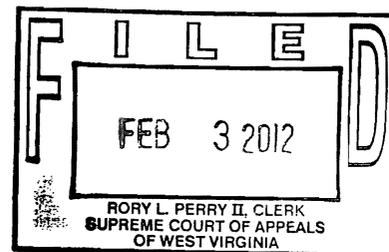


**BRIEF FILED
WITH MOTION**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case 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 J. C. Pomponio, Jr., Judge
Civil Action No. 97-C-241**

**RESPONDENT'S BRIEF
AND
CROSS-ASSIGNMENTS OF ERROR**

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STATEMENT OF THE CASE

INTRODUCTION

The Petitioner in its appeal brief under Table of Contents lists six distinct arguments; however, on page 1 under Assignment of Errors, Petitioner sets forth for the sake of brevity and clarity American States will state assignments of error simply as follows and states four assignments of error. However, within the context of the brief Petitioner abandons that statement and addresses all six of the arguments as stated in the Table of Contents. Petitioner stated in its Assignment of Errors that all arguments are interrelated. For clarity of the Court, Respondent will address all six of the Assignments of Errors by consolidating its response to Petitioners six assignments on the following two responses.

1. For an insurer in West Virginia to deny liability through a policy exclusion, do they have to prove they brought the exclusion to the attention of the insured?

National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734 (1987)

Is the issue of proving whether the insurer sufficiently brought the exclusion to the attention of the insured a factual issue for a jury to decide or a legal issue to be decided by the Court? Upon review, was there sufficient evidence presented to the jury to support the jurors' decision?

2. By finding that the issue of bringing the policy exclusions to the attention of the insured is a factual issue, then the proper standard of review is as stated in Syllabus Points 1, 2, and 3 of *James v. Knotts*, 227 W. Va. 65 (2010) and not a *de novo* standard as Petitioner alleges. Having found the insurer had to bring the

policy exclusions to the attention of the insured is a factual issue. The question becomes, what facts must the insurer prove to make the policy exclusions operational? See Syllabus Point 7, *National, supra*.

In its Introduction, at page 3, Petitioner indicates that Respondent claims the liability policy issued by Petitioner affords liability coverage for deliberate intent claims. That is not what Respondent has claimed. Respondent simply claims the exclusion in the policy that excludes employees being covered under the policy when injured by another employee is not operative to prevent a claim because said exclusion was not brought to the attention of the insured. This is an important issue in this case and needs to be understood on what the jury decided the Petitioner did not do..

It is within these contexts that Respondent will respond to Petitioner's four assignments of error.

PROCEDURAL HISTORY

The Respondent's son, Gerald Kirchner, was accidentally shot and killed on June 6, 1997 at a sporting goods store owned by Grimmatt Enterprises, Inc., d/b/a Park Center Sporting Goods, David Grimmatt, President, located in Rainelle, West Virginia. As a result of the accidental shooting, Respondent caused to be filed a Complaint and an Amended Complaint in the Circuit Court of Greenbrier County, West Virginia, against Petitioner.

The original complaint was filed on December 19, 1997 (See Certified Docket [Cert. Doc.] R0001). Numerous summary judgment motions were filed by the parties with the result being the sole issue remaining to be resolved as determined by the Court in its June 17, 2011, Order was as stated by the Court

They do, however, require that they be provided and disclosed to the insured. That fact is in contention. And, therefore, that fact is made material as to whether the exclusion can be enforced. As to whether the exclusion was in effect would depend on whether the terms and conditions were fully and appropriately even provided and then disclosed to Mr. Grimmett. (Cert. Doc. R0928 and R0929)

STATEMENT OF FACTS

Mr. David Grimmett worked for Aide's Department Store in Rainelle, West Virginia, from 1971 to 1995 until the store closed (Cert. Doc. R1003). In 1995 Mr. Grimmett decided to open a sporting goods store including selling firearms (Cert. Doc. R1005, lines 13-15). Mr. Grimmett has a high school education with no post high school education. (Cert. Doc. R1004). Mr. Grimmett had no experience in buying commercial insurance prior to purchasing the policy in September 1995. Mr. Grimmett had never taken any insurance courses nor had he been taught how to read insurance policies. (Cert. Doc. R1004) Mr. Grimmett was looking for insurance because his lease required him to have insurance. (Cert. Doc. R1024 and R1025) Mr. Grimmett got the name of Emery & Webb out of Fishkill, New York, an agent of Petitioner. Mr. Grimmett called Emery & Webb and talked with Mr. Normand Emard, a non-resident sales agent for Petitioner. Mr. Emard had only two or three conversations with Mr. Grimmett that lasted no more than ten minutes each. Mr. Emard sent a sales offer proposal to purchase insurance dated September 21, 1995, to Mr. Grimmett (See Cert. Doc. R1140). Plaintiff's Exhibit No. I at trial. The document spells out coverages and premium amounts. Notably, it does not mention exclusions. On September 27, 1995, Mr. Grimmett approved paying \$607, one quarterly payment, as indicated on the offer document. Mr. Emard never reviewed the actual policy with Mr. Grimmett. Mr. Emard never reviewed the declaration pages with Mr. Grimmett. Mr. Emard

never got a copy of the actual policy sent to Mr. Grimm. Mr. Emard never reviewed or discussed any policy exclusions nor did he warn Mr. Grimm there were policy exclusions. Mr. Emard did not recall having any conversations with Mr. Grimm concerning renewal of his policy. (See Cert. Doc. R2093-R2094.) Agreed stipulation regarding the testimony of Normand Emard.

Mr. Grimm repeatedly testified that he did not read the liability policy exclusions or the policy in general nor did he understand same. (Cert. Doc. R1038, lines 4-7) (Cert. Doc. R at 1055, lines 11-12) (Cert. Doc. R1066, lines 11-13) (Cert. Doc. R1033, lines 23-24) (Cert. Doc. R1034, line 1),

Mr. Levicoff, Petitioner's attorney, stipulated at trial that Plaintiff's Exhibit 3, the first policy for 1995-1996, was the copy he got from Mr. Grimm's file. (See Cert. Doc. R1010, lines 23-25). The declaration pages of said exhibit (See Cert. Doc. R. at 1144-1146), shows the premium charged Mr. Grimm. No where on said pages nor anywhere else do the declaration pages show a reduction in premium for exclusions. (See Cert. Doc. R1144) The declaration page contains a list of forms by number that make up the total policy. Note in reviewing said policy forms, unlike what Petitioner represented, the forms are not put together in the order in which they are listed (See Cert. Doc. R1142 and R1211). Nothing in the declaration pages reference any exclusions nor do the declaration sheets direct you to exclusions. Mr. Emard stated the declaration sheets are part of the policy (See Cert. Doc. R0952) Mr. Emard was the only person from Petitioner to discuss purchasing insurance with Mr. Grimm. (See Cert. Doc. R0952)

Petitioner since 1992 had a form No. BP 70161292 entitled "Quick Reference. Special Businessowners Policy" (See Cert. Doc. R1212) This document serves as a Table of Contents

and directs you to the policy form and the contents of each form including page numbers for exclusions. Importantly, this form was not included in either of Mr. Grimmatt's policies. We know this because the form numbers are not on either policy declaration sheets (See Cert. Doc. R1144 and R1214). As importantly, it was not contained in the policy introduced by Petitioner at the trial. (See Cert. Doc. R1285-R1334). The renewal policy was not countersigned. See Respondent's trial Exhibit 6 (Cert. Doc. R1220), nor was the amended renewal declaration countersigned. See Respondent's trial Exhibit 5. (Cert. Doc. R1214) The renewal declaration sheet (Cert. Doc. R1220) states "THE POLICY DECLARATION EXTENSION WHICH FOLLOWS LISTS ALL FORMS THAT APPLY TO THIS RENEWAL ..." Cert. Doc. R1223 lists the forms that apply but does not list the Quick Reference Table of Contents, Form BP70161292. This is the policy that was allegedly in force at the time of the accidental shooting.

