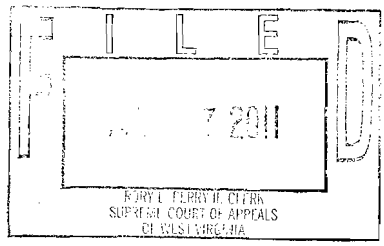
No. 101414

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.

SUMMIT POINT RACEWAY ASSOCIATE, INC.'S SUPPLEMENTAL APPEAL BRIEF

Appeal from Jefferson County Circuit Court
Hon. David H. Sanders, Civil Action. No. 09-C-275

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II. Introduction

In response to this Court's November 4, 2010 Order permitting supplemental briefs but directing the parties not to reiterate their earlier filings, Respondent/Plaintiff below Summit Point Raceway Associates, Inc. ("Summit Point") respectfully refers the Court to its earlier filed brief for the relevant factual background and other introductory material. Summit Point will use this brief to respond to the supplemental brief filed by Petitioner/Defendant below West Virginia Employers' Mutual Insurance Company d/b/a Brickstreet Mutual Insurance Company ("Brickstreet") and the briefs filed by the *amicus curiae*.

III. Discussion of Law

A. Brickstreet was required to offer deliberate intent insurance to Summit Point.

The relevant code section in dispute in this case is unambiguously clear. West Virginia Code § 23-4C-6 states:

> "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. Brickstreet argues at length, however, that the phrase "shall offer" doesn't really mean that Brickstreet was required to offer anything. Rather, it claims that "shall offer" means something like "shall assume the identical obligations of the Workers Compensation Commission prior to Brickstreet's creation." Brickstreet's Supplemental Brief, pp. 10-12.

Brickstreet's reading of the statute simply is not supported by the statute's text. The first part of the statute transfers the old Workers' Compensation Commission ("WCC") assets, obligations and liabilities to Brickstreet. However, the statute immediately then imposes a new duty which

arises only "thereafter" the transfer of the WCC to Brickstreet.[1] After the transfer, Brickstreet was given a duty in addition to its duty to assume the WCC's debts and duties. The Legislature commanded that it "shall offer insurance to provide for the benefits required by this article" – namely, deliberate intent insurance.[2] Use of the phrase "shall offer" further demonstrates that the offer required by Brickstreet was mandatory. *See e.g.* Syl. pt. 6, Foster Foundation v. Gainer, — W. Va. —, — S.E.2d —, 2011 WL 867343 (2011) ("It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation") (citations omitted) *see also* Bias v. Nationwide Mut. Ins. Co., 179 W. Va. 125, 127, 365 S.E.2d 789, 791 (1987) ("The statute says that an underinsurance option shall be offered, and this language must be afforded a mandatory connotation") (citing Syl.Pt. 1, Nelson v. West Virginia Public Employees Insurance Board, 171 W.Va. 445, 300 S.E.2d 86 (1982)).

The Legislature's specific and unambiguous statutory command to Brickstreet makes it unnecessary to apply Brickstreet's unsupported interpretation concerning its alleged identity with the WCC. Brickstreet's proposed interpretation involves words and concepts which simply are not in the statutory text. Kristopher O. v. Mazzone, —W.Va. —, 706 S.E.2d 381, 388 (2011) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation") (citation omitted); Syl. pt. 4, Harper v. Jackson Hewitt, Inc.,

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[1] Amicus West Virginia Business and Industry Council ("BIC") seems to argue that the duty imposed by §23-4C-6 on Brickstreet is not new, but rather part of a thirty year old statute. BIC's brief, p. 4. A review of the annotations in West's Annotated Code of West Virginia shows, however, that section 6 was drafted in 2005. The section's history is also available online at the Legislature's website available at http://www.legis.state. wv.us/Bill_Text_HTML/2005_SESSIONS/1X/Bills/sb1004%20intr. htm (last retrieved April 14, 2011).

