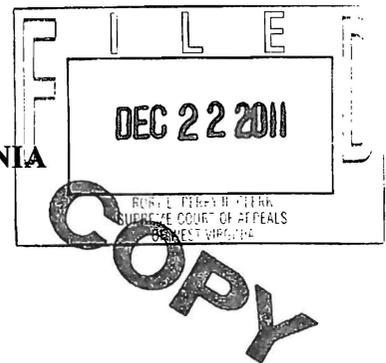


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 11-1186

**AMERICAN STATES INSURANCE COMPANY, Defendant Below,
Petitioner,**

v.

**BARBARA SURBAUGH, Administrator of the Estate of Gerald
Kirchner, Plaintiff Below, Respondent.**

**Appeal from the Circuit Court of Greenbrier County
The Honorable Joseph C. Pomponio, Jr.
Civil Action No. 97-C-241**

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

In the Notice of Appeal, American States set forth in great detail a series of assignments of error. (*See*, Notice of Appeal, §17, R. at 1356). As also pointed out in the Notice, however, all of the assignments of error are interrelated. (*See*, Notice of Appeal, Section “Reasons Why The Court Should Review These Issues”). For the sake of brevity and clarity, American States will state the assignments of error succinctly as follows:

I.

Having determined as a matter of law that the “employee exclusion” in the standard commercial liability policy is clear, and unambiguous, conspicuous, plain and clear, and that the standard policy containing this exclusion prominently placed therein had been delivered to the insured, twice, long before the fatality, the circuit court should have entered a judgment of no coverage at each stage of the proceedings wherein the circuit court was invited to do so, including several motions for summary judgment at trial, a renewed motion for judgment after trial, not to mention on several occasions before the case was submitted to the jury. Each ruling refusing to enter that judgment was error.

II.

Instead of entering a judgment of no coverage as a matter of law, the circuit court misperceived that in order to make the otherwise clear and unambiguous exclusion applicable, there was a separate, discrete requirement that it be “brought to the attention of the insured.” Since the insured said he had not read the policy, the circuit court perceived an issue of fact, and convened a trial. That ruling was error, in that the issue was one of law and required no trial. The circuit court compounded the error by viewing the issue as appropriate for determination by a jury, rather than the circuit court. Those rulings are error.

III.

The evidence at trial was overwhelming in that the exclusion was certainly brought to the attention of the insured sufficiently to make the exclusion enforceable. The circuit court erred by not ruling in that manner, and declaring no coverage as a matter of law.

IV.

The jury verdict to the effect that the exclusion was not sufficiently brought to the attention of the insured is against the law and the weight of the evidence. In refusing to set aside the verdict, and render a judgment of no coverage, the circuit court committed error.

STATEMENT OF THE CASE

I. INTRODUCTION

For at least twenty-five years, if not longer, this Court has striven to delineate appropriate, modern rules that are consonant with virtually uniform precepts in other jurisdictions for determining the efficacy and applicability of basic terms, provisions and exclusions that typically appear in standard insurance policies. That includes standard exclusions that restrict the coverage provided by standard commercial liability insurance policies. Faithful to fundamental principles, such as freedom of contract, the Court has sought to achieve uniformity, consistency and predictability in the application and enforcement of provisions contained in such policies. This case stands out like a beacon of discontinuity against the backdrop of years of jurisprudence in which typical, if not entirely standard exclusions that are conspicuous, plain, clear and unambiguous are unflaggingly enforced.

While procedurally exquisitely intricate, the insurance coverage question in this case is narrow and straightforward – whether a standard commercial liability insurance policy issued by American States Insurance Company (“American States”) to Grimmatt Enterprises, Inc. d/b/a Park Center Sporting Goods and Video (“Grimmett”) affords liability coverage for a deliberate intention claim against Grimmatt arising out of an accidental death of a Grimmatt employee. Grimmatt did not purchase employer liability insurance, so the policy, of course, contains the standard exclusion foreclosing coverage for bodily injury or death of an employee. *See, Erie Ins. & Cas. Co. v. Stage Show Pizza JTS, Inc.*, 210 W.Va. 63, 553 S.E.2d 257 (2001). The circuit court followed settled precedent in holding that this familiar exclusion is clear, and unambiguous. *See, Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000).

Parenthetically, the circuit court also found as a matter of law that the exclusion is conspicuous in the policy, mainly because it is contained in the standard commercial liability

coverage form which is referenced in the Declarations, and it appears just beneath the boldface heading “**EXCLUSIONS**”. *See, Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (2005). The policy was sent to the insured, twice, long before the fatality; ironically, the first time with a letter urging him to “read your policy carefully,” since “in the event of a loss, your insurance coverage will be controlled by the terms, conditions and exclusions of your policy.” (Pl.’s Trial Ex. “2”, R. at 1141 (emphasis added); *see also*, Trial Tr. Vol. I, 53-55, R. at 1008-1010). Despite all of that, the circuit court divined that there was an issue of fact as to whether the exclusion was sufficiently “brought to the attention” of the insured, and took the heretofore unprecedented step of submitting that question to a jury. Perhaps surprisingly, given the evidence, but perhaps not, the jury answered that question in the negative, whereupon the circuit court ordained that that voided the exclusion. The holding on this issue is procedurally unprecedented, and substantially unfounded. American States, therefore, appeals.

II. PROCEDURAL HISTORY

The issues embraced by this appeal arise in the insurance declaratory judgment part of a bifurcated case that has been pending in the Circuit Court of Greenbrier County for fourteen years. The case arises from an incident in Rainelle, West Virginia, on or about June 6, 1997 at Grimmett. Robbie Bragg, a Grimmett employee working in the store, accidentally shot and killed Gerald Kirchner (the “decedent”), who was also a Grimmett employee working in the store.¹ The accident occurred while both Bragg and the decedent were working within the course and scope of their employment with Grimmett. Respondent is the personal representative of the estate of the decedent.

¹ Bragg apparently shot the decedent while showing a customer how to load a handgun that was for sale.

On December 19, 1997, the Respondent filed a civil action against Bragg based upon wrongful death and Grimmatt based upon the “deliberate intention” exception to employer immunity under the Workers’ Compensation statute. (*See*, Certified Docket, R. at 1). In January of 2002, the circuit court approved a consent judgment type of settlement between the parties; Bragg and Grimmatt agreed to a judgment against them in the amount of 1.5 million dollars, Respondent agreed not to execute any part of the judgment against Bragg or Grimmatt, but to commence appropriate proceedings against Bragg’s and Grimmatt’s insurance carriers. In addition, Bragg and Grimmatt assigned any cause of action they may have against their insurance carriers arising out of a refusal to provide a defense for the Respondent’s claims, to the Respondent.²

Respondent first amended her Complaint to join Bragg’s homeowners insurer as a defendant. That claim was disposed of by settlement.³ Respondent then filed a Second Amended Complaint asserting claims against American States on January 4, 2005. (*See*, 2nd Am. Compl., R. at 8). American States filed an Amended Answer on May 31, 2005 asserting, *inter alia*, that the commercial general liability insurance policy affords no coverage for the underlying deliberate intention claims against Grimmatt, rather, the policy clearly and unambiguously excludes coverage for the underlying claims.⁴ (*See*, Am. Answer, R. at 24).

² The Order Approving Settlement and Entering Judgment Against Defendants was filed in the circuit court on January 28, 2002 and was ordered sealed in the file. The Order is not essential to Petitioner’s appeal, has not been included in the Appendix Record, and has only been referenced for background purposes.

³ A First Amended Complaint was filed on April 29, 2002 (*See*, R. at 2). The First Amended Complaint was revised to join Prudential Property & Casualty Insurance Company, Bragg’s father’s homeowner’s insurance carrier. By Order filed on March 15, 2004 (*See*, R. at 2), a settlement between the Respondent and Prudential Property & Casualty Insurance Company was approved by the circuit court and all claims against Prudential were dismissed with prejudice.