Mr. Levicoff, Petitioner's attorney, at trial admitted the Quick Reference Guide was not in the policy but tried to have Mr. Grimmatt testify that in a previous deposition he was given a copy of the policy he actually received that had the Quick Reference Guide in it. (Cert. Doc. R1066-R1071) However, on redirect, Plaintiff's Counsel showed in said transcript of the deposition the policy Mr. Grimmatt was looking at was not Mr. Grimmatt's policy, but a copy of a policy Plaintiff's Counsel, Mr. Leon, received from Emery & Webb. (Cert. Doc. R1078) Thus, Mr. Grimmatt never saw the Quick Reference Guide prior to the accidental shooting!

Mr. Grimmatt received a letter from Emery & Webb with the first policy (Cert. Doc. R1141), stating in part "Please 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." Mr. Grimmatt testified that he did get the letter and glanced at it. (Cert. Doc. R1052 at lines 9 and

10)

Under cross examination, Mr. Grimmatt testified as to the letter, “I really didn’t understand what exclusions and stuff meant.” (Cert. Doc. R1051, lines 12-13)

When asked why he didn’t read his policy carefully, Mr. Grimmatt responded, “Because American States called me up and let me talk to someone on the telephone, and he sold me something and what he sold me, we was in verbal agreement on and that’s what I thought I was buying.” (Cert. Doc. R1050, lines 8-11)

Mr. Grimmatt was also asked on cross examination why after he got the letter he didn’t call Emery & Webb to ask what exclusions meant. Mr. Grimmatt responded, “No, because the agent didn’t talk to me about exclusions, so I didn’t think exclusions was a big deal.” (Cert. Doc. R1052, lines 6-10)

Mr. Grimmatt never saw the insurance policy before he purchased same. The policy was sent to him some 25 days after its effective date of October 1, 1995. Mr. Grimmatt purchased the insurance policy based on the sales offer and the agent’s comments. See Exhibit A attached, copy of Cert. Doc. R1140.

SUMMARY OF ARGUMENT

The Respondent believes Petitioner is asking the Court to use the wrong standard of review. On page 16 of the Appeal, Petitioner asserts the Court should use a *de novo* review standard, asserting it is a question of law. Respondent believes that the review standard is that of reviewing a civil jury verdict. As stated in *Bryan v. Big Two Mile Gas Co.*, 213 W. Va. 110 (2001)

We review jury determinations (assuming that the jury was

properly instructed) under a highly differential standard.

Said standard being much less than a *de novo* review. Petitioner as part of its appeal argument, paragraphs Nos. III and IV, are appealing the Court's denial of their motion for a directed verdict and motion for judgment notwithstanding a verdict.

The Court in *James v. Knotts*, 227 W. Va. 65 (2010) in Syllabus Points 1, 2, and 3 indicate what the standard of review is for reviewing the appeal for judgment notwithstanding the verdict:

1. ...In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on a denial of a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of the appellate court to reverse the circuit court and to order judgment for the appellant.

2. In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved...

3. An appellate court will not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of the evidence.

The trial court below determined the exclusion in question was not ambiguous and was conspicuous. The only issue the court believed was a factual issue was whether exclusions were brought to the attention of Mr. Grimmatt. The court determined that issue was a factual issue for

the jury to decide based on the decision in *Luikart v. Valley Brook Concrete and Supply, Inc.* 216 W. Va. 748 (2005) and *National Mut. Ins. Co. V. McMahon and Sons*, 177 W. Va. 734 (1987).

Respondent believes the circuit court made the correct decision in denying the motion for a judgment notwithstanding the verdict because, in reviewing the evidence in light most favorable to the non-moving party, the Plaintiff believes said evidence is sufficient to support the jury verdict as Respondent will explain in detail in its argument.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues presented by Petitioner are issues that qualify for oral argument under Rule 19 of the Rules for Appellate Procedure in that all the issues involve arguments in the application of settled law.

However, the Respondent's Cross-Assignments of Error, Issue No. 1, is an issue of first impression, whether an uncountersigned insurance contract is an illegal/unenforceable contract by the insurer and, thus, qualifies for oral argument under Rule 20 of the Rules for Appellate Procedure.

Issues Nos. 2 and 3 of Respondent's Cross-Assignments of Error would qualify under Rule 19 for oral argument which involve issues in the application of settled law.

If the Court would determine oral argument would be helpful to the Court, the Respondent would gladly appear.

RESPONDENT'S ARGUMENT

ARGUMENT NO. 1: For an insurer in West Virginia to deny liability through a policy exclusion, do they have to prove they brought the exclusion to the attention of the insured and is the issue of proving whether the insurer brought the exclusion to the attention of the insured a factual issue for a jury or a legal issue to be decided by the Court?

The central issue in this case is whether the duty of Petitioner to bring the exclusion in question to the attention of the insured is a factual decision for a jury or a legal decision for the court. Said finding determines the standard of review this court should use.

The Petitioner states the review standard is a *de novo* standard, page 16 of their brief, because “The interpretation of an exclusion within an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court’s granting of summary judgment, shall be reviewed *de novo* on appeal, citing Syllabus Point 4, *Blankenship v. City of Charleston*, 223 W. Va. 822 (2009) and Syllabus Point 2, *Riffe v. Home Finders Assoc., Inc.*, 205 W. Va. 216 (1999).

However, Petitioner ignored Syllabus Point 3 of *Blankenship, supra*, which states

Determination of the proper coverage of an insurance contract where the facts are not in dispute is a question of law.

So, clearly, the court in *Blankenship, supra*, at Syllabus Point 3 indicates that if the facts are not in dispute, it is a question of law; but in this case the facts are in dispute as to whether Petitioner brought the exclusions to the attention of the insured, so it is a factual standard for a jury and not a question of law. The insurance company has the burden of proving the facts necessary to the operation of any exclusion to avoid liability. In *Luikart, supra*, at 752, citing *National, supra*, the court determined West Virginia Jurisprudence “...imposes a duty to bring such exclusion to the attention of the insured.” This issue is not one of an “ambiguity”. Therefore, the circuit court determined this was an issue of fact. The circuit court was correct in determining this was a factual issue because in *National, supra*, at Syllabus Point 7 states:

An insurance company seeking to avoid liability through the operation of an

exclusion and has the burden of proving the facts necessary to the operation of that exclusion.

The circuit court properly believed there were material issues of fact concerning whether the insurer had met its duty and proved the operative facts to bring such exclusion to the attention of Mr. Grimmett. Therefore, the circuit court ordered a jury trial.

The only case the Respondent could find published since *Luikart, supra*, that has considered the issue of failure to disclose exclusions to an insured is Federal Eastern District Court case of *Canal Ins. Co. V. Sherman*, 430 F Supp 2d 478 (2006). Sherman was a West Virginia resident and his trucking company insurance was purchased in West Virginia. The accidental death happened in Pennsylvania. All parties agreed West Virginia law applied to the declaratory action. The Pennsylvania court went into a detailed analysis of the *Luikart, supra*, case and the *National Mut. Ins., supra*, case. The court specifically stated at 488:

However, and more important to the case at bar, an insurer not only must demonstrate that the exclusions were made conspicuous in the contract, but also “must bring such provisions to the attention of the insured.” Natl. Mut. Ins., 356 S.E. 2d at 496. If the insurer did not expressly bring the exclusion to the insured’s attention, the insurer may still “avoid liability by proving [(1)] that the insured read and understood the language in question, or [(2)] that the insured indicated his understanding through words or conduct.” Id. The burden is on the insurer to demonstrate that it satisfied the duty to explain exclusions to the insured. To satisfy such a burden, the West Virginia Supreme Court instructs that:

Methods by which insurers may effectively communicate an exclusion to an insured to secure his/her awareness thereof may include, but are not necessarily limited to, reference to the exclusion and corresponding premium adjustment on the policy’s declarations page or procurement of the insured’s signature on a separate waiver signifying that he/she has read and understood the coverage limitation.

Luikart, 613 S.E. 2d at 753 (quoting Mitchell v. Broadnax, 537 S.E. 2d 882,

895, n. 24 (W. Va. 2000), superceded by statute in Findley v. State Farm Mut. Auto, Ins. Co., 576 S.E. 2d 807 (W. Va. 2002).

Unlike the insured in *Luikart* who acknowledged that he read the key aspects of the policy, Canal has offered no evidence as to Sherman's understanding of the exclusions. These naked assertions, speculation and conclusory allegations are insufficient to show the absence of a genuine issue of material fact that Sherman demonstrated his understanding of the exclusions through words or conduct. Therefore, Canal's motion for summary judgment that the exclusions bar coverage will be denied.

