IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

DAMON MCDOWELL AND MARY MCDOWELL INSUREDS AND DEEANNA RAE LAWSON ADDITIONAL INSUREDS,

Plaintiffs,

v.

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY, AN ILLINOIS COMPANY D/B/A ALLSTATE, AND PATRICK O. HAMBRICK, JR., D/B/A HERITAGE INSURANCE AGENCY,

Defendants

and

DAMON MCDOWELL AND MARY MCDOWELL INSUREDS AND DEEANNA RAE LAWSON,

Plaintiffs,

v.

CITY OF OAK HILL, municipal corporation of Fayette County, West Virginia,

Defendant.

Civil Action No. 19-C-129
Honorable Paul M. Blake

ORDER DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT

On April 19, 2021, and May 3, 2021, the parties appeared by their respective counsel for previously scheduled hearings on the Plaintiffs' *Motions For Summary Judgment* and Allstate's

Cross-Motion For Summary Judgment. Whereupon the Court, having heard the arguments of counsel, reviewed all discovery, and having considered the parties' respective memoranda, and based upon the findings of fact and conclusions of law put forth herein, is of the opinion that Plaintiffs' Motion For Summary Judgment should be **DENIED** and Defendant Allstate Vehicle And Property Insurance Company's Motion For Summary Judgment should be **GRANTED**.

STANDARD OF REVIEW/CONTROLLING LAW

Upon a properly filed motion for summary judgment, Rule 56 of the *West Virginia Rules of Civil Procedure* provides, in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c); *see also* Syl. Pt. 1, Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992); Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

"The circuit court's function at the summary judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)." Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995); *see also* Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963); Syl. Pt. 1, Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 3, Gray v. Boyd, 233 W. Va. 243, 757 S.E.2d 773 (2014).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of

production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, Williams, 194 W. Va. at 56, 459 S.E.2d at 333. To defeat summary judgment, an opposing party "may not rest upon mere allegations[,]" W. Va. R. Civ. P. 56(e), but must "by affirmative evidence demonstrate that a genuine issue of fact exists." Painter v. Peavy, 192 W.Va. 189, 192 fn. 5, 451 S.E.2d 755, 758 fn. 5 (1994).

"'Roughly stated, 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c), is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party. The opposing half of the trial worthy issue is present where the nonmoving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under applicable law.' Syl. Pt. 5, *Jividen v. Law,* 194 W.Va. 705, 461 S.E.2d 451 (1995)." Syl. Pt. 5, Gray v. Boyd, 233 W. Va. 243, 757 S.E.2d 773, 775 (2014).

"'Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing of an essential element of the case that it has a burden to prove.' Syl. Pt. 4, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. Pt. 6, Boyd, 233 W. Va. at 243, 757 S.E.2d at 775.

Lastly, in considering the evidence and delivering a ruling upon the motion for summary judgment, "'the judge must view the evidence presented through the prism of the substantive

evidentiary burden.'" Williams, 194 W. Va. at 62, 459 S.E.2d at 339 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202, 215 (1986)). All permissible inferences that may be deduced from the underlying facts must be viewed in the light most favorable to the non-moving party. *See* Maston v. Wagner, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015) (quoting Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995)).

With the foregoing controlling law in mind, the Court will now proceed to make findings of fact and conclusions of law relevant to its decision.

Findings of Fact

1. Plaintiffs Damon McDowell, Mary McDowell and Deeanna Rae Lawson are the owners of the property located at 219 Highland Avenue, Oak Hill, West Virginia, which was involved in a fire on June 20, 2019.
2. Plaintiffs purchased the property in May 2019 for the sum of $37,000.00 dollars.
3. On May 17, 2019, Plaintiff Damon McDowell, applied for a home insurance policy with Allstate Vehicle And Property Insurance Company ("Allstate") through the internet on a cellular telephone.
4. Based upon such application, and the information provided therein, Allstate issued Policy No. 801386360, with said policy's effective date being the same day as the application.
5. At the time he applied for the Allstate homeowners policy, Plaintiff Damon McDowell provided information to Allstate concerning the occupancy and condition of the dwelling which he verified as being true. In particular, the application represented that Mr. McDowell lived in the home as the owner; that the roof was replaced on the dwelling in

2009; that the dwelling was not currently in the course of construction; that the property had a current market value of $300,000; and that the property would be occupied within the next thirty days as Mr. McDowell's primary residence.

