IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0603

DAMON MCDOWELL, ET ALS,

PLAINTIFFS BELOW,

PETITIONERS,

V.

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY, an Illinois Corporation, and PATRICK O. HAMBRICK, JR.,

RESPONDENTS.

FROM THE CIRCUIT COURT OF

FAYETTE COUNTY, WEST VIRGINIA

(Civil Action No. 19-C-129)

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Petitioners filed their "Statement of the Case" earlier but must comment on that filed by Respondent Allstate. In particular, Allstate never alleged *fraud* (A. R. pp. 159 – 176, incl.) and no *fraud* was ever otherwise indicated by evidence or established in accordance with applicable precedent except the fraudulent conduct of Allstate directed at Deeanna Lawson. In a rare correct statement/admission, Allstate in its "Statement of the Case" admitted "the fire which gave rise to the action occurred on June 20, 2019, at a residential property *owned* by *Petitioners' Damon McDowell and Deeanna Lawson* located at 219 Highland Avenue, Oak Hill, Fayette County, West Virginia (Respondent's Brief Pg. 1). The ownership interest of Deeanna Lawson had been *denied* by Allstate in its Answer and Petition for Declaratory Judgment (A.R. 159-176, incl.) and *denied* in Allstate's Discovery Responses (A.R. 390) establishing that it was Allstate that attempted to defraud Deeanna Lawson and not the contrary.

PETITIONERS' ASSIGNMENTS OF ERROR CONCEDED BY ALLSTATE OR OTHERWISE ESTABLISHED

1. ASSIGNMENT 1 – CONTRACT OF INSURANCE

Allstate admitted the Contract existed in its Cancellation Notice (A.R. 989) issued July 4, 2019 which provided after the Notice of Cancellation language,... "The protection provided by *your Policy will remain* in effect until the cancellation date and time shown above."... The cancellation date and time were shown to be "August 14, 2019 at 12:01 A.M.".

W. Va. Code 33-1-16 defines Policy to mean "the Contract effecting Insurance, or the Certificate thereof, by whatever name called, and includes all clauses, riders, endorsements and papers attached thereto and made a part thereof". "However, the

application is not part of the Contract of Insurance...unless set forth in full in the Policy"...W. Va. Code 33-6-13. Thus, the Application is not part of the Policy. Therefore, the Contract providing the coverage was in effect not only on the date of fire of June 20, 2019 but on the date of the Notice of Cancellation and continued to be *in effect* until August 14, 2019. Allstate's false claims to the contrary violate W. Va. Code 33-11-4(9)(a).

2. ASSIGNMENT 3 – No Pre-Policy (Contract) premises inspection was conducted by or for Allstate.

"*Allstate's Underwriting* Inspection of the Property, completed on June 12, 2019..." (Respondent's Brief, Pg. 4). It has been earlier established that the Policy or Contract of Insurance was issued on May 18, 2019 and now Allstate has admitted that the first inspection, albeit, only inspection, was an exterior, photographic inspection without the inspector ever entering the Dwelling at any time conducted 24 days after the Contract was issued and 22 days after the premium was paid in consideration for the Policy (Contract). Allstate's clumsy attempt to confuse a *Binder* with the Policy (Contract) was unmasked by proper interpretation of Allstate's own documents. The application, upon which Allstate relies as the Centerpiece of its defense, precisely states (A.R. 924) under "Binder Provision" – "...the Company named above binds the Insurance supplied effective May 17, 2019 at 2:18 P.M. Any insurance bound shall continue in force until terminated by mailing Notice as specified above, or until a Policy is issued. The Policy was issued May 18, 2019. Therefore, the argument that no inspection is necessary to issue a Binder becomes nonsensical, as the Contract (Policy) was issued May 18, 2019. The precedents require Pre-Policy Inspection done for Underwriting purposes, i. e. pre-contract - must be performed before May 18, 2019 and not 24 days thereafter. Allstate's

feeble claims that *Filiatreau v. Allstate Insurance Company,* 178 W. Va. 268, 358 S.E. 2d 829 (1987) is inapplicable because it was a determination of value is without merit. Whether it is a determination of "value" or a determination of "condition", if the Insurer (Allstate) intends to claim the Insured misrepresented the "value" or, in this case, the "condition" the inspection of the Insurer must be concluded before the issuance of the Policy. None was performed. Thus, pre-policy "condition" could not be used to deny coverage. See, also, *Davis v. Farmers Mutual Insurance Co.,* 207 W. Va. 400, 533 S.E. 2d 33 (2000), citing *Yeager v. Farmers Mutual Insurance Co.,* 192 W. Va. 556, 453 S.E. 2d 390 (1994).