⁴ American States also asserted that in any event the judgment entered between Grimmatt and the Respondent does not represent an actual adjudication of liability or damages against Grimmatt that would be enforceable against American States. That position was actually sustained by the circuit court based on Horkulic v. Galloway, 222 W.Va. 450, 665 S.E.2d 284 (2008). Thus, if the coverage determination is

On January 23, 2006, American States filed the first of three motions for summary judgment, asserting that the familiar, typical, and quite standard general liability insurance policy clearly and unambiguously excludes coverage for the underlying claims in this case and that judgment should be entered in American States' favor as a matter of law. (*See*, Mot. Summ. J., January 23, 2006, R. at 31). Respondent countered that the exclusionary language is not conspicuous, plain and clear, that it is not placed in such a fashion as to make obvious its relationship to other policy terms, and that it was not brought to the attention of the insured. (*See*, Mem. Opp'n Mot. Summ. J., July 5, 2006, R. at 107). The circuit court, evidently determining that Respondent's allegations were issues of fact, denied American States' first Motion for Summary Judgment by Order dated June 14, 2007. (Order, June 14, 2007, R. at 222). American States' sought reconsideration of the June 14, 2007 Order or certification for interlocutory appeal. (*See*, Mot. Recons. Cert. Interloc. Appeal, December 17, 2007, R. at 224). By Order dated April 25, 2008, the circuit court declined to reconsider and denied certification. In that Order, the circuit court did, however, hold that the consent judgment is not binding on American States (*See*, Order, April 25, 2008, R. at 494). *See*, Horkulic v. Galloway, 222 W.Va. 450, 665 S.E.2d 284 (2008).

Next, on December 15, 2008, American States filed a Motion to Dismiss on the ground that since the consent judgment could not be enforced against American States, and the Respondent had in substance extinguished her claim against Grimmett, the Respondent for all practical purposes was entitled to no relief against American States. (*See*, Mot. Dismiss, December 15, 2008, R. at 497). The circuit court denied American States' Motion to Dismiss by Order entered on March 23, 2009, reasoning that the Respondent should be afforded an opportunity to prove the merits of her case, but that she must prove both liability for the affirmed, the underlying wrongful death claim still needs to proceed to judgment.

underlying claims, damages, and that there is insurance coverage for such liability. (*See*, Order, March 23, 2009, R. at 564).

Pursuant to an Order entered by the circuit court on November 12, 2009, American States submitted a Case Management Memorandum to the court on December 10, 2009. Significantly, although consistently contending that the issues should be decided on summary judgment without the necessity of a trial, American States asserted therein that if the circuit court decided that a trial was necessary, it must be a trial by the Court, not a jury. That position was clearly articulated as follows:

Whether or not the exclusionary language was brought to the attention of the insured sufficient enough to pass muster pursuant to National Mutual and Luikart is best suited for determination by the Court and not a jury.

The point was further amplified in American States Reply Memorandum, wherein the following appears:

American States submits that the questions presented are not issues of pure fact suitable for jury determination. Rather, the scope of coverage under the policy is a question of mixed law and fact, involving the efficacy of policy exclusions.

Further, the Reply Memorandum contains the following:

However, it is beyond peradventure of a doubt that the ultimate judgment as to the efficacy of the exclusion and the scope of coverage of the policy is distinctly for the Court.

The Circuit Court persistently ruled that the issue of whether the exclusion was brought to the attention of the insured, and, thus, was enforceable would be submitted to a jury.

On April 19, 2010, upon agreement of the parties, the circuit court entered an Order bifurcating the insurance coverage declaratory judgment portion of this case from the underlying wrongful death/deliberate intention action. (*See*, Order, April 19, 2010, R. at 570). Thereafter, the Respondent filed a Motion for Summary Judgment, arguing, *inter alia*, that the exclusionary

language within the commercial general liability insurance policy is ambiguous, is not conspicuous, plain and clear, and was not brought to the attention of the insured. (*See*, Mot. Summ. J., July 20, 2010, R. at 573). Thus, the Respondent argued that the exclusionary language is unenforceable and liability insurance coverage exists for the underlying wrongful death/deliberate intention claims. American States filed a Cross-Motion for Summary Judgment, which essentially renewed the January 23, 2006 Motion, and set forth an additional argument that if any genuine issues of material fact exist in this case, the same are for determination for the circuit court, not a jury. (*See*, Cross-Mot. Summ. J., August 9, 2010, R. at 649). By Order entered on September 24, 2010, the circuit court ruled as a matter of law that the exclusionary language is unambiguous. (*See*, Order, September 24, 2010, R. at 840). The circuit court also determined that whether or not the unambiguous exclusionary language is conspicuous and was disclosed to the insured are genuine issues of fact for trial by jury.

The Respondent filed a Renewed Motion for Summary Judgment on May 4, 2011 arguing, *inter alia*, that the commercial general liability insurance policy is an “illegal” policy, thus, American States is prevented from claiming the unambiguous exclusionary language. (*See*, Renewed Mot. Summ. J., May 4, 2011, R. at 860). In response, American States filed a Renewed Cross-Motion for Summary Judgment asserting *iterum* that inquiry into conspicuity and whether the exclusionary language was brought to the attention of the insured is unnecessary where exclusionary language is unambiguous, because unambiguous insurance policy language is not subject to judicial construction or interpretation, but must be given its intended full effect. (*See*, Renewed Cross-Mot. Summ. J., May 25, 2011, R. at 901). American States further argued that even if the policy is an “illegal” policy, the Respondent cannot choose to enforce the coverage and ignore the exclusions. On June 17, 2011, the circuit court denied both Motions,

concluding that the insurance policy is not “illegal”. (*See*, Order, June 17, 2011, R. at 925). Also in the June 17, 2011 Order, the circuit court determined that “whether the exclusion was provided and disclosed to the Plaintiff is still a fact in issue” (*Id.*), despite that there has never been any dispute that the exclusion is in the policy, copies of which were mailed to the insured twice long before the fatality.

Perceiving this factual issue for a jury, the circuit court conducted a trial by jury on June 23 and 24, 2011.⁵ At the conclusion of Respondent’s case in chief, American States made an oral motion for judgment as a matter of law. (*See*, Trial Tr. Vol. I, June 23, 2011, 79:24-80:2, 129:8-132:15, R. at 1034-1035, 1084-1087). The motion was denied, and the matter was submitted to the jury in a special verdict form posing a single question: “Was the exclusionary language at issue in this case brought to the attention of the insured, Grimmatt Enterprises, Inc.?” The jury answered the question in the negative. (*See*, *Id.* 136:5-10, R. at 1091; Trial Tr. Vol. II, June 24, 2011, 38:7-9, R. at 1136; *see also*, Final Order, June 30, 2011, R. at 1335). American States objected *iterum* to submitting the issue to a jury, on the basis that this is purely an issue of law. (*See*, Trial Tr. Vol. I, 139:4-9, R. at 1094). The circuit court rejected that contention, and instructed the jury that although the exclusion was clear, unambiguous and conspicuous, that in order to be effective to foreclose coverage it also had to be brought to the attention of the insured, Grimmatt.. (*See*, Trial Tr. Vol. II, R. at 1099). Based upon the Jury’s verdict, the circuit court entered a Final Order that the clear, unambiguous, and conspicuous exclusionary language is unenforceable because it was not “brought to the attention of the insured.” (*See*, Final Order, R. at 1335).

⁵ Only one witness testified at trial, David Grimmatt. (*See*, Trial Tr. Vol. I, June 23, 2011, R. at 956). ~~Also, a stipulation was read reciting several facts that related to the agent’s communications with Mr. Grimmatt in connection with the issuance of the policy.~~

American States' timely filed a Renewed Motion for Judgment as a Matter of Law on July 7, 2011. (*See*, Renewed Mot. J., July 7, 2011, R. at 1337). By Order dated July 21, 2011, American States' Motion was denied. (*See*, Order, July 21, 2011, R. at 1352). It is from that Order that American States appeals. However, American States has objected *saepius sepius* to the refusal of the circuit court to rule as a matter of law that the exclusion in its policy is enforceable to foreclose coverage, and to grant judgment, including summary judgment on that issue. The appeal brings up each and every adverse ruling. *See*, Riffe v. Armstrong, 197 W.Va. 626, 477 S.E.2d 535 (1996).