The court then considered Sherman's motion for summary judgment and determined that Sherman had proven that there was no genuine issue of material fact and granted Sherman's judgment based on Canal's failure to bring the exclusions to the attention of the insured or prove that Sherman had read and understood the policy or showed he understood through words or conduct. Petitioner had eight years from the time of the *National, supra*, decision in 1987 to modify their policy to clearly disclose the exclusion to an insured. Petitioner chose not to meet the requirements of *National, supra*.

Petitioner in its argument III states that the requirement of *Luikart, supra*, and *National, supra*, to bring the policy exclusion to the attention of the insured is unnecessary and in any event was a legislative function.. If the West Virginia legislature believed the requirement of *Luikart, supra*, and *National, supra*, cases were an intrusion into their legislative function, they have had 25 years since *National, supra*, to change said ruling legislatively but have chosen not to do so.

ARGUMENT NO. 2: BY FINDING THAT THE ISSUE OF BRINGING THE POLICY EXCLUSIONS TO THE ATTENTION OF THE INSURED IS A FACTUAL ISSUE, THEN THE PROPER STANDARD OF REVIEW IS AS STATED IN SYLLABUS POINTS 1, 2, AND 3, OF *JAMES V. KNOBBS*, 227 W.VA. 65 (2010) AND NOT A *DE NOVO* STANDARD AS PETITIONER ALLEGES. HAVING FOUND THE INSURER HAD TO BRING THE POLICY EXCLUSIONS TO THE ATTENTION OF THE INSURED IS A FACTUAL ISSUE. THE QUESTION BECOMES, WHAT

FACTS MUST THE INSURER PROVE TO MAKE THE POLICY EXCLUSIONS OPERATIONAL?

The standard of review for this case is well stated in Syllabus Points 1, 2, and 3 of *James, supra*. All the Respondent must do to have the jury verdict upheld is to show the evidence that was produced to the jury was sufficient to support the verdict. It should be noted the Petitioner did not attack the jury instruction on appeal so there is no issue of failure to properly instruct the jury.

The Petitioner presented sufficient evidence to the jury to support the jury verdict as to the sole issue presented to the jury “was the exclusionary language at issue in this case brought to the attention of the insured, Grimmatt Enterprises, Inc.?”

It should be noted only one witness was called in this case. No one from Petitioner’s company testified except by stipulations sent to the jury. The question presented under *Luikart, supra*, and *National, supra*, in Syllabus Point 7 is what facts would Petitioner have to present to fulfill their duty to the insured to make the exclusions in question operational; i.e., what facts should have the Petitioner presented to prove that they brought the exclusion to the attention of Grimmatt? West Virginia Jurisprudence provides the answer to that question.

A. By proving the agent of Petitioner discussed and explained the exclusions to Grimmatt. No evidence was produced at trial that anyone discussed or pointed out the specific exclusion on employee coverage to Mr. Grimmatt. As a matter of fact, the only sales person Mr. Grimmatt talked with by stipulation into the record (Cert. Doc. R0952) stated at paragraph No. 6, “Mr. Emard never reviewed or discussed any policy exclusion with Mr. Grimmatt nor did he warn Mr. Grimmatt there were exclusions to the

coverage.” See *Luikart, supra*.

B. By proving that the insured read and understood the language in question. As stated in Respondent’s statement of facts, Mr. Levicoff in his cross examination asked Mr. Grimmatt (Cert. Doc. R1066, lines 11-13),

Q. All right, you weren’t sure because you didn’t read it. Is that right?

A. No, I had no reason to read it. (Referring to the specific employee exclusion)

Mr. Grimmatt was questioned as to his understanding of the exclusion (Cert. Doc. R1033, lines 25 and at R. 1054, lines 1 and 2:

Q. At anytime you did that did you understand that you had an exclusion that didn’t cover this?

A. No.

C. As noted before, the *National, supra*, case, at 742 states

Of course, the insurer may avoid liability by proving that the insured read and understood the language in question or that the insured indicated his understanding through words or conduct.

Mr. Grimmatt being the only witness never indicated he ever read and understood the language in question and never indicated his understanding through words or conduct. In their argument No. IV Petitioner completely misconstrues the language in *National, supra*, as stated above. The Respondent has not and cannot under *Luikart, supra*, and *National, supra*, claim that the exclusions were not brought to his attention based on the fact that he did not read the policy. That is a complete misreading of these cases. What *National, supra*, said was even if the policy language exclusions were not brought to the

attention of the insured, the insurer can still avoid liability by proving that the insured read and understood the language in question or that the insured indicated his understanding through words or conduct. If Petitioner would have presented by a preponderance of the evidence that Mr. Grimmert did read and understand the policy exclusions or indicated his understanding through words or conduct, the Petitioner would have been “off the hook” and the exclusions would have been applied. That is the correct reading of *National, supra*, and *Luikart, supra*, because in *Luikart* the court found that the President admitted to reading and did not say that he did not understand the terms of the policy. Petitioner is clearly wrong in their assertion contained in argument No. IV. The court never stated or implied in any ruling or order that Mr. Grimmert’s failure to read the policy was grounds for the exclusions not to apply.

It is important to note in *National, supra*, that the language requiring the exclusions be brought to the attention of the insured is immediately before the language regarding the insurer may avoid liability by proving the insured read and approved the policy as is clearly discussed and covered in *Canal, supra*.

D. Noting the exclusions on the promotional/offer given to the insured.

Petitioner’s first written correspondence to Mr. Grimmert was an insurance offer (See Cert. Doc. R1140), attached as Exhibit A. Mr. Grimmert testified regarding the offer (Cert. Doc. R1006, lines 7 and 8)

Q. And what is that document?

A. That is basically what we went over and that is what I bought off of.

Most importantly, there is no mention in the offer document of exclusions to the policy.

Syllabus Point 7 of *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216 (1999) states

7. Where an insurer provides sales or promotional materials to an insured as an inducement to enter into an insurance policy, which the insurer knows or should know will be relied upon by the insured, any conflict between such materials and the insurance policy will be resolved in the insured's favor.

The failure of the Petitioner to place notice of exclusions in its offer caused Grimmatt not to be concerned over exclusions because, as stated before, Petitioner's sales agent, Mr. Emard, never told Grimmatt there were exclusions. The offer letter is a promotional item and Grimmatt was justified in trusting/relying on it. His payment for the policy was made based on the letter (Cert. Doc. R1007, lines 23-25). The document on its face shows it was written on September 21, 1995, and payment of \$607 was sent on September 27, 1995, some three days before the policy was to be effective on October 1, 1995 and some 30 days before Grimmatt got a policy. The Petitioner's agent sent the offer intending Grimmatt to rely on same to purchase insurance and talked with Grimmatt and did not disclose or warn of exclusions. Their failure to disclose and warn there were exclusions prevents the Petitioner from asserting same under *Riffe, supra*. It is unquestionable that Grimmatt purchased the insurance from the offer material. The offer letter quoted a premium of \$2,428.00 but does not show any reduction for exclusions per *Luikart, supra*.

E. The premium calculation given to Mr. Grimmatt was contained in the policy declaration sheet for the policy in effect at the time of the accidental shooting and said calculation did not include any adjustment for any premium adjustment. (See Cert. Doc. R1214 and R1216). The declaration sheet did not reference exclusions. *Luikart, supra, at 753,*

Methods by which insurers may effectively communicate an exclusion to an insured to secure his/her awareness thereof may include, but not necessarily limited to, reference to the exclusion and corresponding premium adjustment on the policy's declaration page.

The Petitioner presented no evidence that Mr. Grimmatt received a premium adjustment for exclusions nor did any declaration sheet alert Mr. Grimmatt to the fact there were exclusions. *Luikart, supra*, clearly indicates reference to “the” exclusion and corresponding premium adjustment on the policy declaration page. “The” means the specific exclusion the insurer is trying to apply.

F. The Petitioner did not produce any evidence that they had Mr. Grimmatt sign a separate waiver indicating he had read and understood the coverage limitation. See *Luikart, supra*, at 753

...or procurement of the insured's signature on a separate waiver signifying that he/she has read and understood the coverage limitation.