3.- ASSIGNMENT NO. 4 – Notice of Cancellation admitted Coverage in effect as of June 20, 2019 and continuing until August 14, 2019. This, of course, was established by Respondent's Exhibits and clearly set forth on A.R.143. See, Assignment 1.

4.- ASSIGNMENT NO. 5 – July 18, 2019 Notice, referred to as "Void ab initio" letter, alleged as only reasons for a denial (1) Lack of Occupancy within 30 days of the Application and "2) condition of the premises at the time of Application. (Respondent's Brief Pg. 1).

The so-called "void ab initio" Notice authored by Jeffrey Daniels of Allstate on July 18, 2019 claimed "Material Misrepresentations were made on the application as it relates to *Occupancy of the Home.* You answered that you would be moving into the Home in May 2019 and it would be occupied within thirty (30) days of the signed application and neither occurred. The occupancy is directly correlated to the '*condition of the home at the time of the application*'... A.R. pg. 141. See, also, A. R. 730. Of course, Allstate waived any reliance on the condition of the home prior to or at the time of the issuance

of the Policy (Contract) by its failure to perform a pre-policy inspection to determine condition or, for that matter, value or any other matter upon which Allstate intended to subsequently rely.

As admitted by Allstate, the "void ab initio" notice of July 18, 2019 (A.R. 730) fails to allege as a reason for denial of coverage "remodeling" or "personal property contents list", contrary to the lower court's Findings of Fact 27 (A.R. 10) and 41 (A.R. 14). Further, the issuance of a Contents List was waived by Allstate giving its *void ab initio* notice claimed to apply retroactively to May 18, 2019 (a month before the fire loss) which waives the necessity of any filing by the Insured after May 18, 2019 and prohibits the contents list to be used as against the Insureds to, in any fashion, excuse Allstate from any required performance. See, W. Va. C.S.R. § 114-14-6 under 6.5 (Denial of Claims).

"No Insurer may deny a claim on the grounds of a specific Policy Provision, Condition or Exclusion unless reference to such Provision, Condition or Exclusion is included in the Denial. The Denial must be given to the Claimant in writing...

The critical "void ab initio" notice's failure to mention "Personal Property Contents Lists". (A.R. 730), illustrated the lower Court's erroneous Findings of Fact 27, 35 and 57. (A.R. 10, 13 and 18). The author (Daniels) of the "void ab initio letter" acknowledged that he was aware of the Personal Property Content's List and had previously interviewed Damon McDowell who admitted that he intended to remodel the home (A.R. 738 and 740) prior to Daniels authoring the July 18, 2019 void ab initio notice letter (A.R. 730).

5. ASSIGNMENTS OF ERROR 7, 8 AND 14 – FAILURE TO FIND THE APPLICABILITY OF "DOCTRINE OF REASONABLE EXPECTATIONS OF INSURANCE"; AND FAILURE TO FIND THE DENIAL NOTICES LACKED TIMELINESS.

In West Virginia, the key West Virginia case concerning *Post-Claim Underwriting* is *Keller v. First National Bank*, 403 S.E. 2d 423 (WV 1991) which requires that.. "when an Insurer

creates a reasonable expectation of Insurance Coverage and accepts a premium, the denial notice, in order to be effective, must include a refund of the premium and must be promptly given to be effective. However, that Notice must be given no more than thirty (30) days after the creation of the reasonable expectation of coverage". In this case, that expectation of insurance coverage was created with the issuance of the Policy on May 18, 2019, furthered by the collection of premium payments and partial claim payments, all acknowledged by Allstate.

