

11-1186

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

BARBARA SURBAUGH,
as administrator of the estate
of Gerald Kirchner

Plaintiff

v.

Civil Action No. 97-C-241

GRIMMETT ENTERPRISES, INC.,
West Virginia Corporation
and **ROBBIE BRAGG,** and
AMERICAN STATES PROPERTY
AND CASUALTY INSURANCE COMPANY,
foreign corporation, and
AMERICAN STATES INSURANCE COMPANY,
foreign corporation,

Defendants

ORDER

**IN REGARD TO THE DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A
MATTER OF LAW OR IN THE ALTERNATIVE A NEW TRIAL**

On this day, the Court issues the following Order regarding the above captioned civil action, upon joint motion of the parties to have this Court rule without oral arguments.

HISTORY:

1. Plaintiff filed suit against Grimmatt Enterprises, Inc., ("Grimmett") and Robbie Bragg.
2. Plaintiff entered into settlement negotiations with Grimmatt and Robbie Bragg.
3. On January 28, 2002, the Court approved the settlement allowing the Plaintiff to extract a \$1.5 million judgment from Grimmatt and Robbie Bragg, a covenant from the Plaintiff to Grimmatt and Robbie Bragg not to execute said judgment against them, and an assignment by Grimmatt to

Plaintiff of any claim or cause of action that Grimmett might have against its insurance carrier.

4. Plaintiff was given the opportunity in December 2004 to amend her complaint to include American States Insurance Company ("American States").
5. In December 2005, Plaintiff filed her Second Amended Complaint, including three charges against American States: declaratory relief seeking a determination of whether Grimmett was entitled to coverage under the alleged policy between American States and Grimmett and that American States be ordered to immediately pay the limits of its liability benefits under the said policy to Plaintiff, common law bad faith, and violations of the West Virginia Unfair Claims Settlement Practices Act.
6. That Motion was Denied on June 14th, 2007. A Motion for Reconsideration along with two other motions were filed in December of 2007, and that Motion was Denied, as were the other Motions, in April, 2008.
7. Defendant filed a Motion to Dismiss in December 2008. That Motion was denied in March of 2009.
8. An agreed Order was entered in April, 2010, which bifurcated the wrongful death action and set it for trial.
9. Plaintiff filed "Plaintiff's Motion for Summary Judgment" on July 20, 2010.
10. Defendant American States filed its "American States Insurance Company's Consolidated Memorandum In Support of Cross-Motion For Summary Judgment And In Opposition To Plaintiff's Motion For Summary Judgment" ("Response") on August 9, 2010.
11. The Court entered an order on September 24th, 2010, that Denied in part the Motion for Summary Judgment, ruling that the policy language concerning the exclusion for "bodily injury" was not ambiguous, but there were competing factual allegations in regard to whether the exclusion was conspicuous and disclosed.
12. The Court set the matter regarding American States for trial. Pre-trial was scheduled for this day.
13. On May 4th, 2011, Plaintiff filed a renewed Motion for Summary Judgment
14. On May 25th, 2011, Defendant filed a Cross Motion for Summary Judgment and Motion in opposition to Plaintiff's motion. Both Motions were heard on May 31st, 2011.
15. The Court issued its ruling Denying both parties' motions on June 17th, 2011.
16. This matter went to Trial by jury on June 23rd, 2011, lasting approximately a day and a half. The sole question for the jury was "was the exclusionary

language at issue in this case brought to the attention of the insured?" The jury answered "No."

17. The Final Order was entered June 30th, 2011, finding that the policy exclusion was unenforceable.
18. On July 7th, 2011, the Defendant, American States, filed its Renewed Motion for Judgment as a Matter of Law or in the Alternative, a New Trial.
19. On July 11th, 2011, the Plaintiff filed their Response.
20. On July 14th, 2011, the parties filed a Joint Motion to have the Court issue its ruling without Oral argument.

This Court makes its Order in accordance with Rule 50 of the West Virginia Rules of Civil Procedure.

FINDINGS OF FACT:

1. There were enough disputed facts as to whether the insurance exclusion was brought to the attention of the insured, so as to make a jury trial necessary.
2. The jury reached their verdict after hearing all relevant evidence, and their verdict was based on a legally sufficient evidentiary basis.

CONCLUSIONS OF LAW:

1. That the verdict returned by the jury holding the exclusionary language was not brought to the attention of the insured is valid and the holding that the exclusion is unenforceable shall STAND.

DISCUSSION:

The Defendant files their Motion on the grounds that, after the Court had ruled that the exclusionary language was clear and unambiguous, the Court was duty bound to enter a judgment for American States, and that the further prerequisite that the exclusion be "brought to the attention of the insured" was an erroneous interpretation of West Virginia law. They further assert that, even if there is a separate requirement that the exclusion be "brought to the attention of the insured," that the exclusion was brought to the attention by way of the letter enclosed with the October 1995 policy, and further by way of the "Liability Coverage Form," which an insured is directed to on the Declarations page, in the first sentence. In the alternative, the Defendant moves the Court for a New Trial, and asserts that the enforceability must be determined as a matter of law by the Court, and should not have been determined by a jury. They also assert that the jury instructions were not in any way instructions that are approved by the West Virginia Supreme Court of Appeals.

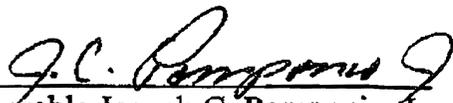
In Plaintiff's Response, they point out that facts were in dispute as to whether the exclusion were placed in such a fashion as to make obvious their relationship to other policy terms, and as to whether the exclusion was sufficiently brought to the attention of the insured. The Plaintiff acknowledges that there was a letter enclosed in the 1995 policy, but there was no such letter in the second policy.

This Court agrees that there were sufficient facts in dispute for a jury trial. Further, *Luikart* makes clear that "West Virginia jurisprudence imposes a duty to make exclusionary language conspicuous, plain and clear, and *further imposes a duty* to bring such exclusions to the attention of the insured." See *Luikart*, page 900. Here, there were enough facts to differentiate this matter from the *Luikart* as to whether the exclusions were properly disclosed and communicated to the insured, and because those facts were in dispute, a jury trial was appropriate. The jury, after hearing all evidence, decided that the exclusion was not properly brought to the attention of the insured. Their verdict arose from a legally sufficient evidentiary basis. Therefore, their verdict should not be overturned as a matter of law.

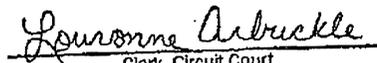
It is therefore ORDERED that:

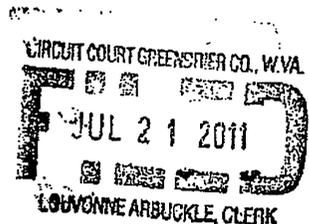
1. The Defendant's Renewed Motion for Judgment as a Matter of Law or in the Alternative, a New Trial is hereby DENIED.

Entered this the 21st day of July, 2011.


Honorable Joseph C. Pomponio, Jr.
Chief Circuit Court Judge

A True Copy:
ATTEST:


Clerk, Circuit Court
Greenbrier County, WV



By _____ Deputy