It is interesting to note in Footnote 5 of *Luikart, supra*, , the court reveals the person who sold the insurance policy to Valley Brook was the previous President of Valley Brook, and the father of the current President of Valley Brook, the purchaser. No such inter-relationship exists in this case.

G. The Petitioners cannot show that they communicated the existence of policy exclusions by placing them in a Table of Contents within the policy. *Luikart, supra* at 753. Most perplexing in this case is the fact the Petitioner had a form to indicate clearly to Mr. Grimmatt exactly where the exclusions were located in his liability section of his policy, but neglected to include it in his policy. No explanation was given at trial why the Table of Contents Form No. BP70161292 dated 1992 (Cert. Doc. R1212) was not in

Grimmett's policies. Mr. Levicoff, Petitioner's attorney, admitted that the Quick Reference Guide was not in Grimmett's policy. (See Cert. Doc. R1066, lines 16 and 17). Mr. Levicoff attempts to show Mr. Grimmett had seen the form in 2005 in his deposition, but the policy copy used in the deposition was not Mr. Grimmett's policy. The deposition policy copy came from Emery & Webb (See Cert. Doc. R1078, lines 19-25 and R1099, lines 1-15). The first time Mr. Grimmett saw the Quick Reference Table of Contents was at his deposition in 2005.

H. The Petitioner sent Mr. Grimmett four sets of declaration pages. The first with the original policy (Cert. Doc. R1144-R1146); then amended declarations page of the first policy dated October 24, 1995, adding mortgagee (Cert. Doc. R1148-R1150); Renewal Declarations (unsigned dated October 1, 2006; (Cert. Doc. R1222); Amended Declarations dated October 1, 1996 (Cert. Doc. R1214-R1216 [unsigned])). None of the declaration sheets show the Quick Reference Table of Contents being a form in the policy. No where in any of the declarations sheets is there reference to any policy exclusions. Although the declaration sheets indicate the premium for the policy, it does not show any premium adjustment for exclusions. The declaration sheets are the first pages of the policy. Just listing the policy form number and the form name as is the case in Grimmett's declaration pages does not communicate any exclusions in the policy or direct him to exclusions in the policy. The only form that did that was the aforementioned Table of Contents Quick Reference form, which was not in any policy given to Grimmett. The declarations sheets are the first pages of the policy and what most insureds look at for insurance coverage. The declarations sheets could easily have

told the insured to read the policy and exclusions. They did neither.

3. Petitioner rests its case largely on the October 21, 1995, letter to Mr. Grimmert telling him to read his policy carefully and that in event of a loss coverage will be controlled by the terms, conditions, and exclusions of your policy. The letter did not refer him to where the exclusions could be found in the policy. Mr. Grimmert testified he may have glanced at the letter in the mail (Cert. Doc. R1050, lines 23-25). No letter was sent to Mr. Grimmert with his renewal policy. It should be noted the liability policy stated to read your policy carefully as restrictions may apply, not that exclusions may apply. Petitioner's argument does not impeach the jury verdict when you take into consideration that the sales agent did not alert exclusions in the policy to Mr. Grimmert. The offer letter that he actually purchased and paid the first quarterly premium from did not alert Mr. Grimmert to any exclusions. The four declaration sheets that he received did not alert him to any exclusions nor tell him to read it. He did not sign anything indicating that he understood the exclusions or policy terms. There was nothing in his premium calculation that indicated his premium was reduced for exclusions. Mr. Grimmert did not think much about exclusions because the agent never said anything about exclusions, only what was covered (Cert. Doc. R1052, lines 9 and 10). The preponderance of the evidence definitely was that Petitioner did not bring the exclusions in question to the attention of Petitioner.

4. Petitioner argues at least three times that Mr. Grimmert was warned about reading his policy carefully: once in the October 21, 1995 letter; once in the policy on the form on liability coverage; and once in the second policy on the form on liability coverage. However, as indicated in *Luikart, supra*, at 753, the most logical place to warn Mr. Grimmert about reading his policy and about exclusions was on the first three pages of the policies, the declaration pages. Mr.

Grimmett looked at the declaration pages to see if the coverages were the same as what was in his offer letter. Nothing in the list of the forms (by number) in the declaration pages indicates exclusions. The Petitioner is saying Mr. Grimmett would have had to examine each form to find out about exclusions and get a notice to read his policy. As stated in *National, supra*, the burden of proof is on the insurer to prove the facts that make the exclusions operational. Thus, there was more than sufficient evidence presented to the jury for them to find Petitioner did not bring the exclusions to the attention of Mr. Grimmett.

5. In recapping the facts under West Virginia Jurisprudence, as indicated above, the Respondent has proven by a preponderance of the evidence that Petitioner has failed to prove the following:

- (1) Did not put notice of the exclusions in the offer letter regarding each coverage;
- (2) The agent did not disclose to Mr. Grimmett there were exclusions in the policy or discuss same with him prior to purchase.
- (3) Did not show a reduction in Grimmett's premium for exclusions in the declarations pages nor reference exclusions;
- (4) Left out of Respondent's policies the Table of Contents in the policy indicating there were exclusions and how to find them;
- (5) Did not prove Grimmett read and understood the policy and exclusions or acted as he did;
- (6) Did not have the insured sign a waiver indicating he read the policy and understood the coverage limitations.

CONCLUSION

Most damaging is the offer letter that spelled out the dollar limits of the coverages Mr. Grimmatt was getting did not indicate the coverages were subject to exclusions. For a first time commercial insurance buyer, Mr. Grimmatt had every right to believe his coverages did not have exclusions. Mr. Grimmatt purchased his insurance on the basis of his conversation with Mr. Emard who did not mention exclusions and his offer letter that did not disclose any exclusions. In addition, the premium quoted did not show a reduction for exclusions.

Mr. Emard was justified in his belief his policy did not have exclusions. It is difficult to comprehend that an agent would not discuss exclusions to the policy with Mr. Grimmatt or disclose there are exclusions in the offer letter. Mr. Grimmatt purchased the insurance from the offer letter, and the agent's representations which are not contested. Under *Riffe, supra*, the After failing to inform or put Grimmatt on notice of any exclusions prior to his purchase, Petitioner cannot assert the exclusions in question apply because they provided sales materials to Grimmatt to induce Grimmatt to buy without disclosing any exclusions applied. Grimmatt acted on and purchased the insurance justifiably relying on those representations enforced by the fact the agent admits he did not discuss or warn of any exclusions prior to the purchase. Therefore, *Riffe, supra*, applies, exclusions fail.

RESPONDENT'S CROSS ASSIGNMENTS OF ERROR

INTRODUCTION

Questions Presented

The Respondent respectfully presents to this Court the following Cross Assignments of Error. Item No. 1 and Item No. 2 below are items appealed from the June 17, 2011 Order entered by the Circuit Court (Cert. Doc. R0925 -R0930), denying Respondent's Summary Judgment Motion.

1. The Respondent filed a summary judgment motion with the court dated May 4, 2011 (See Cert. Doc. R0862 - R0900) on the issue of whether the failure of the Petitioner to either sign the contract in question or have it signed by a resident agent made said contract an illegal or unenforceable contract under West Virginia Code §33-12-11. The court denied said motion.

2. The Respondent filed a summary judgment motion on May 4, 2011 (See Cert. Doc. R0862-R0900) on the issue of whether the term "all other aggregate" as defined in the policy is ambiguous and Respondent had total liability coverage of \$2,000,000 instead of \$1,000,000. The Court denied said motion.

Item No. 3 appeal is based on the Circuit Court's ruling at the end of the trial (Cert. Doc. R1090-R1096).

3. The Respondent requested the Court to give a reasonable expectation of insurance instruction (Plaintiff's Instruction No. 2 - Cert. Doc. R0939-R0940) to the jury to allow the jury to consider whether based on the facts presented at trial applied to this legal theory. The Court refused the instruction and the Respondent objected to not giving the instruction on the record.

STATEMENT OF THE CASE

I. INTRODUCTION

This will serve to supplement the Respondent's Statement of the Case only as to Respondent's Cross Assignment of Errors.