III. STATEMENT OF THE FACTS

A. The Anatomy of Grimmett's Standard Commercial Liability Insurance Policy.

At the time of the fatal accident, Grimmett was insured under a standard commercial "Package" insurance policy, which contains standard business property coverage and standard general liability insurance. The policy was issued by American States (the "Policy") through an agent, Emery and Webb, Inc. Like all such policies in the modern world, this policy consists of a collection of standard forms. The forms that make up the policy are listed and identified by form number, and subject matter on a single page attached to the "Declarations". The listing of forms roughly corresponds to the place in the policy in which each form appears. Thus, the listing acts as a sort of 'table of contents' of the policy.⁶ (R. at 1144). The fourth listed form is the **BUSINESSOWNERS LIABILITY COVERAGE FORM (BP0006)**. That form is, thus, easily located within the policy. Indeed, counsel for American States demonstrated that Mr. Grimmett located it in less than two minutes, when asked to do so. (*See*, Trial Tr. I, 104:2-3, R. at 1059).

⁶ *See*, Luikart v. Valley Brook Concrete & Supply, Inc., 216 W.Va. at 753, 613 S.E.2d at 901 ("Our examination ... reveals that a portion entitled 'Schedule of Forms and Endorsements' was included with the policy and served as a table of contents.").

An examination of that standard liability form shows that it is very typical. It consists of the 1992 version of the standard Insurance Services Office, Inc. (“ISO”), copyrighted commercial general liability form, the most common commercial liability insurance wording in use in the United States. As this Court found significant in Blankenship v. City of Charleston, 223 W.Va. 822, 679 S.E.2d 654 (2009), the ISO standard general liability insurance form typically contains a cautionary introductory statement that “[v]arious provisions in this policy restrict coverage [and one has to] [r]ead the entire policy carefully to determine rights, duties and what is not covered.” *Id.* at 827, 679 S.E.2d at 659. Not surprisingly, an identical cautionary phrase appears in the first sentence of the preamble of the **BUSINESSOWNERS LIABILITY COVERAGE FORM** as “[v]arious provisions of this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.” (Pl.’s Trial Ex. “3”, R. at 1142; *see also*, Trial Tr. Vol. I, 62, R. at 1017).

On the second page of the form begins the exclusions section, aptly headed in boldface “**EXCLUSIONS**”. Directly thereunder appears the explanation phrase “Applicable to Business Liability Coverage”. The typical, standard exclusion which plainly excludes coverage for “bodily injury” to “an employee of the insured arising out of and in the course of employment by the insured” appears as the fifth exclusion (exclusion “e”) on page 2 of the form, just to the right of the boldface heading “**EXCLUSIONS**”. (Pl.’s Trial Ex. “3”, R. at 1142). The wording states in readily understandable terms as follows:

B. EXCLUSIONS

1. Applicable to Business Liability Coverage – This insurance does not apply to:

e. ‘Bodily injury’ to:

- (1) An employee of the insured arising out of and in the course of employment by the insured; or
- (2) The spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

This exclusion applies:

- (a) Whether the insured may be liable as an employer or in any other capacity; and
- (b) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

(Pl.'s Trial Ex. "3", R. at 1185).⁷

The only other provision in the policy that is germane to the issue before the Court is the definition of "bodily injury" contained in the Definitions, which appear in Section F, page 9. That definition makes clear that "bodily injury" "includes death..." (Id., R. at 1192). Because the underlying claims undeniably stem from the death of an employee arising out of and in the course of his employment, it is undisputed that this exclusion applies to foreclose coverage for the Respondent's wrongful death/deliberate intention claim. (*See*, Mot. Summ. J, Ex. "B", January 23, 2006, R. at 35).

B. The Issuance of the Policy to Grimmatt.

In his testimony presented by the Respondent at trial, David Grimmatt, the principal of Grimmatt Enterprises, Inc., testified that in 1995 he desired to open a sporting goods store in Rainelle, West Virginia, and as a condition imposed by his landlord, he needed insurance. Because he was intending to sell guns, liability insurance coverage was hard to come by. He was directed to an agency in New York, Emery and Webb, Inc., that was able to procure commercial

⁷ This exclusion appears in all such commercial liability policies, because such policies do not afford "employer liability" insurance coverage. Insureds wishing to procure coverage for claims for death or bodily injury to employees such as those asserted by the plaintiff against Grimmatt, must purchase "employers' liability" insurance coverage. *See, Erie Ins. & Cas. Co. v. Stage Show Pizza JTS, Inc.*, 210 W.Va. 63, 553 S.E.2d 257 (2001). Here, it is uncontested that Grimmatt did not request and did not purchase "employers' liability" insurance coverage.

coverage for shops that sold guns. He elected to procure the policy over the telephone in the fall of 1995. The inception date of the initial policy is in October 1, 1995, and that policy covered a one year period through October 1, 1996. (*See*, Trial Tr. Vol. I, 49-50, 57, R. at 1004-1005, 1012).

Mr. Grimmatt testified that in the initial year, he received the Policy during October, 1995. That was approximately twenty months prior to the fatal accident. (*See*, Id. 93:9-20, R. at 1048). Mr. Grimmatt admitted that the policy arrived in the mail with an October 21, 1995 cover letter from Emery and Webb, Inc. enclosing the Policy. (*See*, Id. 94:3-6, R. at 1049). The letter states:

“[p]lease read your policy carefully. In the event of a loss your insurance coverage will be controlled by the terms, conditions and exclusions of your policy. After your review, please call us should you find you require any further explanation regarding any part of your policy or if you wish to make any changes or corrections.”

(Pl.’s Trial Ex. “2”, R. at 1141; *see also*, Trial Tr. Vol. I, 53-55, R. at 1008-1010).

Although he admitted to having read the letter, Mr. Grimmatt elected not to read his policy. His excuse is that “[he] was working about 70 hours, a week, ... [and he] was very busy.” (Trial Tr. Vol. I, 94:13, 19, R. at 1049).

According to his trial testimony, Mr. Grimmatt renewed the policy for the next period, October 1, 1996 through October 1, 1997. Aside from an inconsequential change in the property coverage, he made no other changes to the policy. (*See*, Id. 71-72, R. at 1026-1027). Thus, the liability coverage under the renewal policy was identical to the prior year’s coverage. Again, in the fall of 1996, Mr. Grimmatt received a copy of the policy in the mail. (*See*, Id. 94-97, R. at 1052). It consisted of the same form of “Declarations”, which contained the same listing of forms as had been sent to him the previous year. Again, however, he elected not to read through

the policy. By October of 1996, when Mr. Grimmatt received a renewal of the Policy, by his own admission, he “had been told, in writing, three times, if [he] chose to look at it, that [he] should read the policy carefully.” (Id. 119:25-120:2, R. at 1074-1075). In fact, he testified: “I was probably told a lot more than three times, if you read through the policy, time after time, that little print.” (Id. 120:3-4, R. at 1075).

During cross-examination, Mr. Grimmatt was handed a copy of the Policy and asked to locate the Businessowners Liability Coverage Form, and the “**EXCLUSIONS**” listed therein. It took him about a minute and a half to find the Form, and about thirty seconds to find the “**EXCLUSIONS**”. (See, Id. 104:2-3, R. at 1059). He also demonstrated at trial an ability to read the language of the exclusion. (Id). Mr. Grimmatt testified that “if he had chosen to go through [the Policy] and look at it,” and “[i]f [he] didn’t understand it, [he] would have asked somebody about it.” (Id. 104:17-23, R. at 1059). But, he “had no reason to read it.” (Id. 111:13, R. at 1066).

