. Cox’s holding makes sense in light of the facts of that case: it is unreasonable to force the insurer to make separate offers to the other insureds under the policy. The policyholder is

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<sup>9</sup> It seems implausible that Brickstreet means that the actual mailing process is time consuming and unreasonable because it mailed out letters “to each policy holder” without complaint. Petition, p. 7.

reasonably assumed to speak for those under his policy. However, in the instant case, Brickstreet never made *any* offer of deliberate intent coverage to Summit Point. Therefore, Cox is simply inapplicable.<sup>10</sup>

**D. The Circuit Court correctly found that deliberate intent coverage was included in Summit Point's policy as a result of ambiguities in the policy.**

The Circuit Court found that deliberate intent coverage also was included in Summit Point's policy under the doctrine of reasonable expectation: the policy language was ambiguous and Summit Point reasonably expected such coverage. Order, p. 13. Specifically, the Circuit Court reasoned that the title of Part Two of Summit Point's policy, "Employers Liability Insurance," closely matched the language in policies offering deliberate intent coverage long-issued by insurers in this state. The Circuit Court also concluded that Brickstreet's attempt to exclude deliberate intent coverage from Part Two of the Policy (which otherwise covers bodily injury to Summit Point's employees) failed because the exclusion did not refer to "broad form" or "deliberate intent" coverage and did not refer to the specific deliberate intent statute. Such lack of specificity resulted in ambiguity (which, under West Virginia law is always construed against the insurer),<sup>11</sup> and the ambiguity, in turn, permitted Summit Point to reasonably expect deliberate intent coverage.

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<sup>10</sup> During the several rounds of summary judgment briefing below, Brickstreet never raised an argument concerning Cox or the burdensome effects of complying with Bias. The Circuit Court never considered the issue. Therefore, Brickstreet may not raise the issue for the first time on appeal. Builders' Service and Supply Co. v. Dempsey, 680 S.E.2d 95, 99, n.9 (W.Va. 2009) ("issues not raised in the trial court and first raised on appeal are considered waived") (citations omitted).

<sup>11</sup> Exclusions "will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Jenkins v. State Farm Mut. Auto. Ins. Co., 632 S.E.2d 346, 350 (W.Va.2006) (citation omitted). An insurance company "seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." Id. (citation omitted).

Brickstreet argues that the Court simply erred when it stated that the policy did not exclude “broad form” or “deliberate intent” coverage and points to the sections of the policy it deems relevant as proof. (Petition, pp. 23-25). However, the Court referred to the phrases “broad form” and “deliberate intent” in quotes in its order to mean that those phrases themselves did not appear in the exclusion, as indeed, they do not. Brickstreet seems to argue that the language of the exclusion, which purportedly describes a deliberate intent cause of action, suffices. But that language does not track the five point test found in W. Va. Code §23-4-2(d)(2)(ii). Brickstreet merely refers to §23-4-2 without specifying the specific subsection.

This failure to specify the relevant subsection is critical. The other subsection of the statute, §23-4-2(d)(2)(i), gives rise to an entirely different cause of action. An action under §23-4-2(d)(2)(i) is not based on the five point test found in subsection (ii), rather it is based on an employer’s “consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee”. §23-4-2(d)(2)(i). The language in the Brickstreet exclusion speaks of “willful,” “intentional,” “malicious” and “deliberate” acts – but those acts logically fall under subsection (i). Indeed, Brickstreet’s use of the terms “willful” and “malicious” strongly suggests that it intended to refer to the higher level of employer culpability described in subsection (i). Therefore, Brickstreet’s exclusion is at least ambiguous. An employer could reasonably believe that it excludes coverage only for causes of action arising under subsection (i).

In response to the Circuit Court’s conclusion that a policy entitled “Employers Liability Insurance” would lead a reasonable person to believe that the policy entailed deliberate intent coverage, Brickstreet argues that the policy title is irrelevant and that only the policy language

matters. However, the policy language itself states that “employers liability insurance applies to bodily injury by accident or bodily injury by disease” arising “out of and in the course of the injured employee’s employment by you.” Policy, exhibit A to Complaint. This coverage, absent any exclusion (or even with an exclusion only for non-accidental, willful misconduct under subsection (i)), would certainly cover the underlying workplace injury in this case. Moreover, given the role that “Employers Liability” policies have played in insuring deliberate intent actions in this State, an insured could expect an employers’ liability policy to provide deliberate intent coverage.