II. PROCEDURAL HISTORY

The Respondent had filed a Summary Judgment Motion originally on July 20, 2010 on Respondent's Questions 1 and 2 among other issues. The Court in its Order did not address said questions 1 and 2. (See Cert. Doc. R0840 -R0848) dated September 24, 2010. Respondent filed a renewed motion on May 4, 2011 on questions 1 and 2 asking the Court to make a decision (record) on these issues. The Court in its Order noted it had not properly addressed in the September 24, 2010 Order the matters represented in Respondent's original motion. The Court denied questions 1 and 2.

The Respondent requested the Court to give Respondent Jury Instruction No. 2 regarding reasonable expectation of insurance coverage. The Court heard Respondent's argument for giving the instruction, but decided not to give the instruction wherein the Respondent noted his objection on the record stating it was a correct statement of the law and there was a factual basis presented for giving the instruction.

III. STATEMENT OF THE FACTS

West Virginia Code §33-12-13, until it was amended in 2004 required commercial insurance policies to be countersigned by a resident agent. The amendment removed such requirement for policies issued after June 1, 2004. Note the Code section was amended, not repealed, thus "saving" the enforcement of said requirement for policies issued prior to the

amendment.

During the period the Grimmatt policies were issued, Emery & Webb's agent for Petitioner had no one registered as a resident state agent in West Virginia. John C. Webb did not become a licensed resident agent with Petitioner in West Virginia until August 26, 2009. (See Admission No. 8, Cert. Doc R0854 and Cert. Doc. R0886)

The declarations page of the policies issued to Grimmatt is where the countersignature was to be placed. (See Cert. Doc. R1287)

John C. Webb countersigned the first Grimmatt policy on October 23, 1995, knowing he was not a licensed West Virginia resident agent and caused said policy to be mailed to Grimmatt in West Virginia, all in violation of West Virginia Code §33-12-11 (See Cert. Doc. R1287)

Petitioner's agent, Emery & Webb, sent to Grimmatt an amended declarations sheet on or after October 24, 1995, said sheet was not countersigned. (See Cert. Doc. R1148)

Emory & Webb sent a renewal declaration page to Grimmatt with the policy for October 1, 1996 to October 1, 1997, showing a premium of \$2,450.26. Said declaration sheet was not countersigned. (See Cert. Doc. R1220).

Emery & Webb sent an amended declaration sheet to Grimmatt showing a change in personal property coverage indicating a premium refund of \$550.45. The amended declaration sheet was not countersigned. (See Cert. Doc. R1214)

Emery & Webb, Inc. was not licensed in West Virginia as an agency in 1995-1997. Emery & Webb did not become licensed until October 28, 2003 to conduct business in West Virginia. (See Cert. Doc. R0897)

Mr. Grimmatt after contacting Petitioner's agent to purchase insurance talked with Mr.

Normand Emard approximately three times for no more than ten minutes per conversation. (See Cert. Doc. R0952)

Mr. Emard's deposition was taken in New York. However, the parties agreed to the pertinent part of Mr. Emard's testimony and stipulated to said testimony in a document. (See Cert. Doc. R0952-R0953). The document was read into the record to the jury and given to the jury during deliberations and contained the following:

1. Mr. Normand Emard an employee of Emory & Webb and a nonresident sales agent of American States Insurance Company was the only person to discuss purchasing commercial insurance through American States Insurance Company with Grimmett Enterprise, Inc.
2. Mr. Emard sent to Mr. Grimmett an insurance sales proposal.
3. Mr. Emard never reviewed the actual policy with Mr. Grimmett.
4. Mr. Emard never reviewed the policy declarations pages with Mr. Grimmett. The policy declarations pages are a part of the policy of insurance.
5. Mr. Emard never saw the actual policy that was sent to Mr. Grimmett.
6. Mr. Emard never reviewed or discussed any policy exclusions with Mr. Grimmett nor did he warn Mr. Grimmett there were exclusions to the coverage.
7. Mr. Emard only had two or three conversations with Mr. Grimmett prior to his purchasing insurance, said conversations lasting no more than ten minutes each.
8. Mr. Emard did not recall having any conversations with Mr. Grimmett concerning renewal of his policy.

Mr. Emard an employee of Emery & Webb and a nonresident sales agent of American States Insurance Company was the only person to discuss purchasing commercial insurance through American States Insurance Company with Grimmett Enterprise, Inc. Mr. Emard sent to

Mr. Grimmatt an insurance sales proposal. Mr. Emard never reviewed the actual policy with Mr. Grimmatt. Mr. Emard never reviewed the policy declarations pages with Mr. Grimmatt. The policy declarations pages are a part of the policy of insurance. Mr. Emard never saw the actual policy that was sent to Mr. Grimmatt. Mr. Emard never reviewed or discussed any policy exclusions with Mr. Grimmatt nor did he warn Mr. Grimmatt there were exclusions to the coverage. Mr. Emard only had two or three conversations with Mr. Grimmatt prior to his purchasing insurance, said conversations lasting no more than ten minutes each. Mr. Emard did not recall having any conversations with Mr. Grimmatt concerning renewal of his policy.

The sales proposal/quote did not reference any exclusions to the quoted coverages. (See Cert. Doc. R1140)

The sales proposal/quote quoted a premium of \$2,428 but did not reference any reduction in premium for any exclusions (See Cert. Doc R1140).

Mr. Grimmatt caused to be paid \$607 (quarterly payment) on September 27, 1995 (Right hand corner of Cert. Doc. R1140).

Mr. Grimmatt purchased the insurance based on his conversation with Mr. Emard and receiving the sales proposal/quote never having seen the policy.

Mr. Grimmatt paid all premium through the date of the accidental death of Gerald Kirchner on June 6, 1997.

Mr. Grimmatt received the policy in effect at the time of the accidental death sometime after October 1, 1996. The policy was not countersigned (See Cert. Doc. R1214), and the policy itself declares in form 1L72010392 "...but this policy shall not be valid unless countersigned by a duly authorized representative of the company." (Cert. Doc. R1282)

Grimmett in his deposition testified he believed after reading the offer and the declarations pages he had \$2,000,000 coverage for “all occurrences”. (See Cert. Doc. R089, page 80, lines 4-7)

SUMMARY OF ARGUMENT

The Respondent raises the cross-assignment of error. All these are supported by substantial case law.

The first cross-assignment of error goes to the significance of the lack of a countersignature on an insurance policy as required by West Virginia Code §33-12-11. This Court somewhat addresses this issue in the *West, supra*, case; however, under different facts. The *West, supra*, case we believe gives insight into the non-enforceability of exclusions by an insurer when the policy is not signed.

The second cross-assignment of error is the ambiguity of the term “all other aggregate \$2,000,000” in a sales quote given by the Petitioner and similar language in the declaration page. Respondents believe the case of *Riffe, supra*, controls this issue concerning ambiguities, and the term as presented is ambiguous.

The third cross-assignment of error concerns the failure to give a reasonable expectation insurance jury instruction which is covered by *Costello v. Costella* , 145 W. Va. 349 (1995). Respondents believe there was sufficient evidence presented for the Court to give said instruction, and it was error not to give same.

RESPONDENT’S ARGUMENT

I.

THE RESPONDENT FILED A SUMMARY JUDGMENT MOTION WITH

THE COURT DATED MAY 4, 2011 ON THE ISSUE OF WHETHER THE FAILURE OF THE PETITIONER TO EITHER SIGN THE CONTRACT IN QUESTION OR HAVE IT SIGNED BY A RESIDENT AGENT MADE SAID CONTRACT AN ILLEGAL OR UNENFORCEABLE CONTRACT UNDER WEST VIRGINIA CODE §33-12-11. THE COURT DENIED SAID MOTION.

The standard of review of this issue is a *de novo* standard under *Blankenship, supra*, at Syllabus Points 2 and 3. There is no dispute of any fact regarding whether the policies and declarations sheets were signed or unsigned by a licensed resident agent.

The Circuit Court ruled in its Order as a Conclusion of Law:

1. The insurance policy, although not signed in accordance with West Virginia Code §33-12-11, it is still valid because it is not contended as illegal by the Defendants. The Court then found as a fact the liability limit to be \$1,000,000. (Cert. Doc. R0925-R0930)

The Court ordered:

The Plaintiff's Renewed Motion for Summary Judgment as to the claim that the insurance policy was illegal and that the Defendant should be precluded from arguing the exclusionary language is DENIED. It is from these rulings the Defendant appeals.