Neither of the Notices, the Cancellation Notice of July 4, which extended coverage to August 14, 2019, nor the claimed "void ab initio" Notice of July 18, 2019 were given within Thirty (30) days of May 18, 2019 and could not be "timely" as appropriate denial notice.

"If you are wishing to avoid liability on a Policy purporting to give General or Comprehensive coverage, you must make exclusionary clauses conspicuous, plain and clear, placing them in such a fashion as to make obvious the relationship to other Policy Terms and must bring such provisions to the attention of the Insureds." Syl. Pt. 10, *National Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E. 2d 488 (1987). *N.H. Insurance Co. v. RRK, Inc.*, 230 W. Va. 52 736 S.E. 2d 52 (2012), *per curiam*. Both *Keller & RRK* are instructive and analogous. In *Keller* the Bank offered Insurance and the offer was accepted with consideration therefor. See also, *Costello v. Costello*, 195 W. Va. 349, 465 S.E. 2d 620 (1995). The Bank then discovered that its offer was a mistake and attempted to deny coverage but the denial notice was not timely given. In a similar case, the Court in *RRK* held where the Insurer attempted to use a wear and tear provision to exclude contents not previously excluded from the coverage after the

reasonable expectation of insurance that coverage was created by the issuance of the Policy.

Here, a reasonable expectation of coverage was created by issuance of the Policy in exchange for premium payment. Then, on second thought, Allstate used *Post* Policy Inspection to provide a untimely cancellation Notice denying coverage followed by the even more delinquent void ab initio Notice when Allstate discovered its first attempt, by its own terms, could not deprive Petitioners of coverage. The 2nd denied coverage but on different grounds than that set forth in the initial Cancellation Notice. The Cancellation Notice was 45 days late (but ineffective) so Allstate tried again, citing different reasons, this one was sixty (60) days after the Policy issuance. The second Notice was not only untimely, but it was based upon conditions which could have been discovered and should have been discovered by Pre-Policy Inspection. The other provision dealt with using "period of non-occupancy or vacancy of 30 days" to deny coverage, a scheme not permitted by the Policy Language required in Endorsement AVP 101 (A.R. 467) to comply with the statutory provisions applicable to all Fire Insurance Policies in the State of West Virginia under W. Va. Code 33-17-2.

6. ASSIGNMENT OF ERROR 13 – FAILURE OF THE COURT BELOW TO FIND THAT THE DWELLING (COVERAGE A) LOSS, WAS A TOTAL LOSS, UNDER W. VA. CODE 33-17-9, DUE TO UNREFUTED EVIDENCE

Respondents have not refuted Assignment of Error 13 as it has been clearly established that Respondents have presented no evidence to refute the position of the Petitioners and the Findings and the determination of the City of Oak Hill. Therefore, total loss in this case has been established contrary to the lower court's findings and clearly erroneous standard for determining Total Loss by claiming that "Total Loss" required the

"fire must consume the entire structure". Under the VALUED POLICY PROVISIONS (W. Va. Code 33-17-9) of the Policy Coverage, the DWELLING (Coverage A) amount of the Policy ($379,618.00) must be paid.

7. **Assignments of error 9 and 10 – Failure to find "30 day vacancy" and "Remodeling" answer to question could never be material to the risk.**

It has been clearly established that the 30 day vacancy provisions and "remodeling" provisions attempted for insertion in the Policy by Allstate indirectly by Questions and Answers allegedly given over the phone, could never be material to the risk undertaken in such a fashion to avoid coverage due to the fact that "Remodeling" is encouraged by other clear Policy provisions (A.R. 469) contrary to be position of Allstate which violates the actual language of the Policy. Further, Allstate's attempt to limit vacancy to a period of thirty (30) days instead of the 60 day period required by the Policy itself through Endorsement AVP 101 and the required language in the Standard Fire Policy provisions for all Fire Policies issued in the State of West Virginia, would be both illegal and rendered immaterial by actual Policy language.

The remaining Assignments of Error will be addressed in the *ARGUMENT*.