[2] Powroznik v. C. & W. Coal Co., 191 W.Va. 293, 445 S.E.2d 234, 235 (1994) ("the 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")

— W.Va. —, 706 S.E.2d 63 (2010) ("If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery") (citations omitted); Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995) ("We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed"). In this case, there is no need to go beyond the statute's text. The Legislature obligated Brickstreet to offer deliberate intent coverage to Summit Point, regardless of the WCC's duty, because Brickstreet was never identical to the WCC. It is a private, for-profit company that was created to replace the WCC and for the time of the mandatory offer period was in a unique, monopolistic position. There is no textual support for Brickstreet's argument that it had no duties other than the WCC's duties.

Had the Legislature intended merely to replace the WCC with a successor company with strictly identical duties, it easily could have written statutory language to that effect. The Legislature could have said, for example, that Brickstreet was required to assume WCC liabilities without requiring the additional duty to offer deliberate intent coverage. In fact, the Legislature did pass such a statute requiring the assumption of a state agency responsibility in a somewhat analogous situation – medical malpractice insurance. When this state faced a crisis involving a sufficiently large number of uninsured physicians, the Legislature authorized the Board of Risk and Insurance Management, a state run entity, to offer temporarily optional malpractice insurance to those physicians who could not otherwise find insurance. W. Va. Code §29-12B-1 *et seq*. The Legislature found, however, that the Board of Risk's involvement created a financial liability for the state and, in the meantime, medical malpractice insurance remained sufficiently expensive that physicians were forced to leave

the state. W. Va. Code §33-20F-2(a)(12)-(13). The medical malpractice crisis, therefore, to some extent, mirrored the workers compensation crisis that gave rise to Brickstreet. *See* §23-2C-1 (finding that workers' compensation insurance had become so expensive that employers were forced to leave the state).

In response, the Legislature created a Physicians' Mutual Insurance Company that was to assume the Board of Risk policies. The relevant Code section states:

> "On the transfer date: The company shall accept from the Board of Risk and Insurance Management the transfer of any and all medical liability insurance obligations and risks of existing or in-force contracts of insurance covering physicians, physician corporations and physician-operated clinics issued by the board pursuant to article twelve-b, chapter twenty-nine of this code: Provided, That the company may decline or refuse to renew any and all such contracts of insurance transferred to the company from the Board of Risk and Insurance Management upon the expiration of the respective terms of each contract of insurance so transferred and nothing in this section is intended to or shall be construed to otherwise obligate the company to accept, underwrite or renew any contract of insurance whatsoever. The transfer shall not include medical liability insurance obligations and risks of existing or in-force contracts of insurance covering hospitals and nonphysician providers.
>
> The company shall assume all responsibility for and defend, indemnify and hold harmless the Board of Risk and Insurance Management and the state with respect to any and all liabilities and duties arising from the assets and responsibilities transferred to the company pursuant to article twelve-b, chapter twenty-nine of this code"

§33-20F-9 (b) (1)-(2). This statute is critically different from the statutes creating Brickstreet. The Physicians' Mutual was not commanded to make any offer of insurance. It was merely required to accept those obligations and contracts belonging to the Board of Risk. Moreover, the Physicians' Mutual was never a monopoly – it only assumed those policies which were issued by the Board of Risk because the physicians in question could find no other carriers.

Brickstreet, however, was for a time granted a monopoly with respect to the basic workers compensation market. There were no other workers compensation carriers to which West Virginia

employers could look for insurance and advice concerning their employment risks. It made sense, therefore, that Brickstreet was required to do more than merely assume state obligations like the Physicians' Mutual, which, after all, remained only one medical malpractice insurer among others with whom physicians could negotiate. After giving Brickstreet such commanding control of the market, the Legislature also required something of Brickstreet. Specifically, it required Brickstreet to make offers of deliberate intent insurance to employers. §23-4C-6.[3]

This distinction between otherwise similar statutes and public policy situations demonstrates that Brickstreet's additional duty under §23-4C-6 is not mere statutory surplusage. The Legislature chose its words carefully and gave Brickstreet a specific, additional command by requiring that Brickstreet "thereafter . . . shall offer" deliberate intent coverage. Syl. pt. 5, Foster Foundation v. Gainer, — W. Va. —, — S.E.2d —, 2011 WL 867343 (2011) ("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") (citation omitted).