6. Such information was important to Allstate's assessment of the risk and ultimate consideration of whether to accept the Plaintiffs' application and issue a policy of insurance.

7. With respect to the representations made by Mr. McDowell during the application process, Lilly Hoover, the processor at the Allstate agent's office who took Mr. McDowell's application, testified that Mr. McDowell was given the opportunity to review the information provided in the electronic application and confirm and attest to the truth and accuracy of the same by affixing his electronic signature thereon.

8. With respect to the truthfulness of the statements made in the application, the document signed by Mr. McDowell contains the following statement:

> To the best of my knowledge the statements made on this application, including any attachments, are true. I request the Company, in reliance on these statements, to issue the insurance applied for. The Company may recompute the premium shown if the statements made herein are not true. In the event of any misrepresentation or concealment made by me or with my knowledge in connection with this application, the Company may deem this binder and any policy issued pursuant to this application void from its inception. This means that the Company will not be liable for any claims or damages which would otherwise be covered.

9. Pursuant to *W. Va. Code § 39A-1-9*, electronic signatures are valid and binding. Specifically, the statute provides:

> An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure

applied to determine the person to which the electronic record or electronic signature was attributable.

10. The West Virginia State Supreme Court of Appeals has noted:

> An agreement where the terms are presented in an electronic form, or one that is signed electronically, is therefore interpreted and applied using the same common law rules that have been applied for hundreds of years to oral and written agreements.

State ex rel. U-Haul Co. of W. Virginia v. Zakaib, 232 W. Va. 432, 441, 752 S.E.2d 586, 595 (2013).

11. The Court has further explained:

> West Virginia has adopted the Uniform Electronic Transactions Act, W. Va. Code § 39A-1-1 *et seq.*, to facilitate the continued use and development of electronic transactions. The Act specifically states that a "record or signature may not be denied legal effect or enforceability solely because it is in electronic form," and a "contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." W. Va. Code §§ 39A-1-7(a) & (b) (2001).

Zakaib, 232 W. Va. at 441, 752 S.E.2d at 595.

12. Signing an acknowledgment that a party has read and accepted the terms of an electronic document can bind that party even if they did not actually read the instrument. *See generally* Nationstar Mortg., LLC v. West, 237 W. Va. 84, 785 S.E.2d 634 (2016). In *Nationstar*, the Court noted:

> The fact that the Wests may have signed a document without reading it first does not excuse them from the binding effect of the agreements contained in the executed document. *See G & R Tire Distributors, Inc. v. Allstate Ins. Co.*, 177 Conn. 58, 411 A.2d 31, 34 (1979) (***recognizing that when "a person of mature years who can read and write signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it, and notice of its contents will be imputed to him if he negligently fails to do so"***).

Id. at 91, 785 S.E.2d at 641 (***emphasis added***).

13. On May 17, 2019, Mr. McDowell electronically signed the application and verified that all of the information provided in the application was true and correct.

14. When asked about the application during his deposition, Mr. McDowell did not deny signing the application electronically, and testified, "I don't recall doing it."

15. Mr. McDowell also verified during his deposition that personal information contained in the application, such as his date of birth and social security number, were correct and that he had provided that information to Ms. Hoover.

16. Moreover, Mr. McDowell has not offered any evidence to suggest that the signing of the application was not his "act" and attributable to him.

17. While Plaintiffs' counsel appeared to suggest during oral arguments that Damon McDowell did not, in fact, execute the application containing the subject misrepresentations, such an argument is inherently flawed since that would mean that the Allstate Policy was issued as the result of a fraudulent application, such that no valid, enforceable contract for insurance coverage existed and, accordingly, the Policy would be void *ab initio*.

18. Following standard procedure, on June 12, 2019, Allstate completed an underwriting inspection of the property which indicated that the residence was not an acceptable risk due to broken and missing windows, ivy growing on various parts of the structure, moss growing on the roof, and the generally poor condition of the property.

19. The following day (June 13, 2019), after receiving the underwriting inspection report on the property, Allstate's agent, Lilly Hoover, contacted Mr. McDowell and told him of the

inspection. In that regard, Ms. Hoover told Mr. McDowell that in light of the condition of the property, this was not a property that would be covered by Allstate and that the property did not meet Allstate's underwriting risk exposure agreement.