SUMMARY OF THE ARGUMENT

The dispute in this case is susceptible to resolution based upon fundamental precepts of insurance law which, heretofore, have been well-settled. In this case, the issue of coverage turns on an indisputably applicable exclusion, to wit, the familiar “employee exclusion”, which happens to not only be very familiar, but has long been a standard exclusion contained in a standard commercial liability form policy. This Court has articulated a clear, bright-line rule that “[w]here provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Syl. Pt. 2, Mylan Labs., Inc. v. Am. Motorists Ins. Co., 226 W.Va. 307, 700 S.E.2d 518 (2010); *see also*, Witt v. Sutton, ___ W.Va. ___, 2011 WL 1460430, C.A. No. 05-C-1224 (April 14, 2011); Blake v. State Farm Mut. Auto. Ins. Co., 224 W.Va. 317, 685 S.E.2d 895 (2009); Am. States Ins. Co. v. Tanner, 211 W.Va. 160, 563 S.E.2d 825 (2002); Payne v. Weston, 195 W.Va. 502, 466 S.E.2d 161 (1995); Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714 (1970); Christopher v. United States Life Ins., 145 W.Va. 707, 116 S.E.2d 864 (1960). Further:

An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.

Syl. Pt. 5, Bender v. Glendenning, 219 W.Va. 174, 632 S.E.2d 330 (2006); Syl. Pt. 2, Satterfield v. Erie Ins. Prop. & Cas., 217 W.Va. 474, 618 S.E.2d 483 (2005); Syl. Pt. 2, Luikart v. Valley Brook Concrete & Supply, Inc., 216 W.Va. 748, 613 S.E.2d 896 (2005); Syl. Pt. 6, Wehner v. Weinstein, 216 W.Va. 309, 607 S.E.2d 415 (2004); Horace Mann Ins. Co. v. Adkins, 215 W.Va. 297, 599 S.E.2d 720 (2004); Russell v. Bush & Burchett, Inc., 210 W.Va. 699, 559 S.E.2d 36 (2001); Iafolla v. Trent, 207 W.Va. 711, 536 S.E.2d 135 (2000); Cupano v. West Virginia Ins.

Guar. Assoc., 207 W.Va. 703, 536 S.E.2d 127 (2000); Syl. Pt. 8, Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882 (2000); Syl. Pt. 2, Marcum Trucking Co., Inc. v. United States Fid. & Guar. Co., 190 W.Va. 267, 438 S.E.2d 59 (1993); Syl. Pt. 10, Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998). The standard “employee” exclusion within the standard commercial general liability policy issued by American States to Grimmett indisputably applies to the underlying claim, it has been held to be conspicuous, plain and clear, both by this Court in several cases and by the circuit court in this case. The exclusionary language also complies with all of the requirements of West Virginia Statutory law. The instant exclusion is not only clear and unambiguous, but is also conspicuous, plain and clear in the policy. Therefore, it must be enforced.

This Court’s review in this case, being that this appeal involves the efficacy and enforceability of a typical, standard exclusion within a standard commercial general liability policy is *de novo*. “The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court’s grant of summary judgment, shall be reviewed *de novo* on appeal. Syl. Pt. 4, Blankenship v. City of Charleston, 223 W.Va. 822, 679 S.E.2d 654 (2009); Syl. Pt. 2, Riffe v. Home Finders Assocs., Inc., 205 W.Va. 216, 517 S.E.2d 313 (1999).

The circuit court misapprehended West Virginia insurance law by conceiving of a separate, discrete requirement that the insured either have read the policy and noticed the exclusion, or that the insurer show that the exclusionary language was “brought to the attention of the insured.” Further, the court mistakenly interpreted our law to hold that when the policyholder says he never read the policy, *ipso facto*, a jury trial must be held to determine

whether the exclusion was “brought to the attention of the insured.” That view is not consistent with the law in West Virginia or elsewhere.

Not one of this Court’s cases requires anything more than clear and unambiguous language and conspicuous placement in a policy actually delivered to the policyholder to meet the requirements of bringing exclusionary language to the attention of the insured. Further, whether the insured actually read or comprehended the policy is not of consequence in the determination of the efficacy of a policy exclusion. In addition, not one of those cases was heard by a jury.

If there were a separate, discrete requirement that an exclusion be brought to the attention of an insured, that must be a legal issue for the court, not a factual trial before a lay jury. Further, regardless of whether the issue is decided by the Court or a jury, the evidence here overwhelmingly demonstrated that the clear, unambiguous, conspicuous, plain and clear exclusion was “brought to the attention” of the policyholder. The exclusion should have been enforced. The Court below should have declared no coverage under the policy.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for selection for Rule 20 Oral Argument for two reasons. First, the issues presented would ordinarily fall under the rubric set forth in Rule 19, which embraces “cases involving assignments of error in the application of settled law” and “cases claiming insufficient evidence or a result against the weight of the evidence.” W.Va. R. App. P. 19(a). Enforceability of a conspicuous, plain, clear and unambiguous insurance policy exclusion contained in a standard commercial liability insurance policy ordinarily involves the application of well-settled law, and there are scores of decisions from this Court which unanimously hold that a clear, unambiguous exclusion, which also happens to be plain, familiar, quite typical in the this type of policy, will be enforced, not negated. The circuit court’s judgment was so dramatically in discord with the well-settled law that any inclination to affirm the judgment will require a Rule 20 hearing. Affirming the judgment would necessarily create a novel ruling (“cases involving issues of first impression”, W.Va. R. App. P. 20(a)). Second, in this case the circuit court relegated to a lay jury the task of determining whether an otherwise clear, unambiguous, plain and conspicuous exclusion would be enforced. Given the adverse impact that an order affirming that ruling would have on our insurance law, not to mention the insurance market in West Virginia, this case certainly involves an issue “of fundamental public importance.” W.Va. R. App. P. 20(a). Thus, this case calls out for oral argument.

ARGUMENT⁸

I. HAVING CONCLUDED AS A MATTER OF LAW THAT THE “EMPLOYEE EXCLUSION” CONTAINED IN THE STANDARD COMMERCIAL LIABILITY INSURANCE POLICY WAS CLEAR AND UNAMBIGUOUS, AND THAT IT WAS CONSPICUOUS, PLAIN AND CLEAR, AND THAT IT WAS CONTAINED IN THE STANDARD COMMERCIAL POLICY THAT WAS TWICE DELIVERED TO THE INSURED PRIOR TO THE DATE OF LOSS, THE CIRCUIT COURT WAS COMPELLED BY WELL-SETTLED PRINCIPLES OF LAW TO ENFORCE THE EXCLUSION AND DECLARE NO COVERAGE UNDER THE POLICY.

This Court has repeatedly reaffirmed that “[w]here provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Syl. Pt. 2, Mylan Labs., Inc. v. Am. Motorists Ins. Co., *supra*; *see also*, Witt v. Sutton, *supra*; Blake v. State Farm Mut. Auto. Ins. Co., *supra*; Am. States Ins. Co. v. Tanner, *supra*; Payne v. Weston, *supra*; Keffer v. Prudential Ins. Co., *supra*; Christopher v. United States Life Ins., *supra*. Further, this Court has consistently held that “[w]here provisions of an insurance policy are plain and unambiguous and where such provisions are not contrary to statute, regulation, or public policy, the provisions will be applied and not construed.” Witt v. Sutton, *supra*; *see also*, Syl. Pt. 4, Keffer v. Ferrell, 221 W.Va. 348, 665 S.E.2d 94 (2007); Syl. Pt. 1, Mitchell v. Fed. Kemper Ins. Co., 204 W.Va. 543, 514 S.E.2d 393 (1998); Syl. Pt. 1, Kelly v. Painter, 202 W.Va. 344, 504 S.E.2d 171 (1998); Syl. Pt. 1, Rich v. Allstate Ins. Co., 191 W.Va. 308, 445 S.E.2d 249 (1994); Syl. Pt. 1, Keiper v. State Farm Mut.