B. Bias explains what a statutorily mandated offer must entail and the consequences of failing to make such an offer.

Bias v. Nationwide Mut. Ins. Co., 179 W.Va. 125, 365 S.E.2d 789 (1987) holds that:

> 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,

[3] Brickstreet has argued that other insurers were able to sell deliberate intent coverage even while Brickstreet had monopolistic control of the workers compensation market. Even if that is true, however, in light of the natural relationship between the two coverages and the fact that employers will inevitably look to their primary workers compensation carriers for all employee injury related insurance, it made sense that the Legislature still gave Brickstreet the duty to offer deliberate intent coverage.

> intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved."

Id. at syl. pt. 1 and p. 791. When an insurer ignores a statutory mandate to offer coverage and fails to prove that the insured knowingly and intelligently rejected the offer, coverage is included as a matter of law. Id. at syl. pt. 2. Although the specific facts of Bias involved underinsured motorist coverage, the syllabus points clearly state that they apply to "an offer of optional coverage . . . required by statute," not simply uninsured or underinsured motorist policy provisions. *See* cases in Summit Point's earlier brief concerning construction of the indefinite article "an." The syllabus points stand alone to compel any insurer under a statutory obligation to offer insurance[4] to offer it in an effective manner and obtain a knowing and informed rejection.

Bias therefore has two key holdings: 1) the requirements of a statutorily mandated offer of coverage (a statement in definite, intelligible, and specific terms, of the nature of the coverage offered, the coverage limits, and the costs involved); and 2) the consequences of failing to make a statutorily mandated offer (inclusion of the coverage in the policy as a matter of law). Even assuming, solely for the sake of argument, that §23-4C-6 did not require Brickstreet to make a specific Bias type offer, the statute does require ***some*** offer ("the company shall offer"). Even if "offer" is given merely its dictionary definition – "[t]he act or an instance of presenting something for acceptance," Black's Law Dictionary, p. 1111 (Deluxe 7th ed. 1999) – still Brickstreet had to do at least that much. Yet Brickstreet plainly admits that it made "no offer of coverage, be it for

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[4] The statute involved in Bias used the same mandatory phrase as in §23-4C-6: "shall offer." Bias, 365 S.E.2d at 790-91. In its opening brief, Summit Point cited several other statutes in which the Legislature required an insurer to offer insurance. The point of citing those statutes was to show that the Legislature knows how to mandate insurance offers and has done so in several different contexts. Therefore, Brickstreet cannot claim that §23-4C-2 imposes upon it a unique or undue burden.

workers' compensation coverage, 'deliberate intent' coverage, or any other type of coverage." Brickstreet's Response to Motion for Partial Summary Judgment, pp. 9-10; *see also* May 4, 2010 Circuit Court Order, p. 11 (finding that no effective offer was made and no intelligent waiver was obtained).

Brickstreet argues that "shall offer" in §23-4C-6 doesn't mean "shall offer the specific requirements as set forth in Bias." However, in light of its admission that it made no offer of coverage whatsoever, the first holding of Bias concerning the specific requirements of the offer no longer matters: whatever Brickstreet was supposed to do, it did not do. The second Bias holding, however, still applies. Brickstreet failed to make a statutorily required offer of coverage to Summit Point under any definition of "offer," therefore coverage is included as a matter of law in Summit Point's policy. Brickstreet and the *amici* spend their briefs arguing about only the first Bias holding – what offer the statute required. They fail to realize that Brickstreet's admission has made the second Bias holding dispositive.