20. The property was involved in a fire on June 20, 2019, only days after Ms. Hoover's communication to Mr. McDowell.

21. Oak Hill Police Department determined that the fire was the result of arson. All utilities had been cut off prior to the fire and investigators determined the fire originated from three (3) sources of ignition.

22. Allstate also retained its own fire expert to investigate the origin and cause of the fire loss and, following a June 26, 2019, inspection, the expert confirmed that the fire was incendiary and had been intentionally set.

23. The Plaintiffs do not dispute that the fire was intentionally set. In fact, investigation into the fire loss has indicated that there were at least three (3) separate points of origin for the fire and petroleum was used to spread the fire.

24. On July 18, 2019, Allstate sent the Plaintiffs notice that it was electing to void their policy based upon the misrepresentations they had made in their Application for coverage and was also denying their claim because the Allstate Policy does not cover any loss in which any insured has concealed or misrepresented any material fact or circumstance related to the claim or the loss. The letter indicated:

> The occupany [sic] is directly correlated to the condition of the home at the time of the application. The home was not habitable at the time of the application, nor was it at the time of the loss. Our underwriting inspection of the home deemed the home was not a desireable [sic] risk, and Allstate would not have written the business had it known the pre-loss condition of

the home and property, and that it would not be occupied within 30 days.

25. On September 16, 2019, the Plaintiffs filed this action against Allstate and its agent, Patrick Hambrick, asserting that Allstate had breached its insurance contract and that Allstate and Hambrick had violated West Virginia's Unfair Trade Practices Act (W.Va. Code §33-11-4(9)) during the handling of their claims.

26. In response, Allstate denied the Plaintiffs' claims and also filed a *Counterclaim,* seeking a declaratory judgment that it is not obligated to pay any of the Plaintiffs' claims based upon the material misrepresentations made by Mr. McDowell in the application for coverage and asserting that the Allstate Policy was void *ab initio* under applicable West Virginia law.

27. Allstate's Policy excludes coverage for any loss or damage that results from the intentional or criminal acts of or at the direction of any insured person and where an insured person has concealed or misrepresented any material fact or circumstance related to the loss or occurrence. Specifically, Allstate has asserted that Plaintiffs intentionally caused the fire and/or conspired with others to do so, and misrepresented material facts with respect to the amount and value of the contents of the dwelling at the time of the fire.

28. With respect to Allstate's assertions regarding coverage, the Allstate Policy provides, in relevant part, as follows:

> **Insuring Agreement**
> In reliance on the information **you** have given **us**, **we** agree to provide the coverages indicated on the Policy Declarations. In return, **you** must pay the premium when due and comply with the policy terms and conditions, and inform **us** of any change in title,

use or occupancy of the **residence premises**.

Subject to the terms of this policy, the Policy Declarations shows the location of the **residence premises**, application coverages, limits of liability and premiums. The policy applies only to losses or **occurrences** that take place during the policy period. The Policy Period is shown on the Policy Declarations. This policy is not complete without the Policy Declarations.

This policy imposes joint obligations on the Named Insured(s) listed on the Policy Declarations and on that person's resident spouse. These persons are defined as **you** or **your**. This means that the responsibilities, acts and omissions of a person defined as **you** or **your** will be binding upon any other person defined as **you** or **your**.

This policy imposes joint obligations on persons defined as an **insured person**. This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person defined as an **insured person**.

* * *

Misrepresentation, Fraud Or Concealment

We may void this policy if it was obtained by misrepresentation, fraud or concealment of material facts. If **we** determine that this policy is void, all premiums paid will be returned to **you** since there has been no coverage under this policy.

We do not cover any loss or **occurrence** in which any **insured person** has concealed or misrepresented any material fact or circumstance.

* * *

Losses We Do Not Cover Under Coverages A and B:

* * *

D. Under **Dwelling Protection-Coverage A** and **Other Structures Protection-Coverage B** of this policy, **we** do not cover any loss consisted of or caused by one or more of the following excluded events, perils, or conditions. Such loss is excluded regardless of whether the excluded evident, peril or condition involves isolated or widespread damage, arises from natural, man-made or other forces, or arises as a result of any combination of these forces.

1. The failure by any **insured person** to take all reasonable steps to save and preserve property when the property is

endangered by a cause of loss **we** cover.

2. Any substantial change or increase in hazard, if changed or increased by any means within the control or knowledge of an **insured person**.

3. Intentional or criminal acts of or at the direction of any **insured person**, if the loss that occurs:

a) may be reasonably expected to result from such acts; or

b) is the intended result of such acts.