Ambiguity exists when a policy “is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning . . . .” Syl. Pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 332 S.E.2d 639, 640 (W.Va.1985). In light of the reasonable disagreement concerning the scope of Part Two of Summit Point’s policy and the specific nature of Brickstreet’s purported exclusion, the policy is ambiguous as a matter of law. Such ambiguity must be construed liberally in favor of the insured, Prete v. Merchants Property Ins. Co. of Indiana, 223 S.E.2d 441, 443 (W.Va. 1976). Such ambiguity also means “that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of policy provisions would have negated those expectations.” Jenkins v. State Farm Mut. Auto. Ins. Co., 632 S.E.2d 346, 352 (W.Va. 2006) (citation omitted).

In Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc., 553 S.E.2d 257, 262 (W.Va. 2001), the Court was called upon to decide whether an endorsement entitled “Employers Liability-Stop Gap Coverage” provided coverage to an employer sued by one of its employees

under the deliberate intent statute. The Court held that employers liability policies exist to fill the gaps between basic workers' compensation policies and general liability policies. *Id.* at 262. After earlier citing law on insurance policy ambiguity, the Court found that the employers liability policy in question created a reasonable expectation that deliberate intent action was covered. *Id.* at 267-68. In the part of his opinion concurring with the majority, Justice Albright went further. He stated that an employers' liability policy which fails to provide coverage for a deliberate intent action "must be seen as essentially illusory and meaningless" and any construction of the policy reaching such a conclusion "would be absurd." *Id.* at 268.

Similarly, as demonstrated by the affidavit of Summit Point's manager, Summit Point believed that its policy with Brickstreet provided coverage for suits like Brandon Gregory's deliberate intent suit. Doc. no. 4 designated by Brickstreet, Summit Point's Summary Judgment Motion, Exhibit B, Affidavit of Maria Orsini, ¶7 ("Had broad form coverage been explained to me by Brickstreet, Summit Point would have purchased that coverage. I reasonably expected that Summit Point's insurance policy with Brickstreet would have covered injuries and lawsuits similar to Brandon Gregory's injury and lawsuit").<sup>12</sup> Therefore, and in light of the ambiguities properly noted by the Circuit Court, deliberate intent coverage applied to Summit Point's policy.

**E. The Circuit Court correctly found Brickstreet liable for all consequential damages flowing from its wrongful failure to insure and defend Summit Point.**

The Circuit Court held that, because deliberate intent coverage was included in Summit Point's policy as a matter of law, Brickstreet's failure to defend or indemnify Summit Point

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<sup>12</sup> Brickstreet has not challenged on appeal the affidavit, or the Circuit Court's reliance on this affidavit at summary judgment. Nor has Brickstreet argued on appeal that summary judgment was improper because it did not have the opportunity to conduct further discovery.

against the underlying deliberate intent case breached its insurance contract. See August 14, 2008 denial of coverage letter attached to Complaint as Exhibit E (“Summit Point . . . does not have coverage for . . . a deliberate intent cause of action [and] there is no corresponding duty to defend”). Brickstreet’s wrongful denial of coverage and defense forced Summit Point to defend the case at its own cost and settle the case without any assistance from Brickstreet. These costs flowed directly and proximately from Brickstreet’s breach of contract; they are familiar and expected consequences.

It is settled in West Virginia law (and Brickstreet does not dispute this point as a general rule) that an insurer’s wrongful failure to defend its insured will expose the insurer to liability for attorneys fees and costs incurred by the insured. See e.g. Syl. pt. 3, Marshall v. Fair, 416 S.E.2d 67 (W.Va.1992) (“Where an insured is required to retain counsel to defend himself in litigation because his insurer has refused without valid justification to defend him, in violation of its insurance policy, the insured is entitled to recover from the insurer the expenses of litigation, including costs and reasonable attorney’s fees”) (citation omitted). It is equally settled as a general rule that an insurer is liable to the extent of policy limits in such cases. Petition, p. 29.