Neither Brickstreet nor any *amici* argue that this second Bias holding is not good law. Indeed, Bias's general holdings and both syllabus points remain good law. In response to Bias, the Legislature changed the uninsured and underinsured motorist statute, and in so doing it adopted this Court's directives set forth in the syllabus points. W. Va. Code §33-6-31d ("The contents of the form shall be as prescribed by the commissioner and shall specifically inform the named insured of the coverage offered and the rate calculation therefor, including, but not limited to, all levels and amounts of such coverage available and the number of vehicles which will be subject to the coverage"). No case or statute has expressly or impliedly overruled Bias's syllabus points either before or after the legislative amendments. Bias's syllabus points, in fact, have been cited favorably

by this Court and other courts after Bias and after the Legislature changed the uninsured and underinsured motorist's statute in 1993. *See e.g.* Syl. pts. 3 & 4, Jewell v. Ford, 211 W. Va. 592, 567 S.E.2d 602 (2002) (citing Bias's syllabus points 1 & 2); syl. pts. 1 & 2, Westfield Ins. Co. v. Bell, 203 W.Va. 305, 507 S.E.2d 406 (1998) (same); Parham v. Horace Mann Ins. Co., 200 W. Va. 609, 620, 490 S.E.2d 696, 707 (1997) (same); syl. pts. 7 & 8, Cox v. Amick, 195 W.Va. 608, 466 S.E.2d 459 (1995) (same); Webb v. Shaffer, 694 F. Supp. 2d 497, 500 (S.D.W. Va. 2010) (same); LaRocco v. Old Republic Ins. Co., 2009 WL 3169176 (S.D.W. Va. 2009) (same).

Even if the facts of Bias happened to deal with underinsured motorist's coverage, the syllabus points do not restrict themselves to underinsured motorist coverage or otherwise contain any limitations on the types of insurance offers to which they apply. Syllabus points are the law in this state and may be applied in other cases and in different factual scenarios. Comm. to Reform Hampshire County Gov't v. Thompson, 223 W.Va. 346, 355, 674 S.E.2d 207, 216 (2008) ("It is well settled in this state that the holdings of this Court are set forth in the syllabus of our opinions") (citations omitted); Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr., 594 F.3d 285, 301, n. 3 (4th Cir. 2010) ("The syllabus is the law in West Virginia") (Davis, J. dissenting) (citations and internal punctuation omitted); Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290, 296 (2001) (noting that syllabus points may "apply to alternate factual scenarios, which may significantly parallel but still partially diverge from the facts of the previously-decided opinion").

The Court's holdings in Bias were not aberrations. They are part of a well-established line of jurisprudence in this state requiring insurers to communicate clearly and effectively with their insureds and favoring insureds over insurers in any dispute concerning the policy. For example, when construed, policies are construed liberally in favor of insureds. Prete v. Merchants Property

Ins. Co. of Indiana, 159 W.Va. 508, 511, 223 S.E.2d 441, 443 (1976) (citation omitted). Exclusions must be conspicuous, plain and clear and the insurer "must bring such provisions to the attention of the insured." Syl. pt. 2, Satterfield v. Erie Ins. Prop. & Cas., 217 W.Va. 474, 618 S.E.2d 483, 483 (2005). Exclusions in insurance policies are strictly construed and 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." Jenkins v. State Farm Mut. Auto. Ins. Co., 219 W.Va. 190, 194, 632 S.E.2d 346, 351 (2006). Insurers are required to act in their insureds' best interests; when they fail to do so, they are liable for the consequences. Syl. pt. 2, Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766, (1990); Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 324, 352 S.E.2d 73, 74 (1986).

Bias was based on sound policy reasons which remain compelling. An insurer is given a statutory duty to make an offer of insurance because the Legislature believes the insurance to be important enough that the insured must fully understand the coverage in question. Tennant v. Smallwood, 211 W. Va. 703, 709, 568 S.E.2d 10, 16 (2002) ("We, too, have recognized the Legislature's consideration of UM coverage to be of the utmost importance by succinctly holding that "[u]ninsured motorist insurance coverage is mandatory") (citations and internal punctuation omitted). The deliberate intent coverage mandated by §23-4C-6 is particularly important for West Virginia insurers because, as *amicus* the West Virginia Insurance Federation points out, West Virginia's deliberate intent cause of action is unique among all the states. Amicus Brief, p. 13. This uniqueness explains why there is an entire Article, §23-4C-1 *et seq.*, devoted to deliberate intent insurance (or employers' excess liability, as it was called under the WCC) and why the Legislature wrote the last section of the Article at the time of Brickstreet's creation to ensure that Brickstreet

offered that coverage to employers when it took over policies from the WCC. Without an intelligible offer from Brickstreet during the initial transition period, West Virginia employers might otherwise not have known that the new employers' mutual insurance company provided coverage for the specific and difficult to understand statutory cause of action. Indeed, Brickstreet's failure to make an offer to Summit Point and the subsequent deliberate intent suit against Summit Point shows just how valuable the Legislature's requirement could have been had Brickstreet obeyed it.

