IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No.: 21-0603

DAMON MCDOWELL, ET ALS,
PLAINTIFFS BELOW, PETITIONERS

vs.) No. 21-0603

ALLSTATE VEHICLE AND PROPERTY
INSURANCE COMPANY, AN ILLINOIS CORPORATION and
PATRICK I. HAMRICK, JR.
DEFENDANTS BELOW, RESPONDENTS.

PETITIONERS' BRIEF

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Unrefuted evidence, largely acknowledged by Allstate, established; (1) contract existed, (2) Allstate's failure to perform a pre-policy reasonable inspection while claiming the inspection done 25 days after coverage to be an underwriting inspection and; (3) that the July 4, 2019, Cancellation Notice established coverage continued to exist after the Fire Loss on June 20 up to and including August 14, 2019; (4) that the July 18 *void ab initio* notice set forth two basis, neither of which could be treated as material misrepresentations as the statutory requirements and specific Policy provisions prevented interpretation of those Questions and Answers in the Application from being material to the risk; (5) that reasonable expectations of insurance required that the denial notices be timely given – in any event, within 30 days of the issuance of the Policy and neither of the Denial Notices were given within 30 days of the issuance of the Policy; (6) it was unrefuted that the Premises were a total loss within established meanings determined by the City of Oak Hill issuing their Order of demolition of the premises after the fire on June 20, 2019; (7) that there was no evidence that the Insured intentionally caused or contributed to the Fire or conspired with others to cause the fire causing the loss on June 20, 2019. pp. 14, 15,16

That it was established that Allstate (1) deliberately excluded a 50% Owner of the premises from the Policy to limit Allstate's dwelling coverage Exposure by 50%; (2) had provided false answers to Discovery Requests, (3) failed to notify the Fire Marshal of the Fire Loss; (4) alleged that the Fire Marshal completed an investigation which was denied by the State Marshal and (5) alleging that the State Fire Marshal's Office had delegated investigation to Fayette County Deputy Willis when all such assertions were repeatedly denied under Oath by Deputy Willis. pp. 15, 16

Summary of Argument (cont'd)

By Allstate refusing to include Deeanna Lawson as a covered insured, they were aware that she was part owner of the premises at 219 Highland Avenue and that information had been supplied to the Allstate Representatives by the Applicant for Insurance for Allstate yet failed to include Deeanna Lawson from the Policy of Insurance and then attempted to profit thereby by alleging that they only had to pay the Insureds (Damon and Mary McDowell) based upon their interest of ownership of the demised premises pg. 15

Allstate's Conduct in adjusting the claims of the Insureds Constituted Bad Faith entitling Insureds for recovery of face Value of Coverage A and pre and post judgment interest thereon and entitlement to recovery of reasonable attorney fees and costs pursuant to *Pitrolo* and *Hayseeds;* for judgment of entitlement to Coverage C up to $227,117.00 up to be set by a Jury decision; entitlement to an award for Allstate's repeated violations establishing a business pattern with regard to the adjustment of the claims of Insureds in violation of Unfair Settlement Practices Act Provisions of the Unfair Trade Practices Act with amount of that recovery to be determined by the Jury at Trial pg. 17

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Assignments of Error

1. The court below committed plain error by adopting the exact language of the Respondent's Counsel in holding that a Contract of Fire Insurance could not be created by issuance of the Policy in exchange for the payment of the premium.
2. The lower court erred in failing to acknowledge that Allstate and the Insureds established a Contract by issuance of the Policy and delivery of the same to the Insureds in exchange for acknowledged premium payment, later confirmed by claim acknowledgment and partial claim payments.
3. The court below failed to acknowledge the evidence which established that no pre-policy inspection of the premises had been performed by or for Allstate prior to the issuance of the Policy and by treating the inspection performed 25 days after the Policy issuance as an "underwriting inspection" and by holding that the post-policy visual inspection was following standard procedures without receiving any evidence concerning a constituted standard procedures of Allstate or in the industry, all in violation of the Court's holding in *Filiatreau v. Allstate*.
4. The court below erred in its failure to acknowledge that the Notice of Cancellation of Allstate issued July 4, 2019 *following* the Fire Loss of the premises on June 20, 2019 acknowledged that the Policy remained in effect until August 14, 2019 and

constituted admission of coverage for the fire loss which occurred on June 20, 2019.

5. The court below erred in failing to find that the alleged *void ab initio* letter of Allstate Representative Daniels issued on July 18, 2019 stated only two matters related to the Application dealing with (a) alleged answer that the premises would be occupied within "30 days of the Application" and (b) condition of the premises at the time of the Application which Allstate had waived by its failure to make any reasonable effort to determine "condition" by an inspection prior to policy issuance.
6. The court below committed plain error by misstating and inserting in the July 18, 2019 alleged *void ab initio* Notice of Jeffrey Daniels phrases not therein, such as..."based on Plaintiffs' concealment or misrepresentation of Material Facts and circumstances related to their claim or loss and "because the subject fire resulted from the intentional or criminal acts of or at the direction of the Plaintiffs intent to cause loss".
7. The lower court committed plain error in failing to find that after Allstate had acknowledged Policy issuance, Premium Payment and Partial Claim Approval constituting a Contract between the Insured and Allstate that Allstate's insistence that Questions and Answers in the Application overrode statutory and policy provisions created a claim of "ambiguity" which requires Application of the Doctrine of Reasonable Expectations of Insurance.
8. The court committed plain error in failing to find that under the Doctrine of Reasonable Expectations of Insurance the denial notices (including the Notice of Cancellation of July 4, 2019 and the *void ab initio* Notice of July 18, 2019) violated

the requirements of timeliness of notice requiring that the Denial Notices be given within 30 days of the Policy issuance whereas the notices given by Allstate were 47 days and 60 days, respectively, after the issuance of the Policy and are thus, pursuant to *Keller* inadmissible in the proceeding.

9. The court below erred in failing to find that even assuming the truth of Allstate's assertions concerning the Answers to the "30 day Vacancy" question as asserted by Allstate such Question and Answer could never represent a Material misrepresentation as the same would be expressly barred by statutory provisions (W. Va. Code 33-17-2) and the expressed Policy Provisions, including those in Policy Endorsement AVP101.

10. The court below erred in failing to hold that the question of whether or not Damon McDowell indicated that he would be remodeling the premises could provide no support for Allstate's position as remodeling was expressly permitted by Allstate in its clear Policy Provisions.

11. The court below committed plain error in failing to hold that the Denial Notice styled as the *void ab initio* Notice on July 18th which antedates the loss which occurred on June 20, 2019 by relation back to the date of the issuance of the Policy on May 18, 2019 constituted a waiver of any necessity of proofs of loss and prohibits Allstate from reliance, in any fashion, on the Personal Property Contents Lists to deny coverage under the Policy.

12. The court below erred in failing to find that there were numerous issues of Material Fact concerning Allstate's Motion for Summary Judgment which precluded the Court below from granting Summary Judgment to Allstate.

13. The court below erred in ignoring unrefuted evidence in the form of an Order of the municipality in which the premises are situate which, after the fire, determined the premises at 219 Highland Avenue were in such condition that they required demolition; and, the lower court, instead, misstated the standard for determining total loss by implying that the fire must consume the entire structure.
14. The court below committed plain error by holding that the July 18, 2019 Notice of Plaintiffs was a "prompt" notification in the face of clear evidence said Notice was provided 60 days after the issuance of the Policy and 27 days after the fire loss itself.
15. The court below erred in failing to find that Petitioners' were entitled to Summary Judgment on their Motions.

STATEMENT OF THE CASE

Procedural History of the Case

Petitioners, Damon McDowell and Deeanna Lawson, Owners of a .22 Acre Tract, together with the improvements thereon situate at 219 Highland Avenue, Oak Hill, Fayette County, West Virginia (hereinafter "the Insured Dwelling"), together with Mary McDowell, Co-owner, with Damon McDowell of the Personal Property situate therein, suffered a fire loss of the Dwelling and Contents on June 20, 2019. After initial claim payment, Allstate denied coverage. The Petitioners filed their Complaint in the Circuit Court of Fayette County against Respondents for recovery under Allstate Policy 80138360 issued May 18, 2019, alleging (1) breach of contract, (2) violation of the Unfair Claims Settlement Practices Provisions of the Unfair Trade Practices Act pursuant to W. Va. Code 33-11-4(9) and the regulations thereunder and (3) seeking Judgment against the Respondents

under Coverage A and C of the Policy totaling $607,389.00, together with a claim for $200,000.00 for Compensatory Damages and also (4) seeking Punitive Damages, (5) pre and post-judgement interest and reasonable Attorney Fees and Court Costs.

The proceeding was filed and served, together with Petitioners' First Set of Requests for Admissions and Requests for Production of Documents on September 17, 2019. The Respondents removed the matter to Federal Court by Notice of Removal filed October 11, 2019 and Petitioners filed their Motion for Remand.

By Order entered December 11, 2019, U. S. District Judge Goodwin granted Petitioners' Motion for Remand. Upon recusal of Circuit Judge Thomas Ewing, the matter was then assigned to Judge Paul M. Blake, Jr.

At the close of Discovery, Petitioners filed their Motions for Summary Judgment and Respondent Allstate filed its Cross-Motion for Summary Judgment with the Parties thereafter making Supplementary Filings and Arguing the Respective Motions on April 19, and May 3, 2021, respectively (Appendix pp. 741-787, incl. and 788-879, incl.) respectively. The lower court, by Order entered July 6, 2021, denied Petitioners' Motions for Summary Judgment and Granted Respondent Allstate's Cross-Motion for Summary Judgment. It is that Order from which Petitioners have taken this Appeal.

NOTE: Two (2) months after the appeal was filed, the lower court entered an order, September 23, 2021 DISMISSING Patrick Hamrick, Jr., nunc pro tunc Nov. 15, 2020.

Statement of facts of the Case

On or about May 17, 2019, Patrick Hambrick, Jr., dba Heritage Insurance Agency prepared a Proposal and submitted the same to Damon McDowell for Insurance against Fire and Other Loss for 219 Highland Avenue, Oak Hill, West Virginia with Homeowner's

Coverage and Dwelling Protection set at $332,210.00; Personal Property Protection at $199,326.00 and which included an additional Proposal for Life Insurance. Appendix pg. 160. That Proposal did not make any inquiries concerning the occupants, intentions for use, whether or not it was in a state of being remodeled or request any information from Damon McDowell concerning conditions of the premises at 219 Highland Avenue, Oak Hill, West Virginia.

The following day, May 18, 2019, Damon McDowell was contacted by telephone while he was working, roofing a Church, and asked a series of questions by Lilly Hoover, an employee and producer in the Office of Patrick Hambrick, Jr., dba Heritage Insurance Agency. No pre-policy inspection of the premises was performed by or for Allstate. The first premises inspection (exterior only) was performed June 12, 2019, 25 days after policy issuance.

No so-called underwriting inspection report was provided in response to July 29, 2019 request (Appendix 137) and no written application was ever provided to Damon McDowell upon which Respondents rely until 6 months after the first request. Appendix pg. 22. Requests were included in the initial Request for Production of Documents filed with the Complaint which requested a copy of the application upon which Defendants rely. Request 12, Appendix 157. Disputes exist as to the answers given in a conversation between Damon McDowell and Lillie Hoover. Lillie Hoover claims that she has seen the written application and a written signature of Damon McDowell. Although, it has never been produced, she indicates it is in the possession of Mr. Hambrick or Allstate (Appendix pp. 528 and 529). The Policy was issued on May 18, 2019.

Allstate set the Coverage A (Dwelling) and Coverage C (Personal Property Values at $379,618.00 and $227,717.00, respectively. Appendix pp. 536, 537, 538 and 739.

Petitioner, Damon McDowell downloaded from a site at some point after the Fire Loss an application which purports to be the Application but does not contain either his initials or his signature. When "the Application" upon which Respondent's rely was finally provided, (more than six (6) months after the first requests therefor), there appears to be typed initials and a typed signature but without what appeared to be an electronic signature or anything akin to Damon McDowell's actual signature.

It is conceded by Allstate (Appendix pp. 530, 706, 707 and 710) that Allstate, through its Producer (Lillie Hoover) and the void ab initio letter author and (Jeffrey Daniels), were well aware that Deeanna Lawson owned an interest in the insured premises at 219 Highland Avenue, Oak Hill, West Virginia. Nonetheless, Deeanna Lawson was excluded by Allstate from the Policy as either an insured or additional named insured.

The application upon which Respondents rely had the following errors:

(a) The date of birth of Mary McDowell (wife of Damon McDowell) was incorrect by at least 18 years;

(b) The child of Damon and Mary McDowell who resides with them was excluded from residency of the insured premises; but

(c) A non-relative was inserted as a resident with Mr. and Mrs. McDowell.

The application which was promoted by Respondents had the correct name, birthdate and social security number of Damon McDowell and listed Deeanna Lawson as an additional named Insured; although, she was excluded from the Policy by Allstate.

The alleged "Q and A" upon which Respondent, Allstate relies is incapable of creating a "material" misrepresentation, but it is, nonetheless disputed in two key particulars:

(1) Damon McDowell actually stated that he was remodeling 219 Highland Avenue and the application promoted by Allstate states that he denied it was in a state of being remodeled; and

(2) Damon McDowell stated he believed that he could eventually be residing there within sixty (60) days but the application ultimately provided by Allstate said thirty (30) days;

All Parties and Allstate concede that the Agent of Allstate acknowledged that the property had not been inspected by Allstate prior to the issuance of the Policy on May 18, 2019.

The first and only inspection of the Insured premises occurred on June 12, 2019, 25 days after the formation of the Contract by and between Respondent Allstate and the Insureds on May 18, 2019. That Inspection, performed by Myriad, consisted of a partial view of portions of the exterior of the premises. The Report consisted of a report on that partial exterior view of the premises with certain photographs of the exterior of the dwelling and grounds. Appendix pg. 721.

In anticipation of remodeling, the Insureds had been removing certain inoperable appliances and other trash and debris left by the previous owner and had placed the same on the front lawn for trash pick-up. When the Insureds were notified of the visual June 12 Exterior Inspection and the inoperable appliances and debris left by the previous owner being placed on the front lawn for trash pick-up being attributed to the insureds, insureds, after June 12, 2019 and before the fire on June 20, 2019, caused the removal of all the inoperable appliances, trash and debris from the yard (Appendix 682) and had cut,

removed and stacked for pick-up certain foliage described as over-growth and under-brush in the pictorial display of the June 12 visual exterior examination. Appendix pp. 672 and 673.

All utilities were connected at the Insured premises and the charges therefor were in the names of Damon McDowell or Deeanna Lawson. Appendix pp. 714. 715, 716, and 718.

However, certain relatives and friends or associates of relatives of the prior owner insisted on continuing to attempt to live in the premises owned by Damon McDowell and Deeanna Lawson in spite of the efforts of Damon McDowell to have them removed. Appendix 625.

Certain of these individuals had been receiving mail at the premises and, when the premises were secured to prevent them from entering, they would break-in to the premises in spite of the efforts of Mr. McDowell. Appendix 595. This was reported to the local authorities who took no action to assist the owners in their efforts to have the intruders arrested. Appendix 624. A few days prior to June 20, 2019, (1) in an effort to discourage the trespassing squatters and (2) to commence certain electrical improvements, Damon McDowell disconnected the electrical power from the premises in order to use his Generators to provide the power necessary during the period of electrical upgrade of the premises. Appendix pp. 710 and 711.

The persistent squatters were apparently not discouraged as the premises were set on fire (later determined to be as a result of arson) which was first reported near midnight on June 19 with Fire Department response on June 20. When the authorities and the Insurance Company Representatives permitted the Insureds to enter the

premises, they discovered racist graffiti scrawled on many of the walls inside the premises. Appendix pp. 600 and 612.

The identities of many of the persistent squatters were made known to Police Authorities as many were so bold as to receive mail at 219 Highland Avenue and one person dropped their Driver's License near the entrance of the house and it was discovered by Fire Fighters on June 20, 2019 (Appendix 652). There is no evidence of any investigation of individuals whose identities were made known to the Police Officers. Appendix pp. 625.

After the fire, Petitioner, Damon McDowell, filed a claim under the Policy, Allstate acknowledged the Claim and made partial claim payments, Appendix pp. 118, 119, 704 and 705.

The conduct of Allstate supports a determination of coverage by the following:

a. Allstate "happy to have you with us" notification to the Insured on May 22, 2019 signed by Allstate's President, Julia Parsons on the date was actually forwarded as evidence by Exhibit 4 to the Complaint, Appendix 68. Enclosed with what was styled as "Policy and Policy Endorsements" (Exhibit 5 to the Hoover Dep. dated May 21, 2019 and received May 22, 2019) Appendix 541-585, incl. (included AVP101 at pg. 575 but omitted Valued Policy Provisions-provided later).

b. Confirmation of premium payment was made for May 22, 2019 (Exhibit 6 of the Complaint), Appendix pp. 76 and 77, incl.

c. The Amended House and Home Policy Declarations were sent July 5, 2019 (after the fire loss) (Complaint Exhibit 7), Appendix pg. 85.

d. Allstate forwarded the "we received your Claim and started working on it" letter on June 20, 2019 from Teshara Cook (Complaint Exhibit 8), Appendix pg. 116.

e. On June 20, Allstate forwarded the "Good News"! – "the claim payment is on the way" (Complaint Exhibit 9) Appendix pg. 110 and it was followed by an actual Claim Payment (Appendix pg. 111.

f. The Insureds were provided "the advance Living Expense Payments for the periods June 25-29 up to an including July 20, 2019 (Complaint Exhibit 10), Appendix pp. 120-123.

In spite of the acknowledgment of the claim and the partial claim payments, Allstate issued its July 4, 2019 Notice of Cancellation which provided that the coverage would continue in effect until August 14, 2019 (nearly two months after the Fire which occurred on June 20, 2019), Appendix pg. 143.

During the period in which coverage continued in effect pursuant to the Notice of Cancellation (Appendix 143, 708 and 721) until August 14, 2019, Allstate, by Jeffrey Daniels authored a letter referred to as the "*void ab initio*" letter containing five brief sentences in a letter covering two-thirds of a page (Appendix 730 and 731). The basis for the "*void ab initio*" letter was lack of "occupancy of the Home within thirty (30) days of the application and *condition* of the Home at time of Application". In the letter which Allstate styles as the *void ab initio* letter upon which they have placed their total reliance, it never mentions "remodeling" or "in the course of construction" contrary to the lower court's Findings of Fact 27 (Appendix 10) and 41 (Appendix 14). Likewise, the critical *void ab initio* Notice of July 18, 2019 never mentioned "Personal Property Contents Lists", (Appendix 730, 731), contrary to the lower court's Findings of Fact 27, 35 and 57 –

Appendix 10, 13 and 18) although, the author of that letter acknowledges that he was aware of the Personal Property Contents Lists and had previously interviewed Damon McDowell who had admitted that he had intended to remodel the Home.

Petitioners filed the within proceeding, together with their First Set of Requests for Admissions and Requests for Production, on September 17, 2019. Defendants removed the matter to Federal Court by Notice of Removal filed October 19, 2019 and Petitioners filed their Motion for Remand.

Defendants filed Partial Responses to the Requests for Admission and Requests for Production without providing any of the Reports first requested from Jeffrey Daniels on July 29, 2019 (Appendix pp. 136-139, incl.) and requested in the initial Requests for Production served September 17, 2019. *The* Application upon which the Defendants relied in the proceeding was finally forwarded to Petitioners on February 20, 2020, Five (5) months (Appendix 201-322, incl. see, 225 & 226 and Exhibit B) after the initial demand therefor which prohibits its use in evidence pursuant to W. Va. Code 33-6-6,.

SUMMARY OF ARGUMENT

1. The Contract between Allstate and the Insureds was established by Policy issuance and delivery from Allstate in exchange for acknowledged premium payment payments and confirmed by Claim Acknowledgment and Claim Payments;
2. Allstate's Notice of Cancellation on July 4, 2019 *following* the fire loss of the premises on June 20, 2019 acknowledged that the Policy remained in effect until August 14, 2019 and was based on a Visual, Exterior only inspection and Report

completed June 12, 2019, twenty-five (25) days after Policy issued and the Contract was acknowledged;

3. No pre-policy Inspection had been performed by Allstate prior to the issuance of the Policy with the first inspection being performed twenty-five (25) days after the Policy issuance;
4. As the Cancellation Notice of July 4, 2019 confirmed that Policy coverage continued in effect until August 14, 2019, the July 18, 2019 *void ab initio* notice was given after Allstate acknowledged that coverage existed and would continue to exist until August 14, 2019;
5. The alleged *void ab initio* letter of Allstate Representative, Jeffrey Daniels, on July 18, 2019 stated that two matters related to the Application dealing with (a) alleged answer of "occupancy" of the premises within thirty (30) days of the Application and (b) *condition* of the premises at the time of the Application were the reason for the notices. That Notice did not include references to "remodeling" or "personal property contents lists"; although, the information as to each had been previously made available to the Author of the alleged *void ab initio* letter;
6. Assuming arguendo, the truth of Allstate's assertions concerning the answer to the "thirty day (30) day vacancy question and Allstate's assertion of the controversy concerning remodeling, those assertions of misrepresentations could never be raised to the level of Materiality as the same are expressly barred by statutory provisions (W. Va. Code 33-17-2) and expressed policy provisions, including those in Policy Endorsement AVP101;

7. Allstate's acknowledgment of Policy Issuance, Premium Payment and Partial Claims Payment, while alleging that Questions and Answers in the Application could override Statutory and Policy Provisions created a claim of Allstate of ambiguity which requires the Application of the doctrine of "reasonable expectations of Insurance";
8. Under the doctrine of reasonable expectations, the denial notices (including the Notice of Cancellation of July 4th and the *void ab initio* notice of July 18) violated the requirements of timeliness of notice requiring that the denial Notice be given within thirty (30) days of the Policy issuance, whereas the notices given by Allstate were 47 days and 60 days, respectively, after the issuance of the Policy. Allstate's cited Authorities do not support the use of the denials to prohibit payment for the losses of the Petitioners;
9. Allstate's provision of a denial in the form of its *void ab initio* notice, which antedates loss on June 20, 2019 by relation back to the date of the issuance of the Policy on May 18, 2019 constituted a waiver of necessity of proofs of loss and prohibits Allstate from reliance, in any fashion, on the Personal Property Contents Lists to deny coverages under the Policy;
10. Numerous genuine issues of Material Fact concerning Allstate's Motion for Summary Judgment precluded the court below from granting Summary Judgment to Allstate;
11. The unrefuted evidence, largely acknowledged as true by Allstate, established that:

    (a) the Contract of Fire Insurance had been established between Allstate and Petitioners effective May 18, 2019 insuring the premises at 219 Highland

Avenue, Oak Hill, West Virginia with Dwelling Coverage of $379,618.00 under Coverage A and Personal Property Coverage under Coverage C up to $227,117.00;

(b) the Premium Payments were made by the Insureds and acknowledged by Allstate;

(c) a Proper Claim was filed after the Fire Loss on June 20, 2019 and Partial Claim Payments made by Allstate under the Policy;

(d) no Inspection of the Premises were made prior to the issuance of the Policy;

(e) Allstate's Notice of Cancellation of July 4, 2019 acknowledged that coverage remained in effect on the insured premises until August 14, 2019 (well after the fire which occurred on June 20, 2019);

(f) the July 18, 2019 alleged *void ab initio* letter claiming the Policy to be void to May 18, 2019 based upon Question and Answer in an Application concerning occupancy within thirty (30) days and the Pre-Application Condition of the Premises attempted to make the same material misrepresentations in the Application;

(g) the matters raised concerning alleged *material* misrepresentations were all negated by statutorily required provisions in all Fire Insurance Policies issued in the State of West Virginia, and specific provisions in the Policy;

(h) Allstate's claims that "Q and A" in an Application had priority over statutory provisions and clear Policy Provisions created a claim of ambiguity requiring the Application of the Doctrine of Reasonable Expectation of "Insuance" and, pursuant to which, neither of the "denial" notices could have been treated as timely made barring, together with Allstate's failures under W. Va. Code 33-6-6, the use of the notices of denial to deny Insured's coverage of the loss;

12. The conduct of Allstate in:

(a) excluding from the Policy, Deeanna A. Lawson when Allstate knew that she was part Owner of the Insured Premises and had been included as a "Additional Named Insured" under any version of the disputed Application Forms;

(b) failing to do a Pre-Policy Inspection of the premises to be insured and claiming the July 12 Visual Exterior Inspection of Myriad performed twenty-five (25) days after the Policy issuance was a "*Underwriting* Inspection" when

Allstate knew that Underwriting Inspections must be completed before the Policy Issuance and Premium Payments made therefor;

(c) issuing the July 4, 2019 Cancellation Notice based upon the June 12, 2019 Report and Photos which acknowledged that the Policy continued in effect until August 14, 2019 (the fire loss had occurred on June 20, 2019); and then

(d) after the fire and after partial claim payments made pursuant to the Policy and after issuance of the Cancellation Notice which continued Coverage in effect until August 14, 2019, Allstate issuing its *void ab initio* letter dated July 18, 2019 with knowledge the Statutory Provisions and Clear Policy Language prohibited Allstate's Claim of Materiality of the matters set forth in July 18, 2019 letter as a reason for Denial Coverage; and

(e) refusing to provide the Application upon which Allstate relied in responses in Requests provided July 29, 2019 and September 17, 2019;

(f) providing the Application requested on February 20, 2020, five (5) months after the initial demand therefor which prohibits its use in evidence pursuant to W. Va. Code 33-6-6; and

(g) repeatedly providing false answers to Discovery Requests that

(i) Allstate had notified the Fire Marshal of the Fire Loss when a determination had been made that the loss was as a result of arson; as required by W. Va. Code 29-3-12a(b) (Appendix 231);

(ii) That the State Fire Marshal had completed an investigation of the June 20, 2019 fire in the face of official denials of such investigation by the State Fire Marshal (Appendix 395);

(iii) That the State Fire Marshal's Office had delegated Investigation to Deputy Willis in the face of repeated sworn statements of Deputy Willis denying any involvement in the Fire Scene Investigation of the fire on June 20th at 219 Highland Avenue (Appendix 736, 737, 597, 598, 599, 603 and 604).

(h) Arguing that Insureds had intentionally caused or contributed to the Fire Loss or conspired with others when the issue had never been raised as alleged in Allstate's Pleadings and was never asserted in any Report or from any testimony of any deponent with any investigatory authority concerning the Fire Loss:

(I) Attempting to use information from Personal Property Contents Lists when:

(i) Allstate had waived necessity of a Personal Property Contents Lists and any opportunity to use the same by their July 18, 2019 Notice

relating back to May 18, 2019 concerning the June 20, 2019 Fire Loss for which Partial Payments had been made under a claim acknowledged by Allstate; and

(ii) It was known to Allstate that the items trumpeted as having inflated value by Allstate were excluded from coverage under Coverage C of the Policy in any event;

all constituted repeated violations of the Unfair Settlement Practices Provisions of the Unfair Trade Practices Act (W. Va. 33-11-4(9) and the regulations thereunder and constituted a general business practice by which Petitioners were damaged. *Elmore v. State Farm Auto. Ins. Co.* 202 W.Va. 430, 504 S.E. 2d 893 (1998).

The nature, number and type of Allstate's violations reveals them to be intentional.

13. That Allstate's conduct, in adjusting the Claim of the Insureds, constitutes Bad Faith entitling Insureds to recovery of Attorney Fees and Costs pursuant to *Aetna v. Pitrolo*, 176, W.Va. 190, 342 S.E. 2d 156 (1986) and *Hayseeds, v, State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E. 2d 73 (1986) together with a face amount of Coverage A under the Policy of $379,618.00 and pre-judgment interest thereon and Judgment for entitlement to coverage under Coverage C of the Policy in an amount up to $227,117.00 to be determined by later Jury Decision and to an award of damages for Allstate's repeated violations which established a business pattern with regard to adjustment of the claims of the Insureds in violation of the Unfair Settlement Practices Provisions of the Unfair Trade Practices Act [W. Va. Code 33-11-4(9)], with the amount of recovery thereunder determined by the Jury at Trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request that this matter be set down pursuant to Rule 19, Rules of Appellate Procedure. Petitioners believe this matter is not appropriate for Memorandum

Decision and request additional 10 minutes per side for argument due to the number and type of issues to be presented to the Court.

ARGUMENT

Standard of Review Applicable

The within proceeding is an Appeal from decisions made by the lower court regarding Motions of Petitioners for Summary Judgment and Cross-Petition of Respondent Allstate for Summary Judgment, all pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. The Court's Standard of Review for Summary Judgment remains *de novo*. *Fayette County Nat'l Bk. v. Lilly,* 199 W. Va. 349, 484 S.E. 2d 232 (1997). *Keller v. First Nat'l Bk.,* 184 W. Va. 681, 403 S.E. 2d 424 (1991). See, also, *Painter v. Peavy,* 192 W. Va. 189, 451, S.E. 2d 775 (1996).

Decrees based on Questions of Fact will be reversed when it clearly appears to be against the Weight and Preponderance of the Evidence. *Pearson v. West Virginia Lime Company*, 56, W. Va. 650, 49 S.E. 418 (1904); see, also, *State Farm Mutual Auto Insurance Co. v. Am. Cas. Co.*, 150 W. Va. 435, 146 S.E. 2d 842 (1966). "A decree will be reversed which is based on conflicting evidence and findings in support of a decree are contrary to the preponderance of the evidence or where it is otherwise clearly wrong". *Sturm v. Saint Albans*, 138 W. Va. 911, 78 S.E. 2d 462 (1953).

"When evidence is conflicting and Findings of Fact by the Trial Judge, are based upon an inapplicable principle of law, the decision is, for that reason clearly wrong and will be set aside on appeal". *McCausland v. Jarrell*, 136 W. Va. 569, 68 S.E. 2d 729 (1951).

To support a Summary Judgment Decision, it must be shown that there was no genuine issue as to any Material Fact and the moving Party is entitled to Judgment as a

matter of law. *Witt v. Clendenin Lumber*, 178 W. Va. 672, 353 S.E. 2d 749 (1987). The resisting Party must only present some evidence that Facts are in dispute. *McCullough Oil v. Rezek*, 176 W. Va. 638, 346 S.E. 2d 788 (1986). See, also, *Pierce v. Ford Mtr. Co.*, 190F.2d 910 (4th Cir. 1951).

The Trial Court, in considering the Motion for Summary Judgment, must adopt those inferences from the facts that are most favorable to the non-moving Party, unless such inferences are strained, forced or contrary to reason. Conversely, the Trial Court is not permitted to adopt inferences from the facts that are most favorable to the moving Party. *Renner v. Stafford*, 245 Va. 351, 429 S.E. 2d 218 (1993). It was the long-standing Policy of the Courts of West Virginia to favor resolution of disputes on the merits. *McGinnis v. Cayton*, 173 W. Va. 102, 312 S.E. 2d 765 (1984).

On Appeal, the facts must be construed in a light most favorable to the losing Party. *Masinter v. WEBCO,* 164 W. Va. 241, 262 S.E. 2d 433 (1980); *Marks Constr. v. Board of Education,* 185 W.Va. 500, 408 S.E. 2d 79 (1991) (*per curiam)*; see, also, *Hartman v. Bethany College*, 778 F. Supp. 286 (N.D. W.Va. 1991).

I

A Contract for insurance coverage existed between Allstate and Petitioners

The Contract was formed between Allstate and Petitioners (although, Allstate omitted Deeanna Lawson) by policy issuance and premium payment, effective May 22, 2019. "Insurance Policy is a Contract between the Parties, consisting of a Policy and all Endorsements attached thereto" *Littrall v. Indemn. Ins. Co. of No. Am.* 300 F.2d 340, 82 S .Ct. 1558. The "Policy" is the evidence delivered to the Insured, of the Contract of

Insurance and, ordinarily, of itself constitutes complete evidence of the Contract". *United Ben. Life Ins. Co. v. McCrory* 414 F.2d 928, 90 S. Ct. 687, (*per curiam).*

In this instance, the Contract between Allstate and Petitioners (although Allstate deliberately omitted a Owner of the Dwelling) (Deeanna Lawson), was established by the issuance of Policy Number 80138360 (Appendix pg. 161- incl.) in effect at the earliest on May 18, and the latest May 22, 2019 issued and exchanged for the premium payments acknowledged on May 20, 2019 (Appendix pp. 76 and 77) as confirmed. (Appendix 78). Coverage was further confirmed by confirmation of Policy changes through July 5, 2019 (Appendix pg. 85) and by claim payments under the Policy for the loss which occurred on June 20, 2019. Appendix pp. 118, 119, 704 and 705.

II

The loss suffered on June 20, 2019 was covered by the Policy.

Relevant coverages under the Policy were all set by Allstate and not by the Insureds and conceded by Allstate Employees, Hoover and Daniels. Appendix pp. 536, 537, 538 and 739. Coverage A for the Dwelling was set for $379,618.00 and the Policy had the Mandatory Valued Policy Provisions which required that in the case of a total loss the amount set for Coverage A should be paid to the Insured. Coverage C Personal Property Protection was set for $227,117.00.

It is undisputed that a Proper Claim was made and Claim Payments for Loss under the Policy were paid, illustrated by Appendix pp. 118, 119, 704 and 705 with the first being approved and paid shortly after the loss on June 20, 2019. "It is fundamental that the Insured, in an action on an Insurance Policy, has a burden of proving that the loss occurred while the policy was in force and effect" *Aetna Casualty & Surety Co. v.*

Goldman, 229 S.E. 2d 863 (Va. 1976). In this instance, "the loss occurred on June 20, 2019 under a Policy issued the latest on May 22, 2019 and the earliest on May 18, 2019.

"Where the cancellation of an Insurance Policy is sought to be used as a defense against payment under the Policy, the burden of proving cancellation is on the Defendant Insurer". *Huff v. Columbia Ins. Co.*, 94 W. Va. 663, 119 S.E. 854 (1923); *National Union Fire Ins. Co. v. Dixon*, 145 S.E. 2d 187 (Va. 1965). A companion general rule is that the burden is on the Insurer to prove that the loss is excluded by the terms of the Policy. *White v. State Farm Mutual Ins. Co.,* 157 S.E. 2d 925 (Va. 1967). See, *State Farm Mutual Auto Ins. Co. v. Long*, 183 S.E. 138 (Va. 1971).

III

Respondents Ineffective Defenses

A. Established Principles and Precepts

(1) Statutory requirements take precedent over contrary policy language;

(2) Provisions in the Policy are always preeminent over provisions in an application;

(3) In West Virginia, a Fire Insurance Application is not included within the policy absent the language within the policy itself including portions of the application provisions (W. Va. Code 33-6-13);

(4) An answer to a question in an application does not create a condition or provision in the Policy contrary to and in violation of other provisions already in the Policy, particularly, if they would run contrary to required statutory language in the Policy;

(5) Matters made immaterial as a result of specific Policy Language cannot be made material by one application question answer contradicting specific Policy language;

(6) Unless the Policy language indicates specifically otherwise, it does not matter when vacancy or lack of occupancy of a dwelling occurs, be it at the beginning, middle, or late middle of the Policy period – the vacancy or lack of occupancy

must be at least 60 consecutive days to allow any relief to Allstate – even for a suspension of coverage (Policy Endorsement AVP101 – required by W. Va. Code 33-17-2);

(7) Giving of a *void ab initio* notice claimed to apply retroactively to May 18, 2019, as issued by Allstate, waives necessity of any filing by the insured after May 18, 2019, and the effects of such filings may not be used against the insureds to excuse Allstate from any required performance.

B. Notice of Cancellation

Allstate's first thrust was to cancel the Policy by July 4, 2021 Notice of Cancellation from the Risk Management Department based totally upon photographs and report of an Exterior Visual Inspection of June 12, 2019 and provided the Policy "*will* be cancelled as of the Cancellation Date and Time (August 14, 2019) at 12:01 A.M.)". The four reasons set forth therein which were taken totally from the report of the June 12, 2019 Inspection which dealt with the yard, moss build-up on the roof, vegetation or plant growth on the exterior of the Dwelling or Garage (although the Dwelling had no Garage) and vegetation or growth on soffits/fascia/eaves. Appendix 143. The Notice provided that "the Policy will remain in effect until the cancellation date and time (August 14, 2019)". The Notice concluded by a positive note encouraging the Insureds to "contact the Allstate Representative to see if there were other ways that Allstate could continue to work with you to meet your insurance needs"...

Previous to the receipt of the cancellation notice, after being alerted of the results of the June 12, 2019 Inspection and Report, the Porch and Yard were cleared of the appliances and debris left by the prior owners before the fire as evidenced by the photographs provided by the "Origin and Cause" Inspection of June 26, 2019. Appendix pp. 672 and 673.

The Notice of Cancellation provided no defense for Allstate. However, it did confirm that the Policy was *in effect* at the time that the Loss occurred on June 20, 2019.

C. Effect of Claim Payments:

Further complicating Allstate's Defense and undercutting Allstate's belated defense claims relying on Personal Property Contents Lists is the fact that Allstate made payments under the Policy for the loss that occurred June 20, 2019. "Payment by an Insurer of a portion of the amount due under a Policy has the effect of waiver of any requirements concerning proof of loss. *Fidelity Guardian v. The Super Cold*, 225 S.W. 2d 924. See, also, *44 Am.Jur. 2d Insurance, Section* 1383. In this instance, Allstate made two payments pursuant to the Claim after the June 20, 2019 fire and before Allstate demanded the Personal Property Contents Lists.

D. Alleged *Void Ab Initio Letter* (July 18, 2019)

The author of the claimed *void initio* letter, Jeffrey Daniels, confirmed he participated with the Risk Management Committee in discussions prior to the issuance of Cancellation Notice on July 4, 2019. The Cancellation Notice made no mention of the *Application*, *Occupancy* of the Insured Premises, *Remodeling* or *Personal Property Contents Lists*. See, Appendix pg. 143. At the time of his participation with the Risk Management Committee, Jeffrey Daniels had received the Personal Property Contents Lists, completed transcribed telephonic interview with Damon McDowell on June 27, 2019 and thoroughly examined the application prior to issuing the July 18 letter. Appendix pp. 738 and 740.

1. **Void ab initio letter critical omissions**

"Remodeling" was never mentioned in the *void ab initio* letter of Daniels dated July 18, 2019 and the *Personal Property Contents Lists* was never mentioned in the July 18, 2019 *void ab initio* letter that Allstate has used as the basis to claim that there was no Policy in effect on June 20, 2019. See, Appendix 730 and 731. Worse yet, Allstate tried to use the *shiny* object of Personal Property Contents Lists to distract from Allstate's Material Violations of the Unfair Settlement Practices Provisions of the Unfair Trade Practices Act, all the while knowing Allstate had little or no exposure under Cover C for items referenced on the Contents Lists as nearly all were excluded from coverage by the Policy Exclusions. See, Appendix pp. 554 and 555. Yet, the court below in fact findings 27 (Appendix 10) and 41 (Appendix 14) attempted to write them in.

E. Allstate's Futility in Asserting Separate Coverage Defense (personal property) in attempt to Deny Dwelling Coverage

Entire or Severable Nature of Policy

Fire Insurance policy covering different classes of property, separately valued, containing a condition or warranty relating only to one class, and not affecting risk on the other, is a divisible contract. *Bond v. National Fire Ins. Co. of Hartford, Conn.,* 83 W. Va. 105, 97 S.E. 692, 1918.

Where an insurance policy is issued covering different classes of property, each insured for a stated amount, and there is a breach of a condition or warranty respecting one class not affecting the risk as to others, the contract should not be considered as entire, but as severable, and a recovery allowed on account of the property not affected by the breach, notwithstanding the policy stipulates that it shall be void, and no action brought on it when any one of its conditions or warranties are broken, provided the insured has committed no fraud and no act

prohibited by public policy is involved. *Fisher v. Sun Ins. Co. of London,* 74 W.Va. 694, 83 S.E. 729, (1914).

F. Allstate's Violations of W. Va. Code of State Regulations § 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 or as otherwise provided in subsections of these rules.

Here, Allstate made their *denials* by their Notice of Cancellation and followed then incredibly, by their *void ab initio* notice. No where in either of the denials of the Claim did they mention *remodeling* and certainly never mentioned "*Personal Property Contents List*". Their attempt to do so in their Motion and the lower court's countenance thereof and incorporation in the decision below cannot stand.

"Remodeling" was not mentioned in the so-called *void ab initio* letter and the "Personal Property Contents Lists" was also not mentioned in the *void ab initio* letter of July 18, 2019, all contrary to the lower court's Fact Findings 27, 35 and 57 (Appendix 10, 13 and 18). Instead, the *void ab initio* letter relied on an Answer allegedly made to a Question in the Application as to whether the House would be "occupied" within 30 days of the signed Application. The remainder of the reliance of Allstate as expressed in its *void ab initio* letter was the condition of the Home at the time of the application. Of course, the condition of the Home at the time of the Application was never known because Allstate never inspected prior to the completion and acceptance of the Application and the

issuance of the Policy in violation of the court's holding in *Filiatreau v. Allstate Ins.,* 178 W.Va. 268, 358 S.E.2d 829 (1980), but waited for 25 days after the issuance of the Policy and acceptance of the premium payments therefor to do a Visual, Exterior Inspection of the premises.

G. Notices of Cancellation and (*Void Ab Initio* Notice) were "Untimely Denials" Reasonable Expectation of Insurance

"...Once an Insurer creates a reasonable expectation of Insurance Coverage, the Insurer must give the coverage or promptly notify the Insured of the denial. 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". Here, the attempted refund was refused – twice. "The promptness of the denial notice is determined by the circumstances of each case; however, in any event, in order for a denial notice to be effective, such notice must be given no more than 30 days after the Insurer created the reasonable expectation of coverage". *Keller v. First Nat'l Bk.*, 184 W. Va. 681, 403 S.E. 2d 424 (1991). Distinguishing decisions of *Universal Underwriters v. Wilson,* 239 W. Va 338, 801 S.E. 2d 216 (2017) (*per curiam*) (3rd party coverage question) and *Erie, Inc. v. Chaber,* 239 W.Va. 329, 801, S.E. 2d 207 (2017) do not negate the gross failures of denial notice in this matter. Respondent Allstate's insistence on promoting application Q. and A. to override statutory requirements and policy provisions creates the "ambiguity" which requires that denial notices be given in a timely fashion. In this instance, the Policy issued at the latest by May 22 and the earliest by May 18, 2019, with premiums were paid and acknowledged by Allstate. An appropriate Claim was made and payments made to the Insureds pursuant to the Claim, all which occurred on or before

June 22, 2019. The loss occurred on June 20, 2019. The first claimed Notice of Denial or Cancellation was issued July 4, 2019, at a minimum, 44 days after the Policy was issued and Premiums were paid therefor. Then worse, the *denial* notice embodied in the *void ab initio* letter issued when the Cancellation Notice had confirmed that the Policy was still in effect but was yet given 60 days after the Policy issued and the Premiums were acknowledged as having been paid by the Insureds to Allstate and 27 days after the first claim payment by Allstate. Clearly, Allstate is barred from reliance on the Notices.

IV

Allstate's Violations of the Unfair Settlement Practices Provisions of the Unfair Trade Practices Act

"The Unfair Trade Practices Act ("the Act") does not specifically restrict its coverage to the handling of a Claim prior to the institution of illegal proceeding. *Mordesovitch v. Westfield Ins.,* 235 F. Supp. 2d 512 (S.D. W.Va. 2002). The conduct of an Insurance Company during the *pendency* of a law suit may support a cause of action under the West Virginia Unfair Trade Practices Act. *Jackson v. State Farm Mutual,* 215 W.Va. 634, 600 S.E. 2d 346 (W.Va. 2004); *Elmore v. State Farm Auto Ins. Co.,* 202 W.Va. 430, 504, S.E. 2d 893 (1998) (violations constituting a business practice may occur in a single claim).

Thus, Allstate's conduct, documented herein, of (1) refusals to provide requested reports; (2) repeated untrue responses to Discovery Requests; (3) withholding the actual Policy and Endorsements; (4) deliberately misleading Responses concerning Allstate's failure to notify the Fire Marshal of the intentional fire; (5) falsified post-fire inspection photos and staged scenes; (6) failure to perform a pre-policy inspection of the premises while styling the exterior visual inspection 25 days after the issuance of the Policy as a

"Underwriting Inspection"; (7) falsely claiming that the Fire Marshal had delegated to Deputy Willis the Fire Marshal's responsibility to investigate the arson fire and (8) omitting an owner from the Policy when Allstate knew of her ownership interest on Allstate's own claimed Application which revealed her as an "additional named insured", all amounted to serial violations of the UTPA and clearly established a general business practice consistent with intentional infliction of harm on the Insureds in this matter.

V

Application's inadmissibility

Courts have held in certain instances, an Application of Insurance is not admissible into evidence against the claimed Insured. In *Dexton v. Federated Mutual Implement & Hardware, Ins. Co., Inc.,* 274 F. Supp. 699, the Court found that the Plaintiff (named insured) had signed a Blank Application and the Agent later filled in the information before sending the Application to the Company. No copy of the completed Application was ever mailed to the Plaintiff or shown to him. The Court in that instance held that the Application was not made part of the Policy and no reference to it was included in the Policy. The Court held that the Insurance Company could not limit its coverage by terms in an Application which had not been attached or referred to in the actual Insurance Policy received by the Insured.

At one point in the proceeding, Allstate claimed the insurance application was, by statute, made a part of the Policy when Allstate's witness stated the language of the application on which Allstate relied was not in the Policy. Appendix, pg. 732. Of course, that is exactly the opposite of what is stated in W. Va. Code 33-6-13 which requires that "no policy shall contain any provision purporting to make any portion of the Charter, By-

Laws or other constituent document of the Insurer part of the Contract unless such portion is set forth in full in the Policy". In this case the Application was not attached to the Policy and the restrictive Vacancy Language is not therein nor is a prohibition against remodeling.

In this instance, Allstate had refused to provide a copy of the Application upon which it was relying in the proceeding for more than 150 days after the Requests were first made in Production Requests. Such a delay cannot be excused by claiming that an internet download which disputes the key portions of the Application forwarded in an untimely fashion from Allstate (which had typed initials and a typed signature) excused Allstate's failures to timely send the application; particularly, in light of Lillie Hoover's testimony that she had seen the actual signed Application, but it was never presented by Allstate. The internet download does not provide the Answer that Allstate relies on concerning thirty (30) day occupancy. W. Va. Code 33-6-6 which states..."insurance other than Life and Accident and Sickness...no application for insurance signed by or on behalf of the insured shall be admissible in evidence in any action between the insured and the insurer... if the insurer has failed, at expiration of 30 days after receipt by insurer of written demand therefor by or on behalf of the insured, to furnish to the insured a copy of such application..." and thus bars its use in evidence.

VI

Impossibility of a Question and Answer on shortened vacancy period in the Application creating a Policy Condition or Provision which would deny the Insured's Coverage.

A

Order of Authority of Statutes, Policy Provisions and Application Information

Statutes Preeminent in this Matter

The Statute which prescribes the scope and effect of Contracts of Insurance and determines the duties and obligations of the Contracting Parties is as much a part of such Contract as if incorporated into them. Existing laws enter into and become parts of all Contracts under them and no waiver of the Parties or stipulations by them can change the law. The most compelling example in this case is the requirement that the Standard Fire Policy Provisions be included in all Policies of Fire Insurance covering property located in West Virginia. W. Va. Code 33-17-2 requires certain language be embodied in all Policies of Fire Insurance and, in this case, the operative language is embodied in Policy Endorsement AVP101 to Policy 801386360. The Policy in this case also has a provision that if there is any conflict with the Policy and State Statute then the Policy would be conformed to comply with the Provisions of the Statute.

B

Policy v. Application

If the Policy contains provisions in conflict with statutory provisions, it is well settled that the Statute will prevail. *Scholz v. Standard Accident Insurance*, 134 S.E. 728 (Va. 1926);

If there is a conflict between the Policy and the Application, the Provisions of the Policy shall always control. *Logan v. Provident Savings Life Assurance Society,* 57 W.Va. 384, 50 S. E. 539, (1905). Here, the Policy does not expressly provide that the Application is part of the Policy. Even, if it did, Allstate could not place the language which they promote in the Policy as that language would be illegal because of the required language

concerning Vacancy and non-occupancy required pursuant to the Provisions of W. Va. Code 33-17-2.

If, "Occupancy within 30 days of Application" were material to the risk and thus the coverage and such Application language did not violate the statutory language required in all Fire Policies in West Virginia pursuant to W. Va. Code 33-17-2; then, that language would have been *boldly* stated in the Policy - - but it is no where to be found.

West Virginia's statutorily required Fire Policy Provisions found in Endorsement AVP 101 of the Policy make immaterial any claims that 30 day Vacancy or Lack of Occupancy could ever be considered Material to allow avoidance of coverage. Lines 28 through 35 of the Policy Endorsement AVP 101 (Appendix Pg. 575) provides:

Conditions suspending or restricting Insurance

Unless provided in writing added hereto, this Company shall not be liable for loss occurring:

a. While the hazard has increased by any means within the control or knowledge of the Insureds;

b. While a described building, whether intended for occupancy by Owner or Tenant is *vacant* or *unoccupied* beyond a period of sixty (60) consecutive days (underlying and italics, mine) – Appendix pp. 107 and 575, Lines 28-35, incl.

That language is included in the Standard Fire Policy language mandated for all Fire Insurance Policies issued in the State of West Virginia.

Further, if not for that language, the Policy itself is even more liberal concerning Vacancy and Lack of Occupancy as set forth in the portion of the Policy under "Conditions" found in Paragraph 9 on Page 16 (Appendix pg. 257).

Permission Granted to You

(a) The residents premises may be vacant or unoccupied for *any* length of time, except where a time limit is indicated in this Policy. The building structure *under construction* is not considered *Vacant* (emphasis, italics and underlining, mine);

(b) You may make *alterations, additions or repairs and you may complete structures under construction* – Appendix pg. 257.

"The Courts generally treat Vacancy or Unoccupancy clauses as establishing exclusions from coverage, not a condition precedent". *Catalina Enters, Inc. Pension Tr. v. The Hartford Fire Insurance Co.,* 67 F. 3d 63 (4th Cir. 1995); *Business Family Farm, LLC v. United Family Farm Ins. Co.*, 812 Fed. App. 139, citing *Couch* on Insurance §94:108. Those cases were contests between treatments of Policy provisions. Here, Allstate attempts to promote an Application "Q and A" to equal status with statutorily mandated Policy Provisions which require a longer period of vacancy or non-occupancy to afford the Insurer any defense. Allstate's position is without support under any precedent.

The Authorities relied upon by Respondent Allstate, principally *Powell v. Time Insurance Co.,* 181 W. Va. 289, 382 S.E. 2d 342 (1989) and *Massachusetts Mutual Life Ins. Co. v. Thompson,* 194 W.Va. 473, 460 S.E. 2d 719 (1995) focused on W. Va. Code 33-6-7, Sub. Sections (b) and (c). This is wise as W. Va. Code 33-6-7(a) requires that "fraudulent" representation, omission, concealment of fact or incorrect statement must have been fraudulently made. Allstate has never charged fraud in any fashion which is required by the West Virginia Rules of Civil Procedure. Therefore, they retreat to the Claim that a misrepresentation in the Insurance Application was *Material* and that it related 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 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. As stated before, the cases cited are inapplicable to this situation and these matters apparent by a brief reading of *Powell* and *Thompson*. More importantly is the fact that Lack of credulity terminates the Materiality Claims of Allstate as to the so called statements. The so called misstatements focus on two areas:

1. That Occupancy within 30 days of the date of the Application as stated on the Application was required and, in fact, the fire occurred on the 31st day after the Application; and

2. That the Applicant stated that he was not remodeling and later testimony stated that he was going to do remodeling of the Dwelling.

Common sense eliminates both and the Policy and Statutory Provisions eliminate them as well. By common sense, no representative of Allstate could, with a straight face, state that Allstate intends to never write policies of insurance in West Virginia. The reason for that is if they required the Applicants to never have the Dwelling vacant for more than thirty (30) days, then, that would be an illegal provision and condition as that is prohibited by the Provisions of the Standard Fire Policy in West Virginia which allows a more liberal period of sixty (60) days of vacancy or lack of occupancy before coverage could be excused.

Also, it should come as no surprise, but, tens of thousands of Allstate's Insureds remodel their Dwelling. Most of those who decide to remodel may have intended to remodel and not told their Agent. The remainder, more than likely, came up with the idea

later and did remodel. It is likely that Allstate would have few insureds if the ridiculous posture promoted here were allowed.

Fortunately, such nonsense is also prohibited by the actual language of their Policy as previously outlined. The Statutory Requirements and Policy Provisions prohibit Allstate's thirty (30) day vacancy claim and policy provision prohibit the remodeling claim that Allstate has relied on to attempt to deny coverage to these minority policy holders.

Further, under any theory, Allstate's Lack of "Occupancy" within 30 days has been refuted by Allstate's own evidence of charred remains of numerous items of furniture, beds and appliances in the home prior to and on the day of the fire similar to that set forth in *Shank v. Safeco* with all of the evidence actually provided by Allstate's Origin & Cause Expert, which establishes occupancy on a factual basis in accordance with the cases cited in *Shank v. Safeco*, S.D. W.Va. CA. No.: 2:15-cv-09033; see, *Dean v. Tower Ins. Co.,* 979 N. E. 2d 1143, 1145 (N.Y.2012); *Page v. Nationwide Mut. Ins. Co.,* 15 A2d 306, 307, N.Y. App. Div. (1962); *Perrota v. Middlesex Mut. Ins. Co.,* 37 A2d 783, (N.Y. App. Div. 1971).

The statement of Allstate's key witness and "void ab initio" notice author, Jeffery Daniels, was that the dwelling, based on the pictural evidence of furnishing in house at the time of the fire, appeared to be "occupied". Appendix, pg. 713.

VII

Lack of Intentional Causation Claims (contrary to lower court finding)

Absence of Intentional Causation Claims/Lack of Applicability of Personal Property Contents List to deny Petitioner's Claims

Allstate never asserted in the *void ab initio* letter or its Pleadings that Plaintiffs intentionally caused the fire and/or conspired with others to do so, Appendix 730, 731, contrary to the lower Court's Findings of Fact 27 (Appendix 10) and 41 (Appendix pg. 14).

Officers Pack and Willis made no such claims and the only report (Appendix 634) lists Damon McDowell as a victim.

Likewise, Allstate never alleged in Pleadings and it was never set out in the *void ab initio* letter of July 18, 2019 of Jeffrey Daniels that there was any question concerning the amount or value of the contents of the Dwelling at the time of the fire, contrary to the lower Court's Findings of Fact 27 and 36 found on Appendix pp. 10, 13. And 14.

CONCLUSION

Although there are disputes concerning what was truly asked and answered, the conduct of Allstate would, pursuant to W. Va. Code 33-6-6 bar Allstate from using the Application upon which it relies in evidence and assuming that the Denial Notices were not in violation of the precedent established in *Keller*, Allstate's positions would still fail.

Even if the position taken by Allstate were timely raised, they could never amount to Material Representations to create a Policy Condition or Provision by virtue of the same being impermissible as violative of statutorily required language in all fire insurance policies in the State of West Virginia, thus, the Question and Answer upon which Allstate relied could never be Material to the Risk as Allstate was required to and had excused such a condition by its statutorially required policy language. Appendix 575, Lines 28-35 incl.

In spite of Respondent's changing themes as part of a recurring "Post Claim Underwriting Scheme" to deny Petitioner's relief to which they are entitled under the Policy, the evidence has clearly established the numerous Material Issues of Fact militating against the decision of the lower court to grant Allstate's Motion for Summary Judgment which should have been **DENIED**.

Equally apparent is that there are no Material Issues of Fact in dispute that:

1. A Contract of Insurance existed between Petitioners and Allstate with the effective date of May 18, 2019 for Fire Protection covering the Dwelling at 219 Highland Avenue, Oak Hill, West Virginia with a face amount established under Coverage A of $379,618.00 as set by Allstate;

2. That the Contract had been established by the issuance of the Policy and the Payment of the Premiums therefor and further confirmed by claim payment (partial) pursuant to recognized Claim in connection with the Fire Loss which occurred on June 20, 2019;

3. That the Fire of June 20, 2019 rendered the Dwelling a total loss as established by the decision of the municipality in which the Dwelling is situate, unrefuted by Respondents, requiring, pursuant to W. Va. Code 33-17-9 (Valued Policy Act) the payment of the coverage amount therefor of $379,618.00;

4. The Personal Property Section under Coverage C of the Policy was set, as to amount, by Allstate at $227,117.00 and the evidence clearly established from the post-fire photos of Allstate's Origin and Cause Investigator Alderman the presence, prior to and during the fire, of substantial amounts of furniture and appliances which were lost or damaged in the fire of June 20, 2019, establishing occupancy, entitling Petitioner's, Damon McDowell and Mary McDowell to an award of Judgment for Personal Property Contents Coverage under Coverage C in an amount to be determined by a later Jury Decision, not to exceed $227,117.00;

5. That Respondents Claims of "no Coverage" due to Question and Answer in the Application concerning whether or not the premises would be occupied within 30 days of the date of the Application could never support denial of coverage as a Condition or Provision created by the Question and Answer could never be included in the Policy of Allstate as the same would be violative of the Statutory requirements of the W. Va. Code 33-17-2 and would also violate Allstate's actual language contained in their Policy in the body thereof and in Endorsement AVP101 which, at its most restrictive, required Vacancy or Non-Occupancy to continue for 60 consecutive days;

6. Even if the court below had not erred in allowing a 30 day period of non-occupancy to deny coverage, it would be an inappropriate reason for denial, as the evidence established that during the period between May 18, 2019 and June 20, 2019, the premises had definitely been "occupied" pursuant to the definition to "occupied" set forth in *Shank v. Safeco* and cases cited therein established by Allstate's own post fire photographs establishing he presence of appliances and numerous items of furniture including beds, to establish occupancy within "Occupancy" as defined in *Shank v. Safeco* and cases cited thereunder;

7. In this case, Denial Notices could not have been effective to meet the requirements of the Court, as announced in *Keller v. First Nat'l Bk.,* 184 W.Va. 681, 403 S.E. 2d 424 (1991).

Relief Sought By Petitioners

Petitioners request that this Honorable Court reverse the lower court's decision which improperly granted Respondents Summary Judgement against Petitioners and reverse the lower court's decision which denied Petitioners' Motion for Summary Judgment and Grant Petitioners:

1. Judgment for Coverage A set at face value by the Valued Policy Act of $379,618.00, together with Pre-Judgment Interest thereon and further award Plaintiffs'/Petitioners' reasonable Attorney Fees and all Court Costs for Respondent's established Bad Faith in adjusting the Claims of Petitioners; in accordance with *Aetna Cas. & Sur. Co. v. Pitrolo,* 176 W.Va. 190, 342 S.E. 2d 156 (1986) and *Hayseeds, Inc. v. State Farm Fire & Cas.,* 177 W. Va. 323, 352 S.E. 2d 73 (1986), and their progeny.

2. Judgment of Entitlement to an award under Coverage C for Personal Property lost/damaged or destroyed in the Fire of June 20, 2019 as situate in the premises at 219 Highland Avenue in an amount to be determined at Jury Trial not to exceed $227,117.00;

3. Judgment of Entitlement to damages for established violations by Respondent Allstate of the provisions of the Unfair Trade Practices Act under W. Va. Code 33-11-4(9) in an amount to be determined by Jury Trial and such other relief as this Honorable Court may deem just and proper.

Damon McDowell, Mary McDowell and Deeanna Lawson,
Petitioners (Plaintiffs below)

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No.: 21-0603

DAMON MCDOWELL, ET ALS,
PLAINTIFFS BELOW, PETITIONERS

vs.) No. 21-0603

ALLSTATE VEHICLE AND PROPERTY
INSURANCE COMPANY, AN ILLINOIS CORPORATION and
PATRICK I. HAMRICK, JR.
DEFENDANTS BELOW, RESPONDENTS.

CERTIFICATE OF SERVICE

Counsel for Petitioners certify that on November 4, 2021, Petitioners' Brief and Appendix were served by hand-delivery to the Offices of Counsel for Respondents: Brent K. Kesner, Esq., Kesner & Kesner, 112 Capitol Street, Charleston, West Virginia 25301.

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