This exclusion applies regardless of whether the **insured person** is actually charged with, or convicted of, a crime.

* * *

Losses We Cover Under Coverage C:

We will cover sudden and accidental direct physical loss to the property described in **Personal Property Protection-Coverage C** caused by the following, except as limited or excluded in this policy:

1. Fire or lightning.

* * *

Losses We Do Not Cover Under Coverage C:

* * *

D. Under **Personal Property Protection–Coverage C** of this policy, **we** do not cover any loss consisting of or caused by one or more of the following excluded events, perils or conditions. Such loss is excluded regardless of whether the excluded event, peril or condition involves isolated or widespread damage, arises from natural, man-made or other forces, or arises as a result of any combination of these forces.

1. The failure by any **insured person** to take all reasonable steps to save and preserve property when the property is endangered by a cause of loss **we** cover.

2. Any substantial change or increase in hazard, if changed or increased by any means within the control or knowledge of an **insured person**.

3. Intentional or criminal acts of or at the direction of any **insured person**, if the loss that occurs:

a) may be reasonably expected to result from such acts; or

b) is the intended result of such acts.

This exclusion applies regardless of whether the **insured person** is actually charged with, or convicted of, a crime.

* * *

29. On March 29, 2021, the Plaintiffs served their *Motions For Summary Judgment*, asking the Court to find as a matter of law that Allstate is obligated to pay them $379,000.00, together with their attorney's fees, costs and pre-judgment interest.

30. The Plaintiffs seek summary judgment on their contractual claims with respect to the value of the dwelling and to their entitlement to contents coverage for an amount to be proven at trial.

31. Plaintiff Damon McDowell acknowledged in his deposition that he submitted inventory forms to Allstate which indicated that the Plaintiffs had lost approximately Two Million Dollars of contents in the fire.

32. Plaintiffs' contents claim seeks compensation for the loss of an extensive collection of antiques, coins, and collectibles which they claim were in the house at the time of the fire.

33. Mr. McDowell specifically testified that he was claiming $10,000 for a Duncan Phyfe Couch, $8,500 for a Duncan Phyfe dining room set, $1,700 for a wing backed chair, $5,000 for a generator, $100,000 for Ching Dynasty coins, over 100 thousand baseball/football cards valued at $250,000, over 2000 coins valued at over $300,000, and over 200 vintage Barbie Dolls valued at over $100,000.

34. Mr. McDowell further claimed that he had found many of the coins with a metal detector and had purchased the baseball cards, including Babe Ruth and Mickey Mantle cards, for less than $10,000.

35. Such personal property items were not disclosed to Allstate at the time the application

was submitted, nor is there any material evidence that these items were indeed inside the home at the time of the fire.

36. The fire did not consume the entire structure and much of the damage to it was attributed to smoke and water rather than an all-consuming fire.

37. Based upon the level of intensity of the fire and the amount of damage the home sustained, the contents, or at a minimum significant remnants of the contents, should have been present and observable within the damaged home.

38. In contrast, the police officers who investigated the fire testified that they did not find evidence or debris indicating that any of the items claimed by the Plaintiffs had actually been present.

39. The Plaintiffs intended to remodel the home for sale rather than use it as a "primary residence."

40. The home was not being utilized as a primary residence at the time of the fire.

41. Plaintiffs' claim arising from the June 20, 2019, fire was addressed in Allstate's July 18, 2019, letter, in which Allstate indicated that it was electing to treat the Policy as void due to the Plaintiffs' misrepresentations in the application, and was denying Plaintiffs' claim based on Plaintiffs' concealment or misrepresentation of material facts and circumstances related to their claim or the loss and because the subject fire resulted from the intentional or criminal acts of, or at the direction of, the Plaintiffs, with the intent to cause the loss.

42. The Court finds that, prior to the fire, Allstate, upon conducting an inspection of the property and determining that there were material variances between the information provided in the application and the actual condition of the property, and determining that

the property was not an acceptable risk, promptly notified the Plaintiffs that coverage would not be provided.

43. "'The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and ***mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.***' Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.,* 100 W.Va. 559, 131 S.E. 253 (1926)." Syl. Pt. 3, Dan Ryan Builders, Inc. v. Nelson, 230 W. Va. 281, 737 S.E.2d 550, 551, 2012 WL 5834590 (2012) (***emphasis added***).