The State of West Virginia regulates insurance companies and agents through West Virginia Code §33-1-1, *et seq.* In *Security Nat. Bank v. First W. Va. Bankcorp.* 166 W. Va. 775 (1986), 277 S. E. 2d 613, the Court stated:

Private parties contracting about matters that are subject to state regulation suffer no constitutional impairment of contractual obligations when the legislature reasonably changes the regulations through its police power for the preservation of community order, health, safety, morals or economic well being.

In addition, in *Barefield v. DPIC Companies, Inc.*, 215 W. Va. 544 (2004), at 55, states

The insurance business is quasi-public in its character, and the state may, under its police power, ... prescribe the terms and conditions on which it may be conducted and generally to regulate it and all persons engaged in it.

Specifically, insurance companies are licensed under West Virginia Code §33-3-1, *et seq.*

Insurance producers and solicitors are licensed under West Virginia Code §33-12-1, *et seq.* The general provisions of the insurance code are found in West Virginia Code §33-4-1, wherein at §33-4-1, it states:

No person shall transact insurance in West Virginia or relative to a subject of insurance resident, located or to be performed in West Virginia without complying with the applicable provisions of this chapter.

West Virginia Code §33-4-8, of the general provisions, titled “General penalty” states:

In addition to the refusal to renew, suspension or revocation of a license or penalty in lieu of the foregoing, because of violation of any provisions of this chapter, it is a misdemeanor for any person to violate any provision of this chapter, and any person convicted of a misdemeanor for the violation of any provision of this chapter shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment.

The West Virginia Code of State Rules at Section 114-2-2, Requirements for Licensing, at 2.1. states:

Trustworthiness. - Insurers making application for individual insurance producers’ appointments shall make an investigation as to the suitability of the appointee. The appointing company shall, prior to submitting the appointment to this office, satisfy itself that the appointee is a suitable person and is trustworthy and qualified to act as its individual insurance producer. The Insurance Commissioner may, at any time, direct the appointing company to furnish proof that the company has made the investigation required by this subsection and that the investigation was made prior to the execution of the application for appointment.

West Virginia Code §33-12-11, up until December 31, 2004, required that all contracts

for insurance except for excess line insurance shall be “signed or countersigned in writing by a licensed resident agent of the insurer...”

The first policy No. 02-BO-558226-1 issued to Grimmatt Enterprises, Inc. By Petitioner dated October 1, 1995, had the declaration sheet countersigned by John C. Webb, Jr. Although this was not the policy in effect at the time the claim arose against Mr. Grimmatt, Mr. Webb was not a resident agent and never was a resident agent and only became Petitioner’s nonresident agent on August 26, 2009, some twelve (12) years after the claim.

The second declarations sheet sent to Grimmatt for the policy year 10-1-96 - 1-1-97 was not countersigned by anyone. Grimmatt Enterprise, Inc. reduced the amount of inventory coverage and Petitioner sent an amended declaration sheet to Grimmatt which was not countersigned by anyone.

The person who first talked with David Grimmatt concerning insurance was Normand Emard. Mr. Emard was an active nonresident licensed West Virginia agent for Petitioner, but he did not and could not sign the policy because he was not a resident agent as required by statute.

West Virginia Code §33-12-18(b) requires the insurer to appoint individual insurance producers as their agents. John C. Webb was not and Normand Emard was a nonresident agent. As stated above, under the West Virginia Code of State Rules, Section 114-2-2., it is the responsibility of the insurer, in this case Petitioner, to make sure Emery & Webb, Inc., had a resident agent in West Virginia to countersign policies. Petitioner knew or should have known that no one at Emery & Webb, Inc. Was qualified as a resident agent in the State of West Virginia for Petitioner during the years in question.

Petitioner provided Emery & Webb, Inc. insurance policies to be issued by them and

countersigned by Emery & Webb, Inc. or their agents, knowing that no one at Emery & Webb, Inc. was a resident agent qualified to countersign said policies as required by aforementioned statutes.

Petitioner in its Company common Policy Conditions states, ‘In Witness Whereof, the company has caused its policy to be executed and attested, but this policy shall not be valid unless countersigned by a duly authorized representative of the company.’” Petitioner knew that no one at Emery & Webb, Inc. Was qualified to be a duly authorized representative of the company to countersign the policies to be issued in the State of West Virginia.

In the case *Keith West and Susan West v. The West Virginia Department of Transportation, Division of Highways*, 680 S.E. 2d 346 (2009), the Court stated

Review of the policy relied upon by the lower court disclosed that not only was Endorsement No. 7 of the policy unsigned, but no signature appeared on any part of the policy, including the declarations page. The lack of signature on the contract for insurance is legally significant because at the time Policy RMGL 480-62-96 was issued there was a statutory requirement that all contracts of insurance be signed. W. Va. Code §33-12-11 (2002).

The Court in *West, supra*, remanded the case to the lower court for the purpose of developing a record on the significance of the unsigned contract and the unsigned endorsement No. 7 which, if signed, would have excluded coverage for *West*. The Circuit Court on remand found that even though the contract was not signed the Defendant insurance company and the state had admitted on the record the main contract was in full force and effect; however, found Endorsement No. 7 was unsigned and, therefore, was not part of the contract, and the state admitted on the record it was not signed. It should be noted that *West, supra*, did not argue the main contract was not enforceable because same provided coverage. Their argument was the

Endorsement No. 7 which would have excluded coverage was not enforceable because it was not signed, and the circuit court and the Supreme Court agreed; therefore, the exclusion because it was not signed was not enforceable. Basically, that is the same argument Respondent is making here. Because the policy was not signed, the exclusions in the policy are not enforceable.

As stated above, the licensing of insurance companies and their agents is done under the police powers of the State of West Virginia to preserve the community order, health, safety, morals and economic well-being of its citizens.

As the West Virginia Supreme Court of Appeals indicated in *West, supra*, it is legally significant that Petitioner did not have this subject policy countersigned as required at the time in the State of West Virginia, and they are charged under these circumstances with knowingly doing so.

In the case, *Lasting Products Company, a corporation v. Paul Genovese*, 197 Va. 1. 87 S.E. 2d 811 (1955), the Court stated:

The general rule is that a contract made in violation of a statute enacted to protect the public against fraud, imposition, or to safeguard the public health, or morals, is illegal and unenforceable by the guilty party. Additional discussion of this question would be mere repetition of what this Court has said in the following cases: *Cohen v. Mayflower Corp.* 196 Va 1153, 86 S.E. 2d 860; *Rohanna v. Vazzana*, 196 Va. 549, 84 S.E. 2d 440; *Surf Realty Corp. V. Standing*, 195 Va. 431, 78 S.E. 2d 901; *Bowen Electric Co., Inc. V. Foley*, 194 Va. 92, 72 S.E. 2d 388; *Colbert v. Ashland construction Co., Inc.* 176 Va. 500, 11 S..E.2d 612; *Massie and Miller v. Dudley*, 173 Va. 42, 3 S.E. 2d 176.

In addition, in a more recent case, *Black v. Marks, Stokes and Harrison*, 234 Va. 60, 360 S.E. 2d 345 (1987), the Court upheld the principle cited above in *Lasting, supra*, “that a contract made in violation of a statute enacted to protect thee public against fraud, imposition or to safeguard the public health or morals, is illegal and unenforceable by the guilty party.”

The Court in *Eure v. Jefferson National Bank*, 248 Va. 245 (1994), quoting *Colbert v. Ashland Construction Co.*, 176 Va. 500 (1940), state in Syllabus Point 5,

Where a statute expressly provides that a violation thereof shall be a misdemeanor, a contract made in direct violation of the same is illegal, and there can be no recovery thereon, although such statute does not inn express terms prohibit the contract or pronounce it void.

Finally, the United States Supreme Court in *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72 (1982), recognized that,

(T)he authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.

In support of the aforementioned cases, *Restatement of Contracts (First)*, at Chapter 18, §599, Ignorance of facts Rendering Bargain Illegal, states:

Where the illegality of a bargain is due to (a) facts of which one party is justifiably ignorant and the other party is not or (b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law, the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant or for losses incurred or gains prevented by non-performance of the bargain.

