No. 21-0603

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

BRIEF OF RESPONDENTS ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY AND PATRICK O. HAMBRICK, JR.

Brent K. Kesner (WVSB 2022)
Ernest G. Hentschel, II (WVSB 6006)
Kesner & Kesner, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Phone: 304-345-5200
Fax: 304-345-5265
Email: bkesner@kesnerlaw.com
Counsel for Respondents
Allstate Vehicle And Property Insurance Company and
Patrick O. Hambrick, Jr.

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STATEMENT OF THE CASE

In the present action, the Petitioners, Damon McDowell, Mary McDowell and Deeanna Rae Lawson are appealing the Circuit Court of Fayette County's award of summary judgment in favor of Respondent, Allstate Vehicle And Property Insurance Company ("Allstate").[1] In particular, the Petitioners assert that the Circuit Court erred when it found that a homeowners policy issued by Allstate was void from its inception due to fraud in the application and provided no coverage for the Petitioners' claims arising from a June 20, 2019 fire loss. As will be shown, the Circuit Court correctly awarded of summary judgment to Allstate.

The fire which gave rise to this action occurred on June 20, 2019, at a residential property owned by Petitioners Damon McDowell and Deeana Lawson, located at 219 Highland Avenue, Oak Hill, Fayette County, West Virginia. However, the origins of this litigation began in May of 2019, when Petitioner Damon McDowell applied for Allstate Policy No. 801386360.

The Application

At the time he applied for the subject Allstate homeowners policy, Mr. McDowell provided information to Allstate through his application concerning the occupancy and condition of the dwelling which he verified as being true. (A.R.919-924.) While the application was completed electronically, all of the information was provided and verified by Mr. McDowell. In that regard, Lilly Hoover, the employee at the Allstate Agent's office who took McDowell's application, testified as follows:

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[1] As the Petitioners acknowledge at Pg. 5 of their *Brief*, the Circuit Court entered an order nunc pro tunc on September 23, 2021, dismissing the Petitioners' claims against Respondent Hambrick for failure to set forth viable causes of action pursuant to *Rule 12(b)(6)* of the *West Virginia Rules of Civil Procedure*. Petitioners further acknowledge, at Pg. 5, that the order and the dismissal of their claims against Respondent Hambrick are not the subject of this appeal.

Q. There's a question, "Applicant lives in the building as," and what does it indicate on the application?
A. "Owner."

Q. Next question, was the unit residence, how was it to be used?
A. "Primary."

Q. Now, does that mean primary residence?
A. Yes, sir.

Q. Then the question is, "Dwelling in course of construction." And what did Mr. McDowell state?
A. "No."

Q. All the information we just went through, was all that information provided to you by Mr. McDowell in connection with the application that he provided to you over the phone?
A. Yes, sir.

Q. Understanding the importance of this information, is the insured provided with an opportunity to review the application information and then indicate by their execution and electronic or actual signature on it that the information is true and correct?
A. Yes, sir.

(A.R.927-928.) With respect to the truth of the responses given, the application contains the following statement:

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

(A.R.924) Ms. Hoover also testified that Mr. McDowell electronically signed the application to verify that the information provided was correct, stating:

Q. And what did Mr. McDowell tell you as to whether the property would be occupied within 30 days?

A. He said, "Yes."

Q. And it was going to be occupied, based on his representations to you in the application, as a primary residence, by Mr. and Ms. McDowell with Deanna Lawson as a non-relative occupant; is that right?
A. Yes, sir.

Q. Flip to page 6 of 6. This is a page where the insured, having reviewed the policy, either signs if they're completing this process in person or they electronically sign it if they're doing it remotely by computer or electronically; is that true?
A. Yes, sir.

Q. And did Mr. McDowell, Damon McDowell, electronically execute the application indicating that, to the best of his knowledge, the statements made in the application were true and correct and he intended Allstate to rely on those for the issuance of the policy? Did he electronically execute this document?
A. Yes, sir.

COURT REPORTER: Give me two seconds. I'm going to pull -- I've got the document for her. (A brief recess was taken.) COURT REPORTER: She's got the document that has been executed.

Q. (By Mr. Kesner) All right. And if you look at that, Ms. Hoover, are you able to see, in fact, exactly the time that Mr. McDowell electronically executed the document on page 6 of 6?
A. One moment. Page 6. Yes, sir, it shows a date and a time.

Q. And what was the date?
A. May 17, 2019.

(A.R.928) Importantly, in his deposition, Mr. McDowell did not deny signing the application electronically. He was asked:

Q. Do you deny that you executed this application electronically that day?
A. I don't recall doing it.

Q. But you don't deny that you did it, do you?
A. Correct.

(A.R.939) He further verified that the personal information contained in the application, such as his date of birth and social security number were correct and that he had provided that information to Ms. Hoover. (A.R. 931-932) Thus, there is no real question of fact in this case regarding whether Mr. McDowell did, in fact, sign the application submitted to Allstate.

Allstate's underwriting inspection of the property, completed on June 12, 2019, determined that the residence was not an acceptable risk due to broken and missing windows, ivy growing on various parts of the structure, moss growing on the roof, and the generally poor condition of the property. (A.R.940-988) After receiving that information, Allstate's agent immediately contacted Mr. McDowell and told him of the inspection. Ms. Hoover was asked:

> Q. Now, you've indicated and I just want to confirm, this is dated June 12, you've told Mr. Conrad that on June 13 you called and spoke to Damon McDowell to advise him of this inspection and the results; is that correct?
> A. Yes, sir
>
> Q. Did you tell Mr. McDowell that in light of the condition of the property this was not a property that would be covered by Allstate, that did not meet their underwriting risk exposure agreement?
> A. Correct.
>
> Q. And did you indicate that unless these things could be corrected immediately that the risk was not one that Allstate would be willing to carry under a policy of insurance?
> A. Yes, sir.

(A.R.929) Thereafter, Allstate's underwriting department sent the McDowells a "Notice of Cancellation" dated July 4, 2019, based upon the condition of the property. (A.R. 989-990) However, before the Notice was even processed for mailing, the property was severely damaged by fire on June 20, 2019.

Allstate's Investigation Of the Fire Loss

After being notified of the June 20, 2019 fire, Allstate quickly learned that the Oak Hill Police Department believed that the fire was the result of arson. (A.R.991-1000) Allstate also retained its own fire expert to investigate the origin and cause of the fire loss and, following a June 26, 2019 inspection, the expert determined that the fire had been intentionally set. Allstate's fire expert Shawn Alderman was asked during his deposition:

> Q. If I eliminate electrical service and gas service from this property, and I've got at least three points of origin, is there any question that this is an incendiary fire?
> A. There is no question.
>
> Q. Did you determine, based upon your complete investigation at this fire scene in Oak Hill, based on your training and experience, to a reasonable degree of certainty in your field of expertise, whether or not this was an accidental or an incendiary fire?
> A. I did. It is an incendiary fire.

(A.R. 1002-1003) Thus, Allstate was able to determine that the fire had been destroyed by arson while the Petitioners were not living there as their primary residence and that the home was not even habitable at the time.

On July 18, 2019, Allstate sent the Petitioners notice that it was electing to void their policy based upon the misrepresentations they had made in the Application. (A.R. 1004) The letter advised the Petitioners that had Allstate been provided with truthful responses to the Application questions, the Policy would not have been issued. (A.R. 1004)

The Litigation

On September 16, 2019, the Petitioners filed this action against Allstate and its agent, Patrick Hambrick. In their *Complaint*, the Petitioners asserted that Allstate breached its insurance contract and that Allstate and Hambrick violated certain provisions of West Virginia's Unfair Trade Practices

Act (*W.Va. Code §33-11-4(9)*) during the handling of their claims. (A.R.22-158) In response, Allstate filed a *Counterclaim,* seeking a declaratory judgment that it was not obligated to pay any of the Petitioners' claims based upon the material misrepresentations made by Mr. McDowell in the Application and asserting that the Allstate Policy was void *ab initio* under applicable West Virginia law. (A.R.159-176) In addition, Allstate asserted that its Policy excludes coverage for any loss or damage that results from the intentional or criminal acts of or at the direction of any insured person and where an insured person has concealed or misrepresented any material fact or circumstance related to the loss or occurrence. (A.R.159-176) In that regard, Allstate has asserted in this case that Petitioner Damon McDowell intentionally caused the fire and/or conspired with others to do so, and subsequently misrepresented a number of material facts with respect to the amount and value of the contents of the dwelling at the time of the fire. (A.R. 904) Those allegations are important because they raise genuine questions of fact regarding whether the Petitioners would be entitled to coverage under the Allstate Policy even if misrepresentations regarding the condition of the property had not been made in the application. In that regard, the Allstate Policy provides, in relevant part, as follows:

> **Insuring Agreement**
> In reliance on the information **you** have given **us**, **we** agree to provide the coverages indicated on the Policy Declarations. In return, **you** must pay the premium when due and comply with the policy terms and conditions, and inform **us** of any change in title, use or occupancy of the **residence premises**.
>
> Subject to the terms of this policy, the Policy Declarations shows the location of the **residence premises**, application coverages, limits of liability and premiums. The policy applies only to losses or **occurrences** that take place during the policy period. The Policy Period is shown on the Policy Declarations. This policy is not complete without the Policy Declarations.
>
> This policy imposes joint obligations on the Named Insured(s) listed on the Policy Declarations and on that person's resident spouse. These persons are defined as **you** or **your**. This means that the responsibilities, acts and omissions of a person defined as **you** or **your** will be binding upon any other person defined as **you** or **your.**
>
> This policy imposes joint obligations on persons defined as an **insured person.** This means that the responsibilities, acts and failures to act of a person defined as

an **insured person** will be binding upon another person defined as an **insured person**.

* * *

Misrepresentation, Fraud Or Concealment

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

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

* * *

Losses We Do Not Cover Under Coverages A and B:

* * *

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

1. The failure by any **insured person** to take all reasonable steps to save and preserve property when the property is endangered by a cause of loss **we** cover.
2. Any substantial change or increase in hazard, if changed or increased by any means within the control or knowledge of an **insured person**.
3. Intentional or criminal acts of or at the direction of any **insured person**, if the loss that occurs:
   a) may be reasonably expected to result from such acts; or
   b) is the intended result of such acts.

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

* * *

Losses We Cover Under Coverage C:

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

1. Fire or lightning.

* * *

Losses We Do Not Cover Under Coverage C:

* * *

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

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

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

3. Intentional or criminal acts of or at the direction of any **insured person,** if the loss that occurs:
   a) may be reasonably expected to result from such acts; or
   b) is the intended result of such acts.

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

* * *

(A.R. 1005-1048)

After the completion of discovery, the Petitioners served their *Motions For Summary Judgment*, on March 29, 2021, asking the Court to find as a matter of law that Allstate is obligated to pay them the entire policy limits of $379,000.00, together with their attorneys fees, costs and pre-judgment interest. (A.R. 323-521) While the *Motions* were not a model of clarity, the Petitioners appeared to seek summary judgment on their contractual claims with respect to the value of the dwelling and their entitlement to contents coverage for an amount to be proven at trial. (A.R. 363)

Because there were numerous questions of fact which precluded such judgment in favor of the Petitioners, Allstate responded by asking that Petitioners' *Motions* be denied. (A.R. 898-1057) However, Allstate also pointed out that there were no genuine questions of fact with respect to whether the Allstate Policy was void *ab initio* due to the material misrepresentations in the Petitioners' Application. Moreover, because the absence of coverage eliminated the Petitioners' remaining claims against it, Allstate further requested that the Circuit Court grant it summary judgment with respect to all of the Petitioners' claims. (A.R. 898-1057)

The Circuit Court held hearings on the Parties' respective requests for summary judgment on April 19, 2021 and May 3, 2021. (A.R.741-787 and 788-879) Following the hearings, the Court directed the parties to submit proposed Orders reflecting the arguments raised by each side through

proposed findings of fact and conclusions of law. On July 6, 2021, the Circuit Court below entered its *Order Denying Plaintiffs' Motions For Summary Judgment And Granting Defendant Allstate Vehicle And Property Insurance Company's Cross-Motion For Summary Judgment.* (A.R. 2-21) In that regard, the Circuit Court found that there were no genuine questions of fact with respect to whether there were material misrepresentations in the Petitioners' application for the Allstate Policy which rendered the Policy void *ab initio,* and that Allstate was entitled to judgment as a matter of law. (A.R. 18-20) The Petitioners filed their *Notice of Appeal* on July 28, 2021, and their *Brief* on November 4, 2021.

The Petitioners' *Brief* sets forth numerous assignments of error pertaining to the Circuit Court's findings. In particular, the Petitioners dispute that material misrepresentations were made in their application and assert that the Circuit Court should have found that coverage applied and awarded them summary judgment with respect to all of their claims against Allstate. The Respondents now submit their *Response Brief* and ask that the Circuit Court's July 6, 2021 *Order* be affirmed.

SUMMARY OF ARGUMENT

The Circuit Court properly granted summary judgment to the Respondents with respect to the Petitioners' claims. In particular, the Circuit Court properly found that misrepresentations in the Petitioners' application for coverage rendered the Allstate Policy void. Here, Allstate presented specific evidence that Petitioner Damon McDowell provided information concerning the condition and occupancy of the subject property which was untrue. In addition, Allstate provided specific evidence that the misrepresentations were material to the risk and that it would not have issued the subject Policy if truthful information had been provided. Under applicable West Virginia law, such material misrepresentations in the application rendered the Allstate Policy void *ab initio*.

The Petitioners also failed to offer any evidence to dispute that Damon McDowell signed the subject Application or that the representations made therein are binding upon them. In that regard, West Virginia law recognizes electronic signatures and the Petitioners have not denied that Mr. McDowell signed the application electronically. Under these circumstances, the Petitioners' assertion that coverage exists for their claims fails as a matter of law.

The Petitioners' discussion of the July 4, 2019 Notice of Cancellation misses the point. The subject Notice was issued to advise the Petitioners that their Policy was being cancelled because the property did not meet Allstate's underwriting guidelines. The Notice did not create coverage until the effective date of the cancellation or somehow waive Allstate's ability to deny coverage for a specific claim occurring before that date. Likewise, the Petitioners suggestion that the June 12, 2019 underwriting inspection upon which the Notice was based was somehow improper because it occurred twenty-five (25) days after the Policy was issued is unsupported. No legal authority requires that such inspections must occur before coverage is bound and customers routinely ask insurance agents to bind homeowners insurance policies on the day an application is made with the understanding that the insurer will inspect the property in the near future.

The Petitioners' arguments regarding "occupancy" of the premises are also without merit. Allstate denied the Petitioners' claims based upon the misrepresentations made in the application, not any purported "vacancy" of the property. Likewise, the Petitioners misunderstand the legal effect of *W.Va. Code §33-17-2*, which requires that any fire insurance policy issued in this state be "at least as favorable to the insured" as the New York Standard Fire Policy. That requirement has nothing to do with questions on an application for coverage or a denial based upon misrepresentations in an application.

The Petitioners arguments concerning "untimely" coverage denials and "reasonable expectation of coverage" are also without merit. Specifically, Allstate was not required to discover any misrepresentations within thirty days of issuing the Policy and was not prohibited from denying a claim based upon those misrepresentations after that thirty day period had expired. Nor can the Petitioners establish that they had a "reasonable expectation of coverage" when they misrepresented the nature of the property and their occupancy of it in their application.

The Circuit Court also correctly found that the absence of coverage eliminated the Petitioners' other claims. Specifically, in the absence of coverage, West Virginia does not recognize a bad faith claim. Nor can the Petitioners establish a violation of West Virginia's Unfair Trade Practices Act where coverage did not exist and Allstate was justified in denying their claim.

The Circuit Court also correctly found that Allstate was entitled to summary judgment as a matter of law because there was no genuine question of fact to be decided with respect to the misrepresentation issue and the Allstate Policy was void *ab initio* as a matter of law. Likewise, the Circuit Court correctly denied the Petitioners' requests for summary judgment because there were significant questions of fact concerning other misrepresentations made by the Petitioners in connection with the value of their contents claim. Specifically, the Petitioners had represented that they lost over two million dollars worth of contents in the subject fire even though no evidence of the presence of such contents was found at the property by the police and fire investigators after the fire. Because no coverage would apply if the insureds made material misrepresentations regarding the value of their lost contents, there were questions of fact regarding coverage which precluded summary judgment in favor of the Petitioners.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request oral argument under *Rule 19* of the *West Virginia Rules of Appellate Procedure* because they assert that this matter is not appropriate for memorandum decision and further request an additional ten minutes per side for oral argument. The Petitioners do not, however, appear to dispute that the issues raised in this appeal address only the application of settled law to the subject claims or explain why oral argument is necessary. Accordingly, the Respondents oppose the Petitioners' oral argument request because the *Petitioners' Brief* presents no new issues of law and further argument is not necessary.

ARGUMENT

I. Standard of Review.

The Petitioners appeal the July 6, 2021 *Order* issued by the Circuit Court granting summary judgment in favor of the Respondents. Under settled West Virginia law, the *Order* is subject to *de novo* review. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."); *see also*, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.").

While the standard of review is *de novo*, when this Court reviews a decision of the Circuit Court to grant summary judgment, it does so under the same standards that the Circuit Court applied to determine whether summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995). *Rule 56* of the *West Virginia Rules of Civil Procedure* governs requests for partial summary judgement and provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The purpose of summary judgment is to dispose