The Legislature knew 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's syllabus points. Syl. pt. 5, in part, Kessel v. Monongalia County Gen. Hosp. Co., 220 W. Va. 602, 605, 648 S.E.2d 366, 369 (2007) ("When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch") (citations omitted).[5] Bias's syllabus points remain good law and the circuit court was correct to apply them to this case.

C. Brickstreet's attempted exclusion of deliberate intent coverage from Part II of Summit Point's policy is ambiguous.

The circuit court also correctly found that Part II of the Brickstreet policy, employers' liability coverage, was ambiguous and, by operation of law, Summit Point's reasonable expectation of

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[5] *Amicus curiae* West Virginia Business and Industry Council's ("BIC") brief concerns solely Bias and whether Bias imposes any additional duties on Brickstreet. These are the same issues that Brickstreet discussed. BIC's brief makes no new arguments and identifies no unique interest other than those interests advanced by Brickstreet. Moreover, it appears that Brickstreet bought and paid for the BIC's brief. BIC's Brief, fn. 1 ("Because of BIC's interest in the resolution of this proceed . . . Appellant (a member of BIC) has made a monetary contribution to fund the preparation and submission of this brief"). For these reasons, the Court should disregard BIC's brief. Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers) (noting that amicus briefs should be allowed only if a party is not represented, when the amicus has interest in another case that may be affected by the decision or when the amicus has unique information or perspective. "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse").

deliberate intent coverage resulted in that coverage's inclusion in the policy. Brickstreet argued in its petition that an exclusion or "endorsement" unambiguously excludes deliberate intent coverage from Part II, and Summit Point responded by arguing that the exclusion's bare and non-specific reference to a complex statute concerning a complex area of law is sufficiently ambiguous to support the circuit court's order.

The only new argument raised by either Brickstreet or the *amici* related to this issue is the argument advanced by *amicus* The West Virginia Insurance Federation ("WVIF") which argues that the circuit court's order places insurers in a Catch-22 situation. Because Part II of the policy is based on an National Council on Compensation Insurance ("NCCI") form, and because insurance companies are obligated by state regulations to use NCCI forms or risk sanctions, if the policy is ambiguous then all insurers are forced either to modify the form and risk sanction or continue using the same form and risk litigation based on the form's ambiguity.

However, as WVIF admits, the exclusion at issue is not an NCCI form. WVIF's brief, p. 14 ("The form that comprises the basic policy in this case, which includes Part Two but does not include any of the endorsements, not only had to be approved by the OIC [Office of Insurance Commissioner], but the OIC required that Brickstreet use that basic form"). Neither Brickstreet nor any other insurer was obligated to use the particular exclusion in Summit Point's policy.[6] Instead, Brickstreet took it upon itself to write its own exclusion, and, unfortunately for all parties in this case,

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[6]Even if the policy were approved by the OIC, however, that is no argument that the policy satisfies this Court's requirements. *See e.g.* Cunningham v. Hill, 226 W. Va. 180, 698 S.E.2d 944, 951, n. 4 (2010) ("regarding Erie and State Farm's assertions that the Commissioner's failure to disapprove of its form filing indicates that the benefits provided are commensurate with the premium charged and are in compliance with West Virginia law, we accord this argument scant merit. When we have previously found policy provisions to be contrary to law and public policy, this Court has not hesitated to strike the same") (citations omitted).

wrote it badly. It is simply not clear what causes of action the exclusion attempts to exclude: the exclusion's reference to "intentional, malicious or deliberate" acts appears most readily to apply to §23-4-2(d)(2)(i) – a cause of action separate from the deliberate intent suit under subsection (d)(2)(ii) brought against Summit Point for which, Brickstreet argues, coverage is excluded. The language contained in the statute was not provided in the policy and it is unreasonable to expect an insured to understand a bare reference to such a complicated code section.