ARGUMENT

MISSTATEMENTS, MISREPRESENTATIONS AND LIES OF ALLSTATE:

Allstate repeatedly sets forth, in argument, matters not alleged in their Pleading or supported by other evidence. "Summary Judgment cannot be defeated (or, in the case of Allstate, granted) on the basis of factual assertions contained in ...briefs" (insertion mine). *McCullough Oil v. Rezek,* 176 W. Va. 638, 346 S.E. 2d 788 (1986); *Guthrie v. Northwestern Mut. Ins. Co.,* 158 W. Va. 2, 208 S.E. 2d, 60 (1974).

Litany of Allstate Lies: Petitioners' Complaint alleged in Paragraph 1 thereof that Damon McDowell and Deeanna Lawson were the owners of the .22 acre tract...situate at 219 Highland Avenue, Oak Hill, West Virginia pursuant to a Deed of record in Deed Book 778 at Page 58... (A.R. 22). Allstate responded, (1) that Allstate was "without sufficient information or knowledge to form a belief as to the ownership of the property located at 219 Highland Avenue, Oak Hill, West Virginia". (A.R.159).

(2) In its request for Declaratory Judgment, Allstate stated in Paragraph 18 thereof (A.R. 173) that... "the fire was also investigated by the West Virginia State Fire Marshal's Office". (A.R. 173, para. 18).

(3). In Paragraph 23 thereof (A.R. 174) Allstate contended that Plaintiff Lawson was never an insured under the Allstate Policy. Both statements were <u>false</u>. See, A. R. 395 and 734 (Fire Marshal's refutation) and Respondents Brief, Pg. 1.

OTHER VARIANCES BETWEEN RESPONDENT'S BRIEF, PLEADINGS, DISCOVERY AND OTHER EVIDENCE:

The demands for Declaratory Relief consisted of only four (4) paragraphs summarized as follows:

1. Allstate could not be liable for any Insured for more than the Insured's insurable interest, naming only Damon McDowell and Mary McDowell which Allstate contended were the <u>only</u> insureds;

   Allstate's exclusion of Lawson was to cut Allstate's loss exposure in half.

2. That the Policy was *void ab initio* due to misrepresentations regarding the <u>*condition*</u> and <u>occupancy</u> of the property...This, alone, precludes

Allstate's very tardy claims concerning "remodeling" and Contents Lists "under W. Va. C.S.R. § 114-14-6.5.

3. The Allstate Policy does not apply to and excludes coverage for the claims of Plaintiffs and counter-claim defendants arising from the loss of June 20, 2019 and;
4. Allstate was entitled to further and additional relief as the Court may deem just and proper (A.R. 174).

Absolutely no mention was made of "Contents Lists", "Remodeling" or direct or indirect conspiratorial acts of Petitioners.

Allstate, in response to Request for Admissions, when requested to admit that it was "aware of the ownership interest of Deeanna Lawson in the property at 219 Highland Avenue, Oak Hill, West Virginia... Stated, after objection, "...Allstate denies that any ownership interest of Deeanna Lawson was made known to Allstate or its Agent Hambrick. Allstate denies that Deeanna Lawson was added to Allstate Policy as a "Additional Insured"...(A.R. 389 and 390). At that time, Allstate key employees knew and testified under oath that they were aware of the ownership interest of Deeanna Lawson as evident from deposition testimony of Jeffrey Daniels and Lilly Hoover (A.R. 530, 706). Allstate's false statements and assertions included, but were not limited to (1) that as investigation of the Fire Marshal's Office had been performed (later shown as false) (2) the Fire Marshal investigation had been delegated to Deputy Willis; (3) that proper Notice had been given the Fire Marshal by Allstate, (4)that Allstate had no knowledge of Deeanna Lawson's ownership interest in the dwelling at 219 Highland Avenue, all shown

as FALSE by Allstate Producer's (Lillie Hoover) and the *void ab initio* letter Author (Jeffrey Daniels) testimony. See, (A.R. pp. 530, 706, 707 and 710).