Many jurisdictions have applied the *Restatement of Contracts (First)* at Chapter 18, §599. In a similar case dealing with insurance, the Idaho Supreme Court in *Williams v. Continental Life & Accident Co.*, 100 Idaho 71, 593 P. 2d. 708 (1979), found that the insurance company could not deny coverage in excess of the statutory limit of \$10,000 per person on debt insurance when it had written policies and collected premiums for insurance over the \$10,000 limit where the individual/consumer had no knowledge of the limitation and had paid the premiums. In the case at bar, Mr. Grimmitt did not know of the statutory requirement, West Virginia Code §33-12-11,

of the policy having to be countersigned by a licensed resident agent of Petitioner. Most certainly Petitioner knew of the requirement and knew Emory & Webb, Inc., nor any of its agents, were licensed resident agents in West Virginia because Petitioner under the West Virginia Code §33-12-18(b) had to appoint them.

Insurance sales is an area of law where individuals are at an extreme disadvantage in dealing with large insurance companies and their agents. Insurance contracts such as the subject CGL policy are highly complex and technical. A lay person is at an extreme disadvantage. For example, the subject policy in its liability coverage section for what the insurance company will cover is 2 and 2/3 columns. However, the exclusion to said coverage is 9 columns, making it three times the coverage language. No one from Petitioner or their agents ever reviewed or pointed out the exclusion because no one ever talked to Mr. Grimmatt after he received the policy. Petitioner has a form BP 70 16 12 92 called "Quick Reference Special Businessowners Policy" which is an index or table of contents to direct the policyholder to the "Exclusions" to the policy. Said form, although available at the time Petitioner issued Mr. Grimmatt the policy for 10-1-96 to 10-1-97, never included it in Mr. Grimmatt's policy.

It is incredible that Petitioner, a licensed insurer in the State of West Virginia, did not make sure that before a policy was issued in West Virginia, it was countersigned by a licensed resident agent per statute and per the terms of the policy itself. It is also incredible that Normand Emard was provided no training by Petitioner regarding the laws and regulations relating to West Virginia insurance practices. (See page 22 of Emard's Deposition attached hereto as Exhibit C).

Petitioner could argue because the policy was not signed it is void. Such an argument would be totally against West Virginia public policy. Where an entity licensed by the State of

West Virginia has the statutory mandate that before it issues a policy in West Virginia, said policy must be countersigned by a licensed resident agent of the insurer. Said violation of statute is a criminal misdemeanor with fine and jail time (West Virginia Code §33-4-8). Said insurer cannot argue the policy is void and escape having to pay claims because of its failure to abide by said statute. West Virginia and its police power regulates insurance companies to protect its citizens from abuse.

CONCLUSION

Where an insurer knowingly violates West Virginia insurance law (West Virginia Code §33-12-11) by not countersigning insurance policies, the insurer is estopped from being able to raise any policy defenses under the battery of cases cited above and under the *Restatement of Contracts (First)*. However, the insured as the innocent/not guilty party is not estopped from claiming his losses or damages. West Virginia public policy will protect citizens/consumers from insurance companies who knowingly violate the insurance code. In addition, Petitioner put in the policy language that the policy is not valid if not countersigned by a representative of the company; however, Petitioner accepted all of Respondent's premium payments up to the time of the accidental death and, therefore, is estopped from denying coverage.

II.

THE RESPONDENT FILED A SUMMARY JUDGMENT MOTION ON MAY 4,2011 ON THE ISSUE OF WHETHER THE TERM "ALL OTHER AGGREGATE" AS DEFINED IN THE POLICY IS AMBIGUOUS. THE COURT DENIED SAID MOTION.

The standard of review for reviewing the lower Court's denying a summary judgment motion is *de novo* as a question of when the issue is determined is a contractual policy provision

is ambiguous. See *Luikart, supra*.

The Defendant is appealing the courts order denying the term aggregate in the Petitioner's policy was ambiguous. (See Cert. Doc. R. at 0925-0930) where the court found in its findings No. 4. The term aggregate is not ambiguous and Order Item No. 2, the Plaintiff's Renewed Motion for Summary Judgment s to the claim that the aggregate was ambiguous is DENIED.

The Circuit Court's reasoning in finding the term aggregate not ambiguous failed to understand the total language in the policy and declaration sheets and sales offer. The sales offer from which Mr. Grimmatt actually purchased his insurance only states, "All Other Aggregate \$2,000,000" with no further explanation. (Cert. Doc. R1140, Exhibit A attached)

The name of the insurance policy, Business Owners Ultra Plus Liability, (Cert. Doc. R1323) gave Mr. Grimmatt the belief he had "Ultra Plus Liability Insurance."

In Mr. Grimmatt's deposition on October 12, 2005 (Cert. Doc. R0899, page 77, lines 17-21):

Q. And below that what does it say?

A. All other injury or damage (all occurrences): \$2,000,000

Q. What did you think that meant?

A. That it would pay up to \$2,000,000

Page 78, lines 12-19:

Q. All other injury or damages (all occurrences) What does that mean to you?

A. I feel that anything not paid by Workers Comp would be paid up through the insurance company.

Q. Up to \$2,000,000?

A. Up to \$2,000,000

Page 79, lines 24 to page 80, lines 1-7:

Q. Did the insurance company call you up and say, “ This is what we’ll cover under Business Owners Ultra Plus Liability”?

A. No.

Q. You knew you had up to \$2,000,000 for some sort of liability coverage for all coverage from the second page, right?

A. I thought I did.

The above aggregate limits language, Section 4.b. and the declarations language above is on its face ambiguous. The term “occurrence” is defined in the policy (See Cert. Doc. R1260) to “mean an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Thus, anywhere occurrence is used it can be replaced with accident. The declaration page thus reads all other injury or damage (all accidents). What does “all” mean? Everything. (*Merriam Webster Collegiate Dictionary*, 10th Edition)

The declaration extension for the policy in force at the time of the accidental death is as contained in Cert. Doc. R1214-R1216, Exhibit B attached. A review of said exhibit shows clearly the limits of Business Liability:

Business Liability:	
Liability and Medical Expenses	\$1,000,000
Medical Expenses (Any One Person)	\$ 10,000
Aggregate Limits:	
Products - Completed Operations Aggregate	\$1,000,000
All Other Injury or Damage (All Occurrences)	\$2,000,000
Hired Auto and Non-Owned Auto Liability - See Business Liability	
Employee Dishonesty (Deductible: None)	\$ 15,000
Forgery or Alteration (Deductible: None)	\$ 5,000

The only place in the entire policy “aggregate” is discussed besides the above referenced is Form BP00061292 under Section D, Liability and Medical Expense Limits of Insurance, which states:

4. Aggregate Limits

The most we will pay for:

- a. Injury or damage under the “products-completed operations hazard” arising from all “occurrences” during the policy period is the Liability and Medical Expenses limit; and**
- b. All other injury or damage, including medical expenses, arising from all “occurrences” during the policy period is twice the Liability and Medical Expenses limit. This limitation does not apply to “property damage” to premises rented to you arising out of fire or explosion.**

The limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

The above language is not an exclusion, therefore, Syllabus Point 2 of *Luikart, supra*, does not apply. However, Syllabus Points 2, 4, 5, 6, and 7 of *Riffe, supra*, do apply to the amount of coverage issue:

- 2. 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.**
- 4. It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.**
- 5. Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous.**

6. With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

7. Where an insurer provides sales or promotional materials to an insured as an inducement to enter into an insurance policy, which the insurer knows or should know will be relied upon by the insured, any conflict between such materials and the insurance policy will be resolved in the insured's favor.

The Court in reading the above language must find same to be ambiguous thus supporting Mr. Grimmatt's belief that he had \$2,000,000 of coverage for all other "occurrences." No where does the Defendant define "aggregate". Since "aggregate" is not defined in the policy, it is given the usual and customary meaning as found in a dictionary. *Merriam Webster Collegiate Dictionary*, 10th Edition, defines 'Aggregate' as: "1. To collect or gather into a mass or whole." Section D.4.b. of Form BP00061292 certainly would cause any reasonable insured to believe they have twice the liability limits for all other "occurrences/accidents" during the policy period.

In this case the objectively reasonable expectation of the insured and intended beneficiaries as far as the \$2,000,000 "aggregate" insurance called for is not negated by any other policy provisions. Mr. Grimmatt reasonably believed under the aggregate policy language he had \$2,000,000 coverage to cover anything Workers Compensation did not cover.