Because the exclusion is ambiguous, it does not exclude deliberate intent coverage. Syl. pt. 4, Camden-Clark Mem'l Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co., 224 W. Va. 228, 682 S.E.2d 566, 567 (2009) ("Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated") (citations omitted). Part II of the policy then applies without any exclusion and, by its terms, covers "bodily injury. . . aris[ing] out of and in the course of the injured employee's employment by you" including "all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance. " Policy, Part II, A. 1 & B. That language plainly provides coverage for the bodily injury suffered by Summit Point's employee and for which Summit Point submitted a claim to Brickstreet. Indeed, if Part II did not provide deliberate intent coverage by its terms, there would be no need for Brickstreet's attempt at an exclusion.

Case law also confirms that an employer's liability policy without an exclusion ordinarily covers deliberate intent claims. This Court held in Erie Ins. Prop. & Cas. Co. v. Stage Show Pizza, JTS, Inc., 210 W. Va. 63, 553 S.E.2d 257 (2001) that an employers liability endorsement covering "bodily injury to your employees for which the law holds you responsible and recovery is permitted by law" provides coverage for deliberate intent causes of action. Id. at 553 S.E.2d 267. Indeed,

Justice Albright, concurring, noted that unless the coverage in question were "construed to provide coverage in the case of a deliberate intent action for which the workers' compensation provides employers no immunity, those policy provisions must be seen as essentially illusory and meaningless." Id. at 268.

Although the Stage Show Pizza Court held that it is possible to exclude deliberate intent coverage from an employers liability policy, Brickstreet's ambiguous attempt at an exclusion in this case is insufficient. Courts "scrutinize more carefully any policy language that has the effect of excluding an insured from coverage." Id. at 261 (citations omitted). Where the policy language involved is exclusionary, "it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Id. (citations omitted). The application of policy provision which "largely nullify the purpose of indemnifying the insured . . . will be severely restricted." Id. (citations omitted). Brickstreet's proposed exclusion, which ambiguously references a complex statute that no insured would be expected to read, much less understand, does not suffice.

D. Mary Jane Pickens's affidavit is contradicted by plain statutory language and is irrelevant because it is not an expression of agency policy.

Brickstreet's supplemental brief again addresses the issue of an affidavit by Mary Jane Pickens ("Ms. Pickens") which expresses her opinion (which she represents without further documentation to be the opinion of the Office of Insurance Commissioner ["OIC"]) concerning §23-4C-6 – namely, that Brickstreet was not required to make a Bias-compliant offer of deliberate intent insurance. In its earlier brief, Summit Point argued that the affidavit could not be a formal expression of OIC opinion because the affidavit was not promulgated pursuant to West Virginia's Administrative Procedure Act ("APA") W. Va. Code §29A-1-1 *et seq*. Moreover, to the extent that the affidavit was procedurally

proper, it was an impermissible attempt by an agency employee[7] to impose her interpretation on a clear and unambiguous statute.

Brickstreet responds first by tacitly admitting that the affidavit did not comply with the APA, but arguing that it did not have to comply. According to Brickstreet, the OIC's rulemaking and interpretation actions concerning workers compensation issues are exempt from the APA. Indeed, W.Va. Code §33-2-10 does allow the Insurance Commissioner to promulgate rules outside of the APA. Critically, however, and as Brickstreet correctly notes, that exemption applies to workers compensation insurance only. Id. at subsection (b) ("The commissioner is authorized to promulgate rules necessary to discharge his or her duties relating to workers' compensation insurance as set forth in chapter twenty-three of this code, which shall be exempt from the provisions of chapter twenty-nine-a, article three of this code . . . ."). But as this Court held in Stage Show Pizza, deliberate intent insurance is not workers compensation insurance. Stage Show Pizza, syl. pt. 6 ("A finding that an employer is liable pursuant to the deliberate intent provisions of W.Va.Code, 23-4-2 [1994] does not impose upon the employer a statutory obligation to pay fixed benefits, without regard to the fault of any party, for work-related injuries, ***and is therefore not an obligation of an employer under a workers' compensation law for purposes of insurance coverage***") (emphasis added). Therefore, any APA exemption that the OIC enjoys for workers compensation issues does not extend to Ms. Pickens's affidavit which concerns questions of deliberate intent insurance related to §23-4C-6.