The primary damages dispute in this case is whether an insurer who wrongfully fails to defend and indemnify its insured is liable for verdict or settlement amounts in excess of the policy limits. The Circuit Court found that the overwhelming authority justified recovery of damages in excess of policy limits because such damages flow proximately from the insurer’s wrongful conduct. This conclusion logically follows from both the general principle permitting consequential damages in breach of contract cases and also from specific cases concerning breach of insurance contracts. See e.g. Syl. pt. 2, Kentucky Fried Chicken of Morgantown, Inc.

v. Sellaro, 214 S.E.2d 823 (W.Va. 1975) (“Compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation are those as may fairly and reasonably be considered as arising naturally -that is, according to the usual course of things-from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach”); Syl. pt. 2, in part, Desco Corp. v. Harry W. Trushel Const. Co., 413 S.E.2d 85, 87 (W.Va.1991) ([Sellaro] authorizes two categories of damages in a breach of contract action. The first is those directly flowing from the contract breach. As to these damages, there is no requirement that the parties must have actually anticipated them because they are a natural consequence of the breach”); Rose ex rel. Rose v. St. Paul Fire and Marine Ins. Co., 599 S.E.2d 673, 679, n.6 (W.Va.,2004) (“Virtually all states impose upon insurance companies a duty to settle liability claims where the insured is likely to be exposed to damages in excess of the insurance policy limits. An insurance company’s breach of this duty can result in a “bad faith” lawsuit against the company to recover the claimant’s full damages, regardless of policy limits”); Strahin v. Sullivan, 647 S.E.2d 765, 772 (W.Va.2007) (“Numerous jurisdictions in the United States have held insurers liable to the insured for amounts in excess of policy limits when the insurer’s breach of its duty to defend has resulted in an excess verdict rendered against the insured”); Nielsen v. TIG Ins. Co., 442 F.Supp.2d 972, 980 (D. Mont. 2006) (“insurers who breach their duty are liable for the full amount of damages, including those in excess of the insurance policy limits”); Johnson v. Westhoff Sand Co., Inc., 62 P.3d 685, 688 (Kan.App. 2003) (“An insurance company guilty of wrongfully refusing to defend an action against its insured may be held liable for the amount of a judgment in excess of policy limits on a showing that the

excess judgment is traceable to the refusal to defend”); Monaghan v. Admiral Ins. Co., 1994 WL 118021, \*5 (9th Cir.1994) (“If the insurer breaches its duty to defend, it is liable for a judgment in excess of its policy limits”) (citing Alaska law); Newhouse by Skow v. Citizens Sec. Mut. Ins. Co., 501 N.W.2d 1, 7 (Wis.1993) (“an excess judgment is properly included in the damages for breach of an insurer’s duty to defend, if the excess judgment was a natural or proximate result of the breach. . . .Policy limits do not restrict the damages recoverable by an insured for a breach of the contract by the insurer”); Gray v. Grain Dealers Mut. Ins. Co., 684 F.Supp. 1108, 1111-12 (D.D.C.1988) (refusal to defend is a breach of contract “rendering the insurer liable to the insured for the losses resulting. The damages recoverable therefor include not only the *adjudicated or negotiated* amount of the claim and the insured’s expenses in resisting it but also any additional loss traceable to the breach”) (emphasis added and citation omitted); Caldwell v. Allstate Ins. Co., 453 So.2d 1187, 1191 (Fla.App. 1 Dist.1984) (an insurance “company acts at its peril in refusing to defend its insured in that, if it is subsequently determined that the company erroneously denied coverage, the company will be liable for damages for breach of its agreement under the policy”) (citation omitted); Stockdale v. Jamison, 330 N.W.2d 389, 392 (Mich.1982) (“damages for breach of [an insurer’s duty to defend] are not limited to the face amount of the policy”); Miller v. Elite Ins. Co., 161 Cal.Rptr. 322, 331 (Cal.App.1980) (“Wrongful failure to defend opens the insurance carrier to liability for the whole amount of the judgment including any amount in excess of the policy limits”) (citations omitted); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 176 S.E.2d 751, 754 (N. C. 1970) (“It is well settled that an insurer who wrongfully refuses to defend a suit against its insured is liable to the insured *for sums expended in payment or settlement of the claim*, for reasonable attorneys’ fees, for other

expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend”) (emphasis added); Safeway Moving & Storage Corp. v. Aetna Ins. Co., 317 F.Supp. 238, 246 (E. D. Va. 1970) (“It has been held that liability for additional damages above the contractual limits may be assessed against an insurer who willfully refuses to honor its duty to defend, provided that the excess damages are the natural and probable result of the breach”); *and*, Cohen v. Am. Home Assur. Co., 258 A.2d 225, 239 (Md. 1969) (“when an insurer wilfully refuses to perform the obligations required by a liability insurance policy, such as to defend a suit in behalf of the insured or to pay a judgment against him, in consequence of which the insured suffers loss, the court can compel the insurer to respond in damages for such loss”).