⁸ As repeatedly set forth herein, and in the Notice of Appeal, all of the assignments of error in this appeal are interrelated. Each of the arguments hereinafter set forth relates to each assignment of error. Each of the arguments and assignments of error were presented to the circuit court on numerous occasions prior to trial, during the trial, and following the entry of judgment. (*See*, Am. Answer, May 31, 2005, R. at 24; Mot. Summ. J., January 23, 2006, R. at 31; Order, June 14, 2007, R. at 222; Mot. Recons. Cert. Inter. Appeal, December 17, 2007, R. at 224; Order, April 25, 2008, R. at 494; Cross-Mot. Summ. J., August 9, 2010, R. at 649; Order, September 24, 2010, R. at 840; Renewed Cross-Mot. Summ. J., May 25, 2011, R. at 901; Order, June 17, 2011, R. at 925; Trial Tr. Vol. I, 79:24-80:2, 129:8-132:15, R at 1034-1035, 1084-1087; Final Order, June 30, 2011, R. at 1335; Renewed Mot. J., July 7, 2011, R. at 1337; Order, July 21, 2011, R. at 1352).

Auto. Ins. Co., 189 W.Va. 179, 429 S.E.2d 66 (1993); Syl. Pt. 2, Deel v. Sweeney, 181 W.Va. 460, 383 S.E.2d 92 (1989); Syl. Pt. 2, Shamblin v. Nationwide Mut. Ins. Co., 175 W.Va. 337, 332 S.E.2d 639 (1985); Syl., Tynes v. Supreme Life Ins. Co. of Am., 158 W.Va. 188, 209 S.E.2d 567 (1974). Applying these principles, this Court has repeatedly enforced standard exclusions contained in all sorts of insurance policies, including commercial general liability policies exactly like the instant policy.

Following several decisions of this Court including Luikart v. Valley Brook Concrete & Supply, Inc., *supra*, and Smith v. Animal Urgent Care, Inc., 208 W.Va. 664, 542 S.E.2d 827 (2000), the circuit court determined that the exclusionary language at issue is clear and unambiguous.⁹ (*See*, Order, September 24, 2010, R. at 840). The circuit court also found that the exclusion is conspicuously placed in the standard liability policy form (*see*, Order, June 17, 2011, R. at 925) and it is undisputed in this case that the policy containing the conspicuous exclusion was delivered to the insured twice, once at inception and again at renewal, both times long before the fatal accident. Under well-settled West Virginia insurance law, the exclusion should have been enforced to foreclose coverage.¹⁰

⁹ A similar, but earlier version of the ISO “employee” exclusion was enforced 50 years ago in Spencer v. Travelers Insurance Company, 148 W.Va. 111, 133 S.E.2d 735 (1963). In Spencer, this Court stated “[t]he exclusion clause in the policy involved in this litigation is clear and unambiguous.” *Id.* at 119, 133 S.E.2d at 741. The language of the exclusion clause was given its plain meaning and effect. After all, the purpose of the commercial general liability insurance policy is “to protect the general public, not the employees.” *Id.*

¹⁰ The “employee” exclusion has been examined by courts in numerous jurisdictions, and on each and every occasion found to be clear, unambiguous and enforceable. *See*, Scottsdale Ins. Co. v. City Of Easton, 2010 WL 1857358 (3d Cir. (PA) 2010); James McHugh Const. Co. v. Zurich Am. Ins. Co., 927 N.E.2d 247 (Ill. App. 1 Dist. 2010); Admiral Ins. Co. v. G4S Youth Services, 634 F.Supp.2d 605 (E.D. Va. 2009); Admiral Ins. Co. v. Ace Am. Ins. Co., 2009 WL 783321 (W.D. Va. 2009); Acceptance Indem. Ins. Co. v. Maltez, 617 F.Supp.2d 467 (S.D. Tex. 2007); Rapid Leasing, Inc. v. Nat’l Am. Ins. Co., 263 F.3d 820 (8th Cir. (TX) 2001); Lake States Ins. Co. v. Blair, 1999 WL 33327372 (Mich. App. 1999). Indeed, relatively thorough research fails to disclose any case in which any court has found any version of the standard “employee” exclusion contained in the standard ISO commercial liability form to be anything other than clear, unambiguous, and enforceable.

II. THE CIRCUIT COURT MISAPPREHENDED THE INSURANCE LAW CONCEPT OF AN INSURANCE POLICY EXCLUSION HAVING BEEN “BROUGHT TO THE ATTENTION OF THE INSURED”.

The circuit court properly found as a matter of law, probably under the illumination of the Luikart decision, that the “employee exclusion” was conspicuous, plain and clear. (*See*, Order, September 24, 2010, R. at 840; Order, June 17, 2011, R. at 925). Indeed, that conclusion is inescapable. At the threshold, the standard policy issued to Grimmertt contained an express list of forms and endorsements that make up the policy, organized in a manner that makes them easy to find in the policy. The relevant form, appropriately entitled “**BUSINESSOWNERS LIABILITY COVERAGE FORM**” is the fourth in the listing. The liability coverage form is the standard ISO form (the 1992 version). It contains the standard entreaty in the first line on the form: “Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.” The exclusion section is prominently displayed starting on the second page of the liability coverage form under the heading “**EXCLUSIONS**”. There is an explanatory section under the heading which explains that certain exclusions are “Applicable to Business Liability Coverage.” The subject exclusion is the fifth exclusion in a list of “**EXCLUSIONS**”. (*See*, Pl.’s Trial Ex. “3”, R. at 1142). Thus, this exclusion, like all of the liability exclusions in the form, is readily disclosed by even a cursory review of the policy. These circumstances, combined with the crystal clarity of the language of the exclusion should have been enough to make it enforceable as a matter of law.

The circuit court, however, perceived of an additional, separate and discrete requirement that the exclusionary provision must be “brought to the attention of the insured.” Hence still, the circuit court conceived of this as a fact oriented criteria, susceptible to determination by a lay jury. (*See*, Order, September 24, 2010, R. 840; Order, June 17, 2011, R. at 925; Final Order, June 30, 2011, R. at 1335). In that regard, the circuit court misperceived the applicable standard.

It has never been the law of West Virginia, or anywhere else for that matter, that an insurer that has written a clear and unambiguous exclusion, submitted the exclusion wording to and had it approved by the Insurance Commissioner under West Virginia Code 33-6-8 and 33-6-9,¹¹ placed the exclusion conspicuously in the policy, and timely and properly provided the policy with the exclusion conspicuously displayed therein to the insured, must go further and meet an additional obligation to “bring the exclusion to the attention of the insured.” There is certainly no

¹¹ These sections provide as follows:

§ 33-6-8. Filing of forms.

(a) No insurance policy form, no group certificate form, no insurance application form where a written application is required and is to be made a part of the policy and no rider, endorsement or other form to be attached to any policy shall be delivered or issued for delivery in this state by an insurer unless it has been filed with the commissioner and, to the extent required by subdivision (1), subsection (b) of this section, approved by the commissioner, except that as to group insurance policies delivered outside this state, only the group certificates to be delivered or issued for delivery in this state shall be filed for approval with the commissioner. This section does not apply to policies, riders, endorsements or forms of unique character designed for and used in relation to insurance upon a particular subject, or which relate to the manner of distribution of benefits or to the reservation of rights and benefits under life or accident and sickness insurance policies, and are used at the request of the individual policyholder, contract holder, nor to the surety bond forms.

(b)(1) Forms for noncommercial lines shall be filed by an insurer no less than sixty days in advance of any delivery. At the expiration of the sixty day period, unless the period was extended by the commissioner to obtain additional information from the insurer, the form is deemed to be approved unless prior thereto it was affirmatively approved or disapproved by the commissioner. Approval of any form by the commissioner constitutes a waiver of any unexpired portion of the sixty day period.

(2) Forms for: (a) Commercial lines property and casualty risks; and (b) any mass-marketed life and/or health insurance policy offered to members of any association by the association shall be filed with the commissioner and need not be approved by the commissioner prior to use. The commissioner may, within the first thirty days after receipt of the form, request information to ensure compliance with applicable statutory provisions and may disapprove forms not in compliance with the provisions of this chapter. If the commissioner does not disapprove the form within the thirty-day period, the form is effective upon its first use after filing.

...

§ 33-6-9. Grounds for disapproval of forms.

The commissioner shall disapprove any such form of policy, application, rider, or endorsement or withdraw any previous approval thereof:

(a) If it is in any respect in violation of or does not comply with this chapter.

(b) If it contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.

(c) If it has any title, heading, or other indication of its provisions which is misleading.