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[7] Ms. Pickens was not the insurance commissioner at the time of her affidavit, but merely legal counsel. Brickstreet does not explain why her affidavit should be considered as a formal pronouncement by an agency head. As noted in this brief and in Summit Point's earlier brief, Ms. Pickens opinion, which was not issued pursuant to the APA, is not a formal statement of the OIC and is entitled to no deference at all.

Brickstreet continues, not only to fail as a private insurer to recognize its duty to abide by the rulings of this Court, but it still seems to believe that it is not a private insurer at all. Rather, it seems to believe that it is a state agency serving solely as a successor to the WCC. In short, Brickstreet is asking the Court to provide it with the benefits of a private insurer without the obligations of a private insurer, but rather with the protections applying to a state agency.

Brickstreet or the *amici* further do not satisfactorily resolve the affidavit's conflict with §23-4C-6 and Bias. The statute requires Brickstreet to offer insurance and Bias explains the nature of the offer to be made, while the affidavit states that no such offer was needed in the OIC's employee's view. Such stark conflict between the law and the purported opinion of an employee of the OIC renders the affidavit unpersuasive and undeserving of deference. *See e.g.* State, ex rel. Crist v. Cline, 219 W.Va. 202, 211, 632 S.E.2d 358, 367 (2006) (insurance commissioner's interpretation given deference "so long as it is consistent with the plain meaning of the governing statute") (citations omitted); Lovas v. Consolidation Coal Co., 222 W.Va. 91, 95, 662 S.E.2d 645, 649 (2008) (whenever an administrative agency's interpretation conflicts with the statute, "there is no question . . . that the statute must control") (citations omitted).[8]

E. When insurers wrongfully deny coverage, they are liable for the result.

The last issue raised by either Brickstreet in its supplemental brief or the *amici* in their briefs concerns the circuit court's ruling that Brickstreet's liability for wrongfully failing to defend and indemnify Summit Point is not restricted to policy limits. In its earlier brief, Summit Point presented

[8] Summit Point respectfully refers the Court to its opening brief for a fuller discussion of the APA requirements and affidavit's failure to meet those requirements. Indeed, in order to comply with this Court's February 24, 2011 Order discouraging repetition, Summit Point respectfully refers the Court to its opening brief for a fuller discussion of most of the arguments raised by the parties in this appeal.

to the Court decisions from jurisdictions across the country holding that an insurer which wrongfully fails to defend its insured is liable for the full amount of judgment or settlement, even if the amount is in excess of policy limits. *See* cases cited in Summit Point's opening brief, pp. 22-28. *Amicus* West Virginia Insurance Federation ("WVIF") argues that the circuit court's ruling would undermine insurance industry predictability. If the circuit court's ruling stands, WVIF argues that insurance companies will not be able to predict the amount of their liability – and, accordingly, will not be able to establish appropriate premiums – should they be found to have breached their insurance contracts. *Amicus* brief, pp. 8-9.

As WVIF acknowledges, however, insurance companies already face exposure in excess of policy limits as a result of this Court's rulings in Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766, (1990) (insurers liable for full amount of judgment where they fail to settle within policy limits given reasonable opportunity to do so) and Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 324, 352 S.E.2d 73, 74 (1986) (insurer liable for attorneys fees and aggravation damages when insured prevails in a coverage suit). Insurers already face the unpredictability allegedly associated with extra-contractual damages. Despite this supposed uncertainty, insurance companies still do business in this state and, judging by Brickstreet profits, they do quite well. *See* BrickStreet Financials 3/3/09 at https://www.brickstreet.com /General /Pages /Newsroom.aspx (noting a $113,600,000.00 profit in 2008) (last retrieved April 19, 2011). Any alleged uncertainty created by the circuit court's order would be precisely the same uncertainty with which insurers have already become familiar under Shamblin and Hayseeds: when an insurer wrongfully fails to defend its insured, it becomes liable for amounts which may exceed those stated in the policy.