Brickstreet relies on Johnson ex rel. Estate of Johnson v. Acceptance Ins. Co., 292 F.Supp.2d 857 (N.D.W.Va. 2003) for the proposition that an insurer is not liable past its policy limits. In Johnson, the plaintiff represented the estate of a mentally ill man who was killed while walking from his residence, a living facility owned by the defendant health care provider. *Id.* at 862. The plaintiff sued in state court and the defendant filed a notice of bona fide defense and notified its insurance company. *Id.* After the insurance company denied coverage and refused to participate in the suit, the defendant defaulted. *Id.* The plaintiff and the defendant then reached an agreement: in exchange for an assignment of all of the defendant’s claims against the insurance company stemming from its failure to defend the defendant, the plaintiff agreed not to execute on any judgment against the defendant. *Id.* The plaintiff and defendant then stipulated certain facts before the court which entered judgment for the plaintiff in the amount of \$2.25

million dollars. Id. at 862-63. The limits of the defendant's policy with its insurance company were \$1 million per occurrence and \$2 million aggregate. Id. at 866.

Relying on its assignment from the defendant, the plaintiff then filed an action in federal court against the insurance company alleging breach of duty to defend, breach of contract, bad faith, unfair trade practices and conspiracy. Id. at 863. Judge Stamp found that the insurance company had a broad duty to defend the defendant, and further found that the insurance policy, because it was ambiguous, should be construed against the company under West Virginia law. Id. at 866-66. Having found liability, the Court next considered whether the insurance company's liability could exceed its policy limits. The Court found that the plaintiff-assignee' could not recover amounts in excess of policy limits, but critically *only because the defendant never paid any excess amounts itself*. Adopting the reasoning of another federal court, Judge Stamp stated:

To recover more than the policy limits from the insurer, the judgment creditor must assert the insured's injury. If the judgment cannot be enforced against the insured, no such injury exists. *The insured may assign to his judgment creditor any claim he has against the insurer for payment of the excess award, but such assigned claim is actionable only as long as the insured remains liable for the excess damages.* To allow the creditor to release the insured from liability for such excess damages without effecting the release of the insurer would give the creditor and insured the power unilaterally to extend the insurer's liability.

Id. at 867 (quoting Willcox v. American Home Assurance Co., 900 F.Supp. 850, 857 (S.D.Tex.1995)) (emphasis added). In this case, unlike in Johnson, Summit Point was liable for and suffered injury in amounts in excess of policy limits. Summit Point paid amounts substantially in excess of the policy limits to settle the underlying deliberate intent case that Brickstreet wrongfully refused to defend. Summit Point never entered into an assignment and agreement not to execute with the deliberate intent plaintiff. Instead, Summit Point was forced to

defend and indemnify itself against the plaintiff's claims because Brickstreet wrongfully declined to do so. Therefore, because Summit Point suffered actual damages, Johnson does not limit Summit Point's recovery to policy limits. In fact, Johnson's reasoning clearly allows for recovery of excess amounts.

Therefore, and in light of the persuasive authority cited by the Circuit Court, it is clear that Brickstreet is liable for the full, consequential damages found by the Circuit Court in its June 29, 2010 Order.

**V. Prayer for Relief**

For the reasons stated above, Summit Point asks this Honorable Court to deny the Brickstreet's Petition for Appeal and to deny Brickstreet's request for oral argument.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

*Petitioners/Defendants below,*

v.

No. \_\_\_\_\_

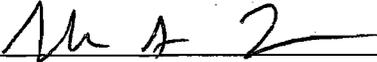
SUMMIT POINT RACEWAY ASSOCIATES, INC.,

*Respondent/Plaintiff below.*

**CERTIFICATE OF SERVICE**

I, undersigned counsel, of the law firm of Wm. Richard McCune, Jr., P.L.L.C., hereby certify that I served a true and correct copy of the foregoing **Response in Opposition to Petition for Appeal** upon the following by U.S. first class mail, postage prepaid, this 23<sup>rd</sup> day of November, 2010:

Don C.A. Parker, Esq.  
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\_\_\_\_\_  
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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**