ALLSTATE EMBARKED ON ITS POST CLAIM UNDERWRITING SCHEME, BY:

1. Entering into a Contract evidenced by the Policy of Insurance and confirmed by Policy Premium Payments and partial claim payments (A.R. 704 and 705);;
2. Issuing the Policy without a Pre-Policy Inspection of the premises to determine its condition, and then;
3. Cancelling the May 18, 2019 Policy by July 4, 2019 Notice yet allowing the Policy to continue in full force and effect until August 14, 2019; while;
4. Receiving another premium payment and paying partial claim payments for the June 20, 2019 fire, and then;
5. Issuing the July 18, 2019 alleged *void ab initio* Notice, that the Policy was void from its inception on May 18, 2019 due to "the conditions of the premises at the time" and a question and answer allegedly requiring occupancy within 30 days of the Policy issuance date of May 18, 2019,.

Allstate's outlandish positions are made worse by claims that their conduct did not create a General Business Practice for repeated violations of the Unfair Claim Settlement Practices of the Unfair Trade Practices Act (UTPA), particularly when coupled with the following:

1. The statement in Respondent's Brief on Page 6 that "Allstate has asserted in this case that Petitioner Damon McDowell intentionally caused the fire and/or conspired with those others to do so". **FALSE**. The answer and petition for

Declaratory Judgment filed by Allstate is devoid of any accusations directed to any of the Petitioners, including Damon McDowell, concerning the Fire and the loss occasioned thereby. In spite of Allstate's Counsel's attempts to put words in the mouth of Alderman (A.R. 694) concerning so-called accusations of Willis or Pack, no such accusations were made when Willis and Pack were deposed. Instead, the only Police Report listed Damon McDowell as a "victim" (A.R. 638).

2. Allstate makes liberal references to Fire Fighters and Police Officers, yet, *none* of the Fire Fighters were ever deposed in this case and no Officer so deposed made any accusation as against Damon McDowell (A.R. 159-176, incl.) See, also Allstate's Answer and Petition for Declaratory Judgment).
3. The Investigator to whom Allstate claims the West Virginia State Fire Marshal delegated its investigation (Deputy Willis) repeatedly refuted such Allstate claims in his deposition by stating (a) he was not conducting an investigation and (b) none was referred to him and that (c) he was not aware of any Investigator for Allstate speaking to Fireman concerning the Contents; that (d) the Investigation was closed until the Content's Lists was brought to his attention a year and half after the fire (A. R. 604 and 605); that (e) he was not aware of any investigation into any of the persons identified as taking mail at the residence. (Coleman, Underwood, Croft, et als., A. R. 608). See, also, A.R. 736, 757, 597, 599, 603 and 604.
4. The Chief Investigator and Deputy Fire Marshal for the State of West Virginia advised that "our agency was not contacted to investigate a fire from June 20, 2019 at 219 Highland Avenue, Oak Hill, West Virginia and we did not conduct

the fire scene examination and, as such, no report was produced concerning the fire by the West Virginia State Fire Marshal's Division". (A. R. 734) – (A.R. 395).

5. Detective Sgt. James Pack advised that (a) no one went upstairs to examine the upper portion of the house at all and that included Detective Willis and anyone else initially at the scene and that (b) he was the only one to return to the scene with the Allstate Origin and Cause Investigator Shawn Alderman and (c) Detective Willis never went to the upper floors of the Insured Premises (A. R. 621). and (A.R. 629), (d) Pack never saw others go upstairs and would have if anyone had (A.R. 629), (e) he was given a list of the names from counsel for Petitioners which included Michelle Sumpter, Goodman Blade, Daniel Croft, Jimmy Shumate and Sierra Sumpter and that no cell phone investigation concerning any of those individuals had been performed. (A. R. 624).

It is noteworthy that the relatives of the former Owner (Sumpter) and other Squatters/Trespassers felt privileged enough to return when run off by the minority owner who complained to authorities. There is no evidence of authority response. Only after the power was cut off to discourage the trespassers, was there a change. The change was that the home was then set on fire.