Of course, if any insurer wants to make absolutely certain that it will not face damages in excess of policy limits it can fully perform its obligations under its policy and state law, or, if there is a question of coverage, it can defend under a reservation of rights. If there is any chance that coverage exists, a prudent insurance company should provide a defense and then perhaps move for declaratory judgment with respect to coverage. But that is not what Brickstreet did in this case. Months after counsel for Summit Point notified Brickstreet of the claim,[9] Brickstreet denied coverage outright and refused to defend even under a reservation of rights.

Rather than defend under a reservation of rights, Brickstreet wrongfully put Summit Point's business at risk by refusing outright to defend and indemnify Summit Point. Regardless of what Brickstreet believed the law to be, it was not entitled to gamble with its insured's money by wrongfully denying coverage or failing to defend when coverage was at issue. An "insurance company can bet as much of its own money as it wants, and it can bet its own money at any odds that it wants, but it cannot bet one single penny of [an insured's] money even when the odds are ten

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[9] As explained in Summit Point's earlier filing, Summit Point did not receive a written response from Brickstreet to Summit Point's attorney's request for coverage for almost four months after the request was sent. Summit Point argues that that delay and other aspects of Brickstreet's claims handling in this case violate West Virginia's Unfair Trade Practices Act (UTPA), W.Va. Code §33-11-1 *et seq.*, as implemented in 114 CSR §§14-5.1 and 6.6 which required Brickstreet either to respond promptly in writing or, if the response was verbal, to make a note in the claim file. There is no evidence in this case of either a prompt written response or a properly noted claim file. Moreover, Brickstreet did not respond to Summit Point's counsel's letter – undoubtedly a pertinent communication under 114 CSR §14-5.3 – within the required 15 day window. Id. One is left to wonder whether Brickstreet, at the time the claim was initially submitted to it, recognized that it was subject to the UTPA. Surely, if it recognized its responsibilities at that time, it would not have failed to respond promptly and properly to a request from an insured's attorney for Brickstreet to provide defense. Is this not further evidence of Brickstreet's apparent belief that it is not subject to the statutes of the state and the decisions of this Court that apply to other private insurers? Perhaps it was only a mistake. Perhaps it is simply evidence of a lack of understanding of the law governing private insurers. It is not conduct one would expect from a responsible private insurance company.

million to one in its favor!" Shamblin, 183 W. Va. at 599, 396 S.E.2d at 780 (Neeley, J., concurring).

To their credit, neither Brickstreet nor the *amici* have argued that the circuit court's order would have dire consequences for this State. No one argues that by affirming the circuit court, this Court would drive insurance companies out of the state or drastically raise premiums for businesses. Indeed, the circuit court's decision undoubtedly helps businesses in this state by discouraging insurers from denying coverage for deliberate intent claims against employers wrongfully. A business that purchases an insurance policy in this state should be purchasing peace of mind and security against risk, not the aggravation and inconvenience involved in litigating coverage questions with the insurance company. Hayseeds, 177 W. Va. at 329, 352 S.E.2d at 79 ("when an insured purchases a contract of insurance, he buys insurance-not a lot of vexatious, time-consuming, expensive litigation with his insurer").

IV. Prayer for Relief

Summit Point respectfully asks this Honorable Court to affirm the May 4, 2010 and June 29, 2010 Orders of the Circuit Court of Jefferson County, West Virginia.

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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.101414

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 **Summit Point Raceway Associates, Inc's Supplemental Appeal Brief** upon the following by U.S. first class mail, postage prepaid, this 26th day of April, 2011:

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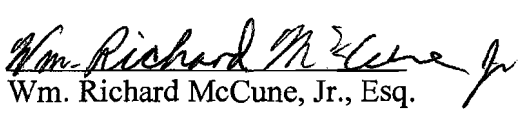

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