44. The West Virginia State Supreme Court of Appeals has noted, "[a]bsent a contractual obligation to pay a claim, no bad faith cause of action exists, either at common law or by statute." Hawkins v. Ford Motor Co., 211 W.Va. 487, 492, 566 S.E.2d 624, 629 (2002) (citation omitted).

45. Likewise, Unfair Trade Practices Act claims are premised upon a failure to pay a claim when it is owed. For example, W.Va. Code §33-11-4, in relevant part, requires insurers to attempt to settle claims in which the insurer's liability is "***reasonably clear***." W.Va. Code §33-11-4(9)(f) (***emphasis added***).

46. Similarly, W.Va. Code §33-11-4, in relevant part, prohibits insurers from "compelling insureds to institute litigation in order to recover ***amounts due*** under an insurance policy." W.Va. Code §33-11-4(9)(g) (***emphasis added***).

47. If there was no valid, enforceable contract for insurance coverage between the Plaintiffs and Allstate, Plaintiffs' claims fail as a matter of law.

48. Likewise, if the contract was void *ab initio* as asserted by the Defendant, Plaintiffs' claims fail as a matter of law.

49. In West Virginia, insurance coverage is a matter of law when material facts are undisputed. *See* Syl. Pt. 1, Tennant v. Smallwood, 211 W. Va. 703, 704, 568 S.E.2d 10, 11 (2002).

50. The Court applies clear insurance policy terms and will give full effect to the plain meaning intended. *See* Syl. Pt. 2, W. Virginia Fire & Cas. Co. v. Stanley, 216 W. Va. 40, 43, 602 S.E.2d 483, 486 (2004) (citation omitted).

51. An insurer may validly limit coverage. *See* Green v. Farm Bureau Mut. Auto. Ins. Co., 139 W. Va. 475, 479 80 S.E.2d 424, 426 (1954).

52. With respect to Allstate's request for summary judgment in its *Cross-Motion*, West Virginia law provides that if an applicant for insurance coverage misrepresents material facts in applying for insurance, the insurer may void the policy. *See generally*, W. Va. Code §33-6-7(b), (c); Massachusetts Mut. Life Ins. Co. v. Thompson, 194 W.Va. 473, 460 S.E.2d 719 (W.Va. 1995); Powell v. Time Ins. Co., 181 W. Va. 289, 382 S.E.2d 342 (1989).

53. W. Va. Code §33-6-7 provides:

> All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealments of facts, and incorrect statements shall not prevent a recovery under the policy unless:
>
> (a) Fraudulent; or
>
> (b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or

> (c) The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

54. The West Virginia Supreme Court of Appeals applied the statute in *Thompson* and found that "W. Va. Code §33-6-7 (1957), adopts the test of whether a reasonably prudent insurer would consider a misrepresentation material to the contract.'" Syl. Pt. 4, Thompson, 194 W. Va. at 474, 460 S.E.2d at 720 (quoting Syl. Pt. 6, Powell, 181 W.Va. 289, 382 S.E.2d 342). The Court found that, under W. Va. Code §33-6-7(b) or (c), an insurer need not prove "that an insured specifically intended to place misrepresentations, omissions, concealments of fact, or incorrect statements on an application . . .." Thompson, 194 W. Va. at 478, 460 S.E.2d at 724. Instead, "the insurer must establish that the misrepresentation was material to the issuance of the policy . . . [and]

> 'in order for a misrepresentation in an insurance application to be material, it must relate to either the acceptance of the risk insured or to the hazard assumed by the insurer. Materiality is determined by whether the insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.'

Thompson, 194 W. Va. at 478, 460 S.E.2d at 724 (quoting Powell, 181 W.Va. at 297, 382 S.E.2d at 350 and Syl. Pt. 5.)

55. As noted in *Thompson*, West Virginia has adopted the majority view that an insurer may void an insurance policy regardless of causal connection between a misrepresentation and

a claim that the policy might otherwise cover. *See* Thompson, 194 W. Va. at 478-81, 460 S.E.2d at 724-27. An insurer need only "show that the misrepresentation, omission, concealment of fact, or incorrect statement substantially affected or impaired its ability to make a reasonable decision to assume the risk of coverage." Thompson, 194 W. Va. at 727, 460 S.E.2d at 481.