APPLICATION QUESTION AND ANSWER PROBLEMS:

The lower court accepted the Application offered five (5) months after requested, in violation of W. Va. Code 33-6-6, as being an admissible document, contrary to the applicable Statute which required that it be provided within 30 days of demand to be

admissible. Even if that ruling were not clearly wrong, many questions are raised by testimony of the producer of that Application. The application finally provided February 20, 2020 (after request therefor was made September 17, 2019) reveals not an electronic signature but a typed name and typed initials at the two critical locations. The application contains errors or outright falsehoods by inserting (1) the birthdate of Damon McDowell's wife more than 18 years in error, (2) placing a non-relative to occupy the Dwelling and (3) omitting the daughter of Damon and Mary McDowell from the position of an occupant of the Dwelling. The problems with that document are deepened by the testimony of its Producer, Lillie Hoover, who states that she saw the actual Application with handwritten notes of Damon McDowell and his handwritten signature and that document was in the possession of Hamrick and/or Allstate (A.R. 528 and 529), and "she did not know why Allstate never provided it". (A.R. 529). Allstate places the testimony of Lillie Hoover above all others in this proceeding. Yet, Allstate's legendary "this conversation is being recorded" recording was never offered to verify her version of the telephone conversation. Five (5) months after the demand for what Allstate refers to as the Application, a document was presented but not with handwritten markings or signature of Damon McDowell which Allstate's key witness, Lillie Hoover, claimed to have seen.

Testimony of Damon McDowell: Allstate includes a *portion* of the deposition testimony of Damon McDowell but ignores answers of Damon McDowell that given the glaring errors (wife's birthdate, excising their daughter from the dwelling and inserting a non-relative instead) were such that he would have never signed a document with such information in it. (A.R. 526), and was never allowed to read it until after the fire. (A.R. 526)

Allstate tries to get some traction out of "residence claims" which was the same strategy tried by the Insurer in *Shank v. Safeco* in which Judge Goodwin held residency was never the question. Nonetheless, their own evidence found in the recorded telephonic interview of Damon McDowell with Jeffrey Daniels on June 27, 2019 indicates that, at the time he did intend to reside there with his wife until he discovered the attitude of the neighborhood concerning him (a black man) and only then did he consider remodeling and flipping the house as would tens of thousands of Allstate's Insureds without any excuse of Allstate to cancel.

Clearly, these are among of the many issues of fact should have been considered for the Court to even consider Allstate's Motion for Summary Judgment. Other clear errors based upon things ignored by the Court were: (1) The evidence of occupancy illustrated by the Origin and Cause Investigators photographs of the charred remains of beds, tables, chairs, dressers, refrigerators (3), overstuffed chairs, and tools of someone obviously involved in remodeling the Dwelling as shown by A. R. 431-448, incl.). See, *Shank v. Safeco*, C. A. 2:15-CV-09033 (S.D. W. Va. – 8/30/2016) - (A.R. 372-382, incl). Also, Allstate's other key (Daniels) witness admitted the dwelling was "furnished" (A. R. 713), and thus occupied.

Many questions of law were ignored by the court below as revealed in its clearly erroneous findings. Among those was the question of whether or not a claimed answer concerning occupancy within thirty (30) days of the Application could ever create Policy Provision or condition in the face of statutory requirements more liberal, (Sixty (60) consecutive days of vacancy or non-occupancy) and in the face of Policy language found in Endorsement AVP 101 (A.R. 467) and Par. 9 of "conditions on Policy pg. 16 (A.R. 469)

which rendered the question and answer campaigned by Allstate as "Material" to be immaterial and, actually illegal if placed in the Policy.

The whole point of "vacancy" provisions is to protect against the change of circumstances rendering a property vacant. The Policy itself does not say occupied within a certain length of time; but, only deals with length of time of vacancy to excuse coverage and that length is sixty (60) consecutive days.

As Allstate has grudgingly admitted, no such language (occupy within 30 days) occurs anywhere in the Policy (A.R. 729, 732, 733) and the Policy has provisions directly opposite the position taken by Allstate in its Post-Claim Underwriting scheme. The Policy states that the premises could be vacant for "any period of time"...unless a period of time is set forth in the Policy. Wherefore, but for limitation of sixty (60) consecutive days set forth in AVP 101, Vacancy or Lack of Occupancy could never be an issue. See, A. R. 467 and 469.

The issues of material facts which could not be established in Allstate's favor are almost too numerous to count and prevent an award of Summary Judgment to Allstate.

ALLSTATE'S LAST GASP IN ITS POST CLAIM UNDERWRITING SCHEME ("SHINY OBJECT")

It has been well established that the Contents Lists were never mentioned in the (1) Cancellation Notice or; (2) *void ab initio* Notice and never mentioned in any Pleading of Allstate in this proceeding. However, a year and half after the loss, Allstate in the ultimate Post-Claim Underwriting Scheme decided to pull out a shiny object to try to distract attention from its glaring problems. The lower court included discussion of these matters which had been clearly and previously waived by Allstate's issuance of the Notice of Denial which antedated the loss by their relation back from July 18, 2019 to May 18,

2019 therefore negating the need for any proof of loss and blocking Allstate from the use of any proof of loss or contents Lists provided. Even more despicable is the fact that Allstate delivered these Contents Lists to Law Enforcement Officers without the explanation of Allstate's earlier refusal to mention Contents in either Denial/Notice *and* without explaining that Allstate had meager or no exposure to liability as to all the major items on that lists as a result of the exclusions or limitations set forth in their Policy (A.R. 249 and 250).

DENIAL OF LIABILITY

Denial by Insurer, made.. on grounds not related to "Proofs of Loss" – i.e. "Personal Property Contents Lists, is ordinarily considered a Waiver of Proofs of Loss or any defects therein". *Tayloe v. Merchants' Fire Insurance Co.,* 50 U.S. 13, L. Ed. 187. See, also *Am. Jur.* 2d, Insurance, Section 1384. Denials referenced include "denial based upon the statement that the Insurer had no obligation for the loss or that Policy never issued". It has further been held that such a Waiver is not affected by the submission of a Proof after Notice of Denial.

Likewise, any payment of the claim made constitutes a Waiver of any requirement of Proofs of Loss. However, Allstate's shiny object ploy does reveal that Allstate's intent in utilizing its Post-Claim Underwriting Scheme was deliberate, malicious and intended to cause harm to the Insureds.

CONCLUSION

Allstate's only position in seeking Summary Judgment was based upon *the* Application and alleged answers to questions therein as set forth in the July 18, 2019

Daniels letter. That position was only taken after Allstate realized that the earlier position of attempted Cancellation based on the Notice of July 4, 2019, on its face, was ineffective.

Allstate's final position depended upon two things: (1) the condition of the premises at the time the Policy was issued (May 18, 2019) and (2) the Question and Answer concerning *Occupancy* of the premises within thirty (30) days of the Application date to claim that Allstate would not have undertaken the risk and should be excused from coverage.

Allstate could have protected against (1) above (conditions) by simply doing a Pre-Policy Inspection, required by applicable precedent, of the easily accessible premises. Allstate did *nothing*. As to (2), even if answered as claimed by Allstate as to the question of thirty (30) day occupancy, such a condition or provision could not have been inserted in the Policy. If so, Allstate would have placed it therein in headline letters, but Allstate did not. The reason is, that it could not create such a Policy condition or provision because an attempt to do so would have been deemed illegal as it violated the required language in all Fire Insurance Policies issued in the State of West Virginia and found in the Policy in Endorsement AVP 101 (A.R. 467).

Further, Allstate's own evidence confirms "Occupancy" within the meaning of *Shank v. Safeco* and precedents cited by W. Va. District Court Judge Goodwin in *Shank,* and with Daniel's concession that it was "furnished" at time of loss (A.R. 713).

ALLSTATE'S UNFAIR CLAIM SETTLEMENT PRACTICES WERE COMMITTED WITH SUCH FREQUENCY AS TO ESTABLISH A GENERAL BUSINESS PRACTICE UNDER W. VA. CODE 33-11-4(9)

(a) *Misrepresenting pertinent facts or Insurance Policy Provisions relating to coverages at issue by:*

(1) Falsely asserting that the Application is a part of the Policy;

(2) Omitting an Owner from the Policy shown as additional named Insured on the Application.;

(3) Prompting admittedly false position that an Insurance Application Answer is preeminent although clearly contrary to statutorily required language in the Policy and other specific Policy Provisions dealing with Vacancy and Non-Occupancy and Remodeling.

(b) *Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under the Policy* by:

(1) Refusing to provide for five (5) months after demand therefor, the Application upon which Allstate intended to rely and stated that it would rely on for its defense and the inspection report.

(c) *Failing to adapt and implement reasonable standards for the prompt investigation of claims under Insurance Policies;*

(1) Attempting to use Contents List not included in any of the Cancellation Notice or the *void ab initio* Notice denials one year and four months after the loss in violation of W. Va. C.S.R. § 114-14-6.5...

(f) *Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear* by:

(1) With all coverage limits set by Allstate and Coverage A Liability of Allstate having been clearly established for "total loss", refusing Good Faith Settlement of Coverage A claims by attempted use of separate Coverage (C) matters not mentioned in any Denial Notices.

(i) *Attempting to settle claims on the basis of an Application which was altered without Notice to, or knowledge of or consent of, the Insured...*

(1) Altering an Application and withholding it for five (5) months while omitting information which would be clearly relevant and inserting information not indicated by any other facts developed.

(m) *Failing to promptly settle claims, where a liability has become reasonably clear under one portion of the Insurance Policy Coverage in order to influence settlements under other portions of the Insurance Policy Coverage* – in that

(1) After the Coverage A (Dwelling) Claim had been established as a total loss (unrefuted by Allstate), refusing to pay the Coverage A amounts set by Allstate of $379,618.00 by impermissible claims concerning the separate and severable coverage under Coverage C by utilization of information, the receipt and use of which is impermissible.

The number and frequency of the violations by Allstate in this single proceeding constitute the establishment of a General Business Practice of Unfair Claims Settlement Practices as against the Petitioners. *Elmore v. State Farm Mutual Insurance Co.*, 202 W.Va. 430, 504 S.E. 2d 893 (1998).

Based upon the foregoing and matters in Petitioners' Brief, Petitioners are entitled to Summary Judgment, as there are no material issues of fact to prevent Petitioners' Award of Summary Judgment and Petitioners are entitled to Summary Judgment as a matter of law. The decision of the lower Court should be REVERSED and Petitioners' Motions for Summary Judgment should be GRANTED.

RELIEF TO WHICH PETITIONERS ARE ENTITLED

1. An award of Summary Judgment for full amount of the Policy Coverage A for the Dwelling of $379,618.00 to Damon McDowell and Deeanna Lawson, Property Owners;
2. An award of Summary Judgment for Personal Property Coverage under Coverage C of the Policy to Damon and Mary McDowell in an amount to be determined by the Jury at Trial for purposes of determining the value, not to exceed $227,117.00;
3. Pre and Post Judgment interest on the awards of this Court and those following of the Jury Trial, together with Petitioner's costs in the proceeding, including reasonable Attorney Fees as a result of Allstate's Bad Faith in failing to provide Insurance proceeds required of it pursuant to the Policy;
4. Summary Judgment that Petitioners have established that Allstate engaged in a General Business Practice of violations of the Unfair Claims Settlement Practices Provisions of the Unfair Trade Practices Act against Petitioners for which Petitioners are entitled to an award in an amount as set by the Jury at subsequent Trial; and such other awards and relief to which the Petitioners are entitled.

Respectfully Submitted,

DAMON MCDOWELL, MARY MCDOWELL AND DEEANNA LAWSON, Petitioners By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0603

DAMON MCDOWELL, ET AL,
PLAINTIFFS BELOW,

PETITIONERS,

V.

ALLSTATE VEHICLE AND PROPERTY
INSURANCE COMPANY, an Illinois Corporation, and
PATRICK O. HAMBRICK, JR.,

RESPONDENTS.

FROM THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA
(Civil Action No. 19-C-129)

I, Erwin L. Conrad, counsel for Damon McDowell, Mary McDowell and Deeanna Lawson, does hereby certify that on the 6th day of January, 2022, service of the foregoing **"PETITIONERS' REPLY BRIEF"** has been made upon Counsel of record by depositing a true copy thereof in the regular United States mail, first-class postage prepaid and Via Fax No. 304-345-5265, addressed as follows:

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