Applying the above syllabus points to the contract language of Petitioner's Policy No. BP00061292, Section D.4.a.b. and the declaration sheets as to the dollar limits of coverages available to the Respondent requires this Court to find that Mr. Grimmatt had \$2,000,000 aggregate additional liability coverage for all other "occurrences"; including coverage for this wrongful death and also an employee accidentally shooting another employee while at

work.

The promotional materials given to Grimmatt to induce him to purchase the insurance (Cert. Doc. R1140) simply says, "All Other Aggregate", and no other explanation was provided to Grimmatt concerning said term by Petitioner's agent, Mr. Emard. Just looking at the declarations sheets (Cert. Doc. R1146), All Other Injury or Damages (All Occurrences), \$2,000,000, without further explanation would lead a reasonable person to believe they had \$2,000,000 of coverage for "All Other Injury". There is no clear explanation in the policy for said language in the policy. The Circuit Court erred a material of law that the coverage under the policy was not \$2,000,000 as stated, especially when you consider the sales promotional quote from which Mr. Grimmatt purchased the insurance.

CONCLUSION

Given the aforementioned Syllabus Points of *Riffe, supra*, and applying them to the facts and policy in this case, this Court should determine as a material of law the aggregate language is not defined and is clearly ambiguous, thus strictly construed against the Petitioner; that the sales promotional quote was misleading and not clearly understandable and Mr. Grimmatt was rightfully entitled to rely on same; that the "All Other Aggregate \$2,000,000" is reasonably susceptible of two different meanings, thus as a matter of law ambiguous. Mr. Grimmatt was given a sales quote that said term was not adequately defined and any conflict between the sales quote and the policy will be resolved in favor of Mr. Grimmatt.

III.

THE RESPONDENT REQUESTED THE COURT TO GIVE A REASONABLE EXPECTATION OF INSURANCE INSTRUCTION (PLAINTIFF'S INSTRUCTION NO. 2 - CERT. DOC. R0939-R0940) TO

THE JURY. ALLOWING THE JURY TO CONSIDER WHETHER BASED ON THE FACTS PRESENTED APPLIED TO THIS LEGAL THEORY. THE COURT REFUSED THE INSTRUCTION AND THE RESPONDENT OBJECTED TO NOT GIVING THE INSTRUCTION ON THE RECORD.

The failure of a Circuit Court Judge to give a jury an instruction is a legal question which is reviewed *de novo*. See *Costello, supra*, at Syllabus Point 3 which states

Where in trial by jury there is competent evidence tending to support a pertinent theory of case, it is duty of the trial judge to give instruction presenting such theory when requested to do so.

The Plaintiff's jury instruction was a correct statement of the law. (See Cert. Doc. R0939-R0940) *Luikart, supra*, at Syllabus Point 4 states

With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

The facts presented to the jury to support the giving of the instruction was that during the insurance application process the agent of the Petitioner, Mr. Normand Emard, never talked to Mr. Grimmert about any exclusions nor did he warn him exclusions existed (Cert. Doc. R2093-R2094). The sales offer letter included disclosure of all coverages and their limits and indicated the premium amount but did not disclose any exclusions or state same even existed (Cert. Doc. R1140). Mr. Grimmert made his decision to purchase the insurance from the representations of Mr. Emard and the sales offer letter. Mr. Grimmert did not get the insurance policy until after October 25, 1995, some 25 days after it was effective, October 1, 1995. As stated by this Court in *Costello, supra*, at 353,

Louis J. Diguglielmo's (Agent) conduct during the application process

may have created a reasonable expectation of insurance upon the part of the Appellant.

There is no question Mr. Emard's failure to disclose exclusions both orally and in the sales offer letter created an expectation in Mr. Grimmatt that he was covered for the wrongful accidental death at his business by another employee. Additional facts creating that justifiable expectation of insurance is the declaration pages did not reference exclusions nor did the premium show any adjustment for exclusions on the declaration pages (Cert. Doc. R1144-R1146). Mr. Grimmatt got one letter with his first policy, none with the second policy, advising him to read his policy, including exclusions. Mr. Grimmatt said he glanced at the letter, but did not worry about exclusions because the agent did not mention them nor did his sales offer. The dialogue between Petitioner's sales agent and Mr. Grimmatt and the sales offer would be considered "promotional" and, as such, in *Riffe, supra*, at Syllabus Point 7, any difference between promotional terms and the policy will be controlled by the terms of the sales offer. Any procedure that fosters a misconception about the insurance to be purchased may be considered in regard to the doctrine of reasonable expectations of insurance. Petitioner had a table of contents which clearly directed the insured to the exclusions in the liability policy (Cert. Doc. R1212), but neglected to put said form in Mr. Grimmatt's policy. Certainly failure to place in the policy the only form that truly alerts a policy holder that there are exclusions and what page the exclusions are on is a procedure that fosters a misconception about the insurance purchased. See *Luikart, supra*, at 755. As in this case, the case of *Ramano v. New England Life Insurance Co.*, 178 W. Va. 523 (1987), stated in *Luikart, supra*, at 755

This Court refused to apply a policy exclusion when promotional materials provided to the insured did not alert him to the exclusions and on the

contrary (like in this case) led him to a reasonable belief that he was covered under the policy.

Based on the above facts, the Circuit Court had enough competent evidence tending to support the doctrine of reasonable expectation of insurance that it had a duty to give Plaintiff's Instruction No. 2 on the doctrine of reasonable expectation.

Pursuant to the above legal authorities, especially *Costello, supra*, which actually ruled under very similar circumstances the failure to give the reasonable expectation of insurance instruction was error by the Circuit Court under these facts, and is so in this case.

The Circuit Court's reasoning as to why it did not give the instruction is found on Cert. Doc. R1093, lines 10-18:

THE COURT: But I think because the communication to Mr. Grimmett - - he got the policy that specifically addressed exclusions. That's communication to him that there are exclusions in the policy. I don't think there's any way we can get around that, so that is why I don't believe that an instruction on reasonable expectations is proper because that's your evidence, and there is communication in here that specifically states that there are exclusions. So I'm not going to give the instruction on the reasonable expectations...

The reasoning is faulty. All policies in reasonable expectation cases were received and contained exclusions in them. Reasonable expectation cases deal not with the policy language, but the procedure the insurer used to get the insured to purchase the insurance, such as promotional materials and discussions with sales agents. If sales agents and sales promotional offers do not give notice of exclusions, then it is a jury question as to whether the doctrine applies and the issue that went to the jury as to whether the Petitioner (Defendant) failed to bring the exclusions to the attention of the insured would have been another "procedure" that would justify the Court giving the instruction.

CONCLUSION

The lower court correctly determined to allow the jury to find the facts as to whether Petitioner brought the exclusions to the attention of the insured. The doctrine of reasonable expectations of insurance does not examine the policy language, but the procedures used by insurers to get the insured to purchase the insurance. Like the application process and the disclosure of exclusions, did the insured read the policy and understand? The sales offer was very vague and incomplete and did not even mention exclusions and same was never disclosed by Petitioner's agent prior to the purchase. All these facts justified the instruction be given. Failure to give the instruction was error, and this Court should correct then error by reversing said ruling.

RESPONDENT

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 11-1186

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

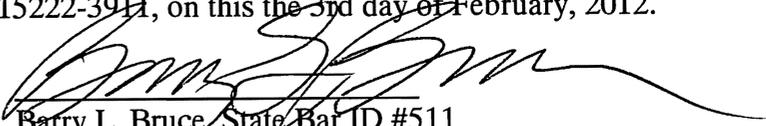
v.

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

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

CERTIFICATE OF SERVICE

I, Barry L. Bruce, Barry L. Bruce and Associates, L. C., Counsel for Respondent, certify that I have on this date served upon Avrum Levicoff, Levicoff, Silko & Deemer, P. C., Counsel for Petitioner, a true and correct copy of the foregoing Respondent's Brief and Cross-Assignments of Error by U. S. Mail, first-class, postage prepaid to Centre City Tower, Suite 1900, 650 Smithfield Street, Pittsburgh PA 15222-3911, on this the 3rd day of February, 2012.



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Exhibits on File in Supreme Court Clerk's Office