56. In the matter before this Court, Allstate clearly considered the fact that the house was not the Plaintiffs' primary residence, was uninhabitable and undergoing construction, was in a current state of disrepair in that it had broken windows which were open to the elements, was covered in vines, and had a deteriorating roof to be material to the risk Allstate would be assuming when it issued the Policy to the Plaintiffs.

57. Allstate's application specifically asked if the property was "in course of construction," and the Plaintiffs expressly represented that it was not. In fact, there can be no question that the property was not being used as the Plaintiffs' "primary residence," as represented in the application, since the Plaintiffs have specifically alleged in Paragraph 6 of their *Complaint* that their intent was "to remodel the home for subsequent sale" and have further alleged, at Paragraph 11 of their *Complaint,* that "the dwelling was being remodeled and was, within the language of the Policy considered under construction."c

Conclusions of Law

58. Having acknowledged that he had read the application and attested that the information it contained was true and correct, the Court concludes Mr. McDowell is now bound by his electronic execution of the application.

59. The Court concludes there were material misrepresentations made by Mr. McDowell in

the application for insurance coverage.

60. In light of the undisputed evidence outlined herein, the Court concludes that the representations made by Plaintiff Damon McDowell in the Application were material to the risk and Allstate would not have issued the policy if it had been informed of true and accurate information.

61. The Court concludes such material misrepresentations impeded Allstate's initial ability to make a viable risk assessment of the property.

62. The Court concludes there never was a meeting of the minds regarding this contract for insurance coverage.

63. The Court concludes no valid, enforceable contract for insurance existed between Plaintiff and Allstate.

64. Based upon the plain language of the application, the material misrepresentations made by Plaintiff McDowell in said application, and no meeting of the minds between the parties in the creation of the contract for insurance, the Court further concludes the contract is void *ab initio*.

65. Therefore, the Court concludes there was no insurance coverage by Allstate covering the Plaintiff's structure at the time of the fire.

66. As the Court has concluded that the contract for insurance was void *ab initio*, the Court further concludes there are no genuine questions of material fact with respect to whether there was a valid policy of insurance issued by Allstate covering the dwelling at the time of the fire.

67. Therefore, pursuant to W. Va. Code §33-6-7 and the principles set forth in *Thompson* and

Powell supra, the Court finds and concludes that Allstate is entitled to judgment as a matter of law in that Policy No. 801386360 was void *ab initio* due to the material misrepresentations in the application and therefore provides no coverage for the Plaintiffs' claims.

68. Because Allstate had no legal duty to pay for the Plaintiffs' damages, the Court likewise finds and concludes its refusal to do so could not breach the insurance contract, the common-law duty of good faith, or the Unfair Trade Practices Act as alleged by the Plaintiffs.

69. Accordingly, because there is no coverage and the Allstate Policy is void from inception, the Court concludes the Plaintiffs' claims must fail as a matter of law.

70. Based upon all the foregoing, the Court concludes Plaintiffs' motion for summary judgment should be denied.

NOW, THEREFORE, in consideration of all of the foregoing Findings of Fact and Conclusions of Law, the Court is of the opinion to, and hereby does, **DENY** the Plaintiffs' *Motions For Summary Judgment* and **GRANTS** the *Cross-Motion For Summary Judgment* of Defendant Allstate.

This is a **final order in relation to Defendant, Allstate Vehicle And Property Insurance Company, only**. Accordingly, the Court directs the Clerk of this Court to designate such action against Defendant, Allstate, final and remove it from active status on the Court's docket.

The objections and exceptions of the parties as to all adverse rulings herein are noted and preserved for purposes of appeal.

The Clerk of this Court is further instructed to forward an attest copy of this *Order Denying Plaintiffs' Motions For Summary Judgment And Granting Defendant Allstate Vehicle And Property Insurance Company's Cross-Motion For Summary Judgment* to: **Erwin L. Conrad, Esq.**, *Conrad & Conrad, PLLC*, P.O. Drawer 9048, Fayetteville, WV 25840; **Brent K. Kesner, Esq.**, *Kesner, Kesner & Bramble, PLLC*, P.O. Box 2587, Charleston, WV 25329; and **William H. File, Esq.**, 130 Main Street, Beckley, WV 25801.

ENTERED this 16th day of July 2021.

PAUL M. BLAKE, JR.
JUDGE

Paul M. Blake, Jr., Judge

A TRUE COPY of an order entered July 16 2021
Test: Melissa B. Hendricks
Circuit Clerk Fayette County, WV