(d) If the purchase of such policy is being solicited by deceptive advertising.

(e) If the benefits provided therein are unreasonable in relation to the premium charged.

(f) If the coverages provided therein are not sufficiently broad to be in the public interest.

precedent in West Virginia or elsewhere for requiring that an insurer prove that it “brought the exclusion to the attention of the insured” to a jury. To the extent the circuit court perceived such a separate, discrete requirement, the court misunderstood our insurance law.

In several cases, following the National Mutual Insurance Company v. McMahon & Sons, Inc. decision, this Court has discussed a rule that:

An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.

Syl. Pt. 5, Bender v. Glendenning, *supra*; Syl. Pt. 2, Satterfield v. Erie Ins. Prop. & Cas., *supra*; Syl. Pt. 2, Luikart v. Valley Brook Concrete & Supply, Inc., *supra*; Syl. Pt. 6, Wehner v. Weinstein, *supra*; Horace Mann Ins. Co. v. Adkins, *supra*; Russell v. Bush & Burchett, Inc., *supra*; Iafolla v. Trent, *supra*; Cupano v. West Virginia Ins. Guar. Assoc., *supra*; Syl. Pt. 8, Mitchell v. Broadnax, *supra*; Syl. Pt. 2, Marcum Trucking Co., Inc. v. United States Fid. & Guar. Co., *supra*. However, the Court has uniformly determined whether this standard is met based on an examination of the policy as a matter of law. In essence, the Court applies a *de novo* standard of review, largely without regard to extrinsic evidence other than the timely delivery of the policy to the insured. In the history of our insurance jurisprudence, not one case actually imposes any discrete requirement that exclusionary language that is otherwise conspicuous, plain and clear, be “brought to the attention of the insured.” Further, there is not a single decision which indicates that whether any such requirement is met is a matter of fact properly tried to a jury.

The circuit court in these proceedings attempted to follow this Court’s decision in Luikart v. Valley Brook Concrete & Supply, Inc., *supra*. Luikart does hold that “an insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make

exclusionary clauses, ‘conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.’” (Pl.’s Mot. Summ. J, July 20, 2010, R. at 578 (*quoting from* Syl. Pt. 2, Luikart, *supra*)). However, Luikart does not articulate that standard as involving a discrete factual issue, beyond a requirement that the exclusion be conspicuously placed in the policy, and that the policy be timely supplied to the insured. Quite to the contrary, in the *per curiam* opinion in Luikart, this Court observed that the clear and unambiguous exclusionary language was conspicuous in the policy, and, thus, determined as a matter of law that it was sufficiently disclosed to the insured. The Court observed in that analytical process that the exact same exclusionary language at issue in this case “was set apart from the other language by an emboldened subheading entitled ‘Exclusions.’ Therefore, the only conclusion that can be reached by the use of the boldface language is that it was, indeed, conspicuous.” 216 W.Va. at 753, 613 S.E.2d 901. On that basis, the Court affirmed a summary judgment for the insurer. Neither Luikart nor any other case suggests that this is an issue for trial, and certainly not a fact issue appropriate for a jury trial. These issues are invariably decided by the court as a matter of law, again, almost uniformly based on the policy itself.¹²

Even in the terminal decision in Mitchell v. Broadnax, *supra*, in which the Court grappled with the efficacy of exclusions in the consumer oriented, heavily regulated realm of personal auto policies, the Court did not articulate a requirement for bringing an exclusion to the attention of an insured over and above making the “exclusionary clauses conspicuous, plain, and

¹² In Luikart, this Court did make reference to oral testimony of the principal of the insured, who had indicated that he looked at the policy. To the extent that the opinion references the verbal testimony of the principal, the decision is an aberration. The most recent cases involving issues of insurance coverage neither dwell on nor make reference to anything outside of the contours of the policy. The fact of the matter is that the Court in Luikart did not decide whether or not the language was conspicuous based upon the testimony of the principal. The Court decided that the language was conspicuous based upon the face of the policy.

clear, placing them in such a fashion as to make obvious their relationship to other policy terms....” 208 W.Va at 49, 537 S.E.2d at 895. Although in a footnote in Mitchell the Court did discuss devices “by which insurers may effectively communicate an exclusion to an insured to secure his/her awareness...”, neither in the realm of personal auto insurance, nor certainly in commercial liability insurance, has such a requirement ever become part of our law. Rather, it has always been sufficient to make an exclusion efficacious to show that it is clearly and unambiguously worded, and conspicuously placed in a policy that is timely delivered.

In requiring more, and especially in submitting the issue to a jury for determination, the circuit court engrafted onto West Virginia insurance law a standard never heretofore recognized.

III. A SEPARATE AND DISCRETE REQUIREMENT THAT AN OTHERWISE CONSPICUOUS, PLAIN AND CLEAR EXCLUSION BE BROUGHT TO THE ATTENTION OF THE INSURED IS UNNECESSARY AND IN ANY EVENT A LEGISLATIVE FUNCTION.

The present rules regarding insurance policy exclusions, that they must be clear and unambiguous, and conspicuous, plain and clear, affords sufficient protection to unwitting policy holders, especially in the realm of commercial insurance. It cannot be overlooked that policyholders who desire to comprehend more precisely what their policies do and do not cover always have the esteem to read them. Then, if they try, and genuinely cannot understand them (despite that they must be clear and unambiguous), they always have the recourse of asking the agent, something Mr. Grimmitt admitted at trial that he could have done, but chose not to do.

It is also worthy of note that our insurance statutory law gives the Insurance Commissioner the duty, and the opportunity, to protect policyholders against insurance policy provisions which, *inter alia*, "... contain[] or incorporate[] ... any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract." W.Va. Code § 33-6-9(b). Of course, it is almost ridiculous to conceive that the Insurance Commissioner would regard the ISO standard liability policy as falling short of this standard. Nonetheless, that protection is in place. There is just no need for the Circuit Court of Greenbrier County, or the Greenbrier County jury to administer further protection. But, if there were a felt need to further protect policyholders -- for example by requiring signature forms, or written waiver documents and the like, *see*, Mitchell, n. 24, or even a conference between the agent and insured to review the policy -- such a requirement should be relegated to the legislature. That sort of unique requirement affects so many important, potentially conflicting interests that it must be regarded as a legislative function.

Plainly, matters of this nature are not appropriately committed to the fiat of individual circuit courts, and certainly not the sympathies of lay juries.

IV. WHETHER THE POLICYHOLDER ELECTS TO READ THE POLICY OR NOT CANNOT BE A FACT OF CONSEQUENCE TO THE ENFORCEMENT OF INSURANCE POLICY EXCLUSIONS.

At bottom, the only circumstance argued in the instant case as to which the exclusion should not be enforceable was that the policyholder testified that he had not read his policy -- over nearly a two year period from the time he was first sent the initial policy until the fatality. (*See*, Trial Tr. Vol. I, 94-97, R. at 1049-1052). The circuit court ultimately held that that testimony created a fact issue for the jury. That conclusion simply cannot be a correct apprehension of the law. The reasons are obvious; but American States will adumbrate them anyway.

Foremost, a view that an otherwise efficacious and applicable insurance policy exclusion can be literally negated by the policyholder averring that he or she did not read the policy is too happenstantial, too unpredictable, and renders the terms of the contract utterly uncertain. It is simply not reasonable to allow the enforceability of standard exclusions in a standard policy to turn on a factor so ephemeral as whether or not the insured chooses to read, or claims he or she cannot understand the terms of a policy. That level of uncertainty would be unacceptable in any contract, but it is peculiarly problematic in the case of insurance, where the industry makes underwriting judgments, and prices its product based on the ability to contain its risks based in part on the reliable enforcement of standard exclusions.

Second, a rule that would make it consequential whether or not a policyholder reads, or understands the terms of the insurance contract would definitely produce inconsistent results. A case such as the instant one underscores the problem. Here, the plaintiff contends for the applicability of coverage, essentially solely on the basis that Grimmett claims be neglected to read his policy. Some other plaintiff may be less fortunate; a policyholder against whom some other plaintiff has a claim that is within the embrace of an exclusion may be more literary, or less

crafty, and admit having read through the policy. There is no good and equitable reason why the one plaintiff's claim should be covered, and the other not.

Third, a rule that rewards anyone for not reading an insurance policy issued to a corporate policyholder cannot be countenanced. Our rules of law should encourage diligence and circumspection; the rule that allows an insured to broaden the coverage -- in effect, obtain coverage that was not purchased and paid for -- encourages dereliction and rewards indolence. Again, this case is a perfect example. A reading of Mr. Grimmett's trial testimony leaves one with the definite conviction that he likely could have cared less about the insurance he bought, hence, he never bothered to look at it -- until after the death of his employee. That sort of disregard should be subject to reprobation; not gratification.

Fourth, allowing the policyholder's claim not to have read or understood the policy to impact the efficacy of a policy exclusion would engender problems with discrimination in the underwriting and pricing of insurance. For instance, an illiterate, an individual or foreign birth, or a person of measurably low intelligence might have difficulty procuring insurance, or might be subject to higher premiums if the law developed in such a way as to make it difficult to enforce exclusions against persons who do not read or understand their coverages.¹³

Finally, allowing an insured to defeat clear, unambiguous exclusions by claiming not to have read the policy encourages deception and fraud. Again, this case is a good example.

For these reasons, and others, this Court has never condoned the failure of an insured to read a policy, and has never countenanced a rule that a clear, conspicuous and unambiguous exclusion can be negated, merely because the insured says he or she did not read or notice it in the policy. This Court has said otherwise. "In West Virginia, insurance policies are controlled

¹³ One can envision with a shudder the appearance of language questions, and reading proficiency sections on applications for insurance. *See, Citizens Cas. Co. v. Zambrano Trucking Co.*, 140 N.J. Eq. 378, 54 A.2d 721 (1947).

by the rules of construction that are applicable to contracts generally.” Blake v. State Farm Mut. Auto. Ins. Co., 224 W.Va. at 322, 285 S.E.2d at 900; Payne v. Weston, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995). It is well-settled that “the failure to read a contract before signing it does not excuse a person from being bound by its terms.” Sedlock v. Moyle, 222 W.Va. 547, 551, 668 S.E.2d 176, 180 (2008) (*quoting* Reddy v. Cmty. Health Found. of Man., 171 W.Va. 368, 373, 298 S.E.2d 906, 910 (1982)). Further, “[a] person who fails to read a document to which he places his signature does so at his peril.” Id. West Virginia law has long recognized that an “insured cannot escape the effect of the conditions of a policy on the ground of ignorance, due to failure to read his policy, it being his duty to examine it” Lewis v. State Auto. Mut. Ins. Co., 115 W.Va. 405, 177 S.E. 449, 451 (1934); *see also* Moore v. United Benefit Life Ins. Co., 145 W.Va. 549, 115 S.E.2d 311 (1960). Essentially, by receiving and retaining an insurance policy, the insured is estopped to challenge any of the conditions in the policy solely on the basis that the insured did not read the policy. *See, Id.*¹⁴

Extensive research discloses, as expected, that no Court permits policyholders, or plaintiffs claiming through them, to defeat restrictive terms in their insurance policies, and, in effect, secure coverage not otherwise contemplated by their policies, by claiming they did not read or understand them.

One of the more enlightening discussions of this issue is contained in a seminal decision of the Pennsylvania Supreme Court in Standard Venetian Blind Company v. American Empire Insurance Company, 503 Pa. 300, 469 A.2d 563 (1983), a case which is actually very analogous to the instant case. The Pennsylvania Court there overruled an earlier decision of the

¹⁴ This Court has only accepted one exception to this general rule, “based on the theory that an applicant for insurance is entitled to assume, in the absence of evidence, that the agent has prepared his application according to the agreement made between them, and that the insurer has written the policy in accordance to the application, and is not chargeable with negligence for failure to examine such instruments to discover errors and omissions.” Lewis, at 405, 177 S.E. at 451. That exception has no application here.

intermediate level appellate court which, like the circuit court in this case, had held that an exclusion in an insurance policy that is otherwise clear and unambiguous, is, nonetheless void if the policyholder did not notice it, and the insurer cannot show that the policyholder had been made aware of and had its meaning explained. *See, Hionis v. N. Mut. Ins. Co.*, 230 Pa.Super. 511, 327 A.3d 363 (1974). In flatly rejecting that rule, the Pennsylvania Supreme Court revisited well established precepts of insurance law that are indistinguishable from our own:

The principles governing our interpretation of a contract of insurance are familiar and well settled. The task of interpreting a contract is generally performed by a court rather than by a jury. The goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision in a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language. “In the absence of proof of fraud, ‘failure to read [the contract] is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof.’”

Standard Venetian Blind Co., 503 Pa. at 304-305, 469 A.2d at 566 (internal citations omitted).

The Court noted that, as here, a principal of the corporate insured testified that he had chosen not to read the policy, but if he had they “could have been readily comprehended,” because the language was “plain and free of ambiguity....” *Id.* The Court also observed that there was no contention that the exclusions are “contrary to law or to regulations of the Insurance Department.” *Id.* Eschewing the so-called ‘Hionis rule’, which requires the insurer to have pointed out and explained the exclusion, the Court stated:

We believe that the burden imposed by Hionis fails to accord proper significance to the written contract, which has historically been the true test of parties’ intentions. By focusing on what was and was not said at the time of contract formation rather than on the parties’ writing, Hionis makes the question of the scope of insurance coverage in any given case depend upon how the factfinder resolves questions of credibility. Such a process, apart from the obvious uncertainty of its results, unnecessarily delays the resolution of controversy, adding only unwanted costs to the cost of procuring insurance. Thus, Hionis, which would permit an insured

to avoid the application of a clear and unambiguous limitation clause in an insurance contract, is not to be followed.

Id. at 306, 469 A.2d at 567. Further, rejecting the notion that an insured, especially a commercial insured, can successfully void a clear and unambiguous exclusion, essentially by not reading the policy, the Court reasoned:

We hold only that where, as here, the policy limitation relied upon by the insurer to deny coverage is clearly worded and conspicuously displayed, the insured may not avoid the consequences of that limitation by proof that he failed to read the limitation or that he did not understand it.

Id. at 307, 469 A.2d at 567.

Standard Venetian is in accord with virtually uniform authority in other states. No state's insurance law requires an insurer, or agent, to affirmatively point out exclusions that are clear and unambiguous, or explain their meaning in order that they be enforceable, and no case allows an insured to negate such an exclusion by choosing not to have read the policy. As one California Court put it:

Failing to read a policy (or its table of contents) is not sufficient reason to hold a clear and conspicuous policy provision unenforceable. To hold otherwise would turn both contract and insurance law on its head. Insurers are not required to sit beside a policy holder and force them to read (and ask if they understand) every provision in an insurance policy. Nor are policy holders permitted to accept the benefits under the policy while denying the existence of inconvenient terms.

Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Group, 197 Cal.App.4th 1146, 1156, 128 Cal.Rptr.3d 330, 338 (2011). The Petitioner stops short of arguing for an affirmative duty on policyholders to read their policies. The decision of whether or not to read the policy is within the purview of the insured. That being said, every court to have considered the issue has held that if the policyholder elects not to read its policy, but, nonetheless, retains the coverage without objection or requesting a change, when loss occurs the insured is stuck with the coverages, and the restrictions and limitations imposed by the clear, conspicuous, and

unambiguous terms of the policy. *See e.g.*, Dahan Novelties & Co., LLC v. Ohio Cas. Ins. Co., 51 So.3d 129 (La. App. 4th Cir. 2010); Century Surety Co. v. QSC Painting, Inc., 2010 WL 891245 (W.D. Pa. 2010); Dougherty v. Farmers New. Century Ins. Co., 2007 WL 465629 (M.D. Pa. 2007); Ruiz v. Gov't Employees Ins. Co., 4 S.E.3d 838 (Tex. App. 1999); Floral Consultants, Ltd. v. Hanover Ins. Co., 128 Ill.App.3d 173, 470 N.E.2d 527, 83 Ill.Dec. 401 (1984); Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 469 A.2d 563 (1983); Martinez v. John Hancock Mut. Life Ins. Co., 145 N.J.Super. 301, 367 A.2d 904 (1976); Foster v. Crum & Forster Ins. Cos., 36 Ill.App.3d 595, 345 N.E.2d 49 (1976); Darnell v. Sw. Am. Ins. Co., 240 S.W.2d 509 (Tex. Civ. App. 1951).

V. THE CIRCUIT COURT OF GREENBRIER COUNTY ERRED IN CONVENING A JURY TRIAL, AND IN SUBMITTING AN ISSUE OF THE ENFORCEABILITY OF AN INSURANCE POLICY EXCLUSION TO A JURY.

There has never been a jury trial on any aspect of the coverage of a liability insurance policy in West Virginia; at least none are reflected in any reported case that research has been able to turn up. Nonetheless, plowing new jurisprudential earth, the circuit court persistently and erroneously viewed the issue of whether the exclusion was brought to the attention of the insured as one that required trial. The issue was one for summary disposition. Even assuming that an evidentiary trial was warranted, the trial court compounded the error by characterizing the issue as one of pure fact, subject to a trial by jury. The issue was more appropriately viewed as a question of law. At a minimum, the question is a mixed question of law and of fact. “Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” Syl. Pt. 2, Blake v. State Farm Mut. Auto. Ins. Co., *supra*; Syl. Pt. 1, Tennant v. Smallwood, 211 W.Va. 703, 568 S.E.2d 10 (2002); Mitchell v. Fed. Kemper Ins. Co., *supra* (quoting Pacific Indem. Co. v. Linn, 766 F.2d 754, 760 (3d Cir. 1985)). The underlying material facts here were not in dispute. To submit an issue of insurance coverage, especially the efficacy of an insurance policy exclusion, to a jury virtually guarantees inconsistency and unpredictability. The efficacy of insurance policy exclusions cannot rest on the often variable passions, prejudices and sympathies of lay jurors. Submitting issues like this to lay juries is guaranteed to lead to drastic increases in the cost, and impair the evaluation of commercial liability insurance. Such determinations must be exclusively within the purview of courts. The circuit court erred in submitting this case to a jury.

VI. APART FROM WHETHER A LIABILITY INSURANCE COVERAGE ISSUE SHOULD BE DECIDED BY A JURY OR BY A COURT, THE OUTCOME OF THIS CASE, INCLUDING THE JURY VERDICT AND THE DECLARATION OF THE CIRCUIT COURT OF GREENBRIER COUNTY, IS AGAINST THE CLEAR IMPORT OF THE LAW AND THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Assuming *arguendo* that West Virginia jurisprudence requires something more than clear and unambiguous exclusionary language and conspicuous placement in the policy; in effect, if there is a separate, discrete additional requirement that the exclusion be further ‘brought to the attention of the insured,’ the evidence at trial was overwhelming. The policyholder was issued a typical, standard 1992 copyrighted version of the ISO commercial general liability form, which contains several very standard exclusions. Since such policies do not afford “employer liability” coverage, which must be separately purchased, these policies almost always contain the typical, standard, clear and unambiguous “employee” exclusion. The form in this case was part of a “package policy” which also provided standard commercial property coverage. The Declarations sheet, which is a three page document, contains a listing of forms that make up the policy. That listing is right on the very first page of the Declarations. The listing is organized in roughly the same manner as the forms appear in the “package”. Thus, the listing provides a ready guide to locating the respective forms. The **BUSINESSOWNERS LIABILITY COVERAGE FORM** is the fourth listed on the Declarations. It is easily located -- that is, by one interested in finding it. The very first line of the liability form warns the reader that “Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties, and what is and is not covered.” (emphasis added). (*See*, Pl.’s Trial Ex. “3”, R. at 1142). If that were not enough, when Grimmitt received the policy upon its initial inception in October, 1995, it came accompanied by a letter which similarly stated:

“[p]lease read your policy carefully. In the event of a loss your insurance coverage will be controlled by the terms and conditions and exclusions of your policy. After your review, please call us should you find you require any further

explanation regarding any part of your policy or if you wish to make any changes or corrections.”

(Trial Tr. Vol. I, 94-97, R. at 1049-1052; Pl.’s Trial Ex. “2”, R. at 1141). He admitted at trial that he at least read the letter. (*See*, Trial Tr. Vol. I, 94, R. at 1049).

If Mr. Grimmatt were actually interested to know if he had coverage for injury or death of employees, he could easily have determined that he did not. The “employee exclusion” is on the second page of the **BUSINESSOWNERS LIABILITY COVERAGE FORM** under a subheading titled “**EXCLUSIONS**”. Directly underneath the subheading appears the explanation phrase “Applicable to Business Liability Coverage.” The “employee exclusion” appears as the fifth exclusion (exclusion “e”) just to the right of the boldface heading “**EXCLUSIONS**”. (Pl.’s Trial Ex. “3”, R. at 1142).

Mr. Grimmatt testified that he first received the insurance policy approximately twenty months prior to the fatal accident. Despite the admonition to “read it carefully,” he did not do so. (*See*, Trial Tr. Vol. I, 93-94, R. at 1048-1049). He admitted that he renewed the policy without change in the liability coverage. (*See*, *Id.* 71-72, R. at 1026-1027). He received the policy a second time approximately eight months before the fatal accident. Again, despite cautionary language in the policy to read it carefully, he chose not to do so. (*See*, *Id.* 94-97, R. at 1049-1052). In fact, he admitted at trial that he had been told at least three times to read the policy carefully, and testified: “I was probably told a lot more than three times, if you read the policy, time after time, that little print.” (*Id.* 120:3-4, R. at 1075). The evidence at trial demonstrated beyond doubt that if Mr. Grimmatt had elected to understand the scope and limitations of the coverage he purchased, he certainly could have done so. At trial, when asked to find the liability coverage form, he did so in less than two (2) minutes. When then asked to locate the “employee exclusion” he did so in seconds. When asked to read the wording, he understood it easily. (*See*,

Id. 104, R. at 1059). That evidence was more than sufficient to compel the conclusion that the exclusionary language was “brought to the attention of the insured” as a matter of law. *See e.g., Luikart, supra* (affirming a summary judgment on less compelling evidence of notice to the insured).

Plainly, the issue should have been determined by the Court as a matter of law. Submitting the issue to the jury was error in the first instance. But, at the end of the day, given the evidence, the conclusion of the jury that this exclusion was not sufficiently brought to the attention of this particular insured was clearly against the law and the weight of the evidence. That finding had to be motivated by passion, prejudice or sympathy. Although a trial was unnecessary and inappropriate, and a jury trial to boot, the Circuit Court of Greenbrier County should have set aside the verdict and entered judgment as a matter of law in Petitioner’s favor.¹⁵

¹⁵ American States made an oral motion for judgment as a matter of law at the conclusion of Respondent’s case in chief. (*See, Trial Tr. Vol. I, 79:20-80:2, 129:8-132:15, R. at 1034-1035, 1084-1087*). ~~American States also timely filed a Renewed Motion for Judgment as a Matter of Law on July 7, 2011. (*See, R. at 1337*).~~

CONCLUSION

Having determined that the “employee exclusion” was clear and unambiguous, that it was conspicuous, plain and clear, that it was appropriately placed in the policy, and that the policy was twice delivered to the policyholder long before the fatality, the circuit court was duty bound under applicable law to enforce the exclusion, and declare no coverage under the policy as a matter of law. The failure to do so, when invited repeatedly was error. This Court must reverse the judgment, and enter judgment in favor of American States.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1186

AMERICAN STATES INSURANCE COMPANY, Defendant Below,
Petitioner

v.

BARBARA SURBAUGH, Administrator of the Estate of Gerald
Kirchner, Plaintiff Below, Respondent

Appeal from the Circuit Court of Greenbrier County
The Honorable Joseph C. Pomponio, Jr.
Civil Action No. 97-C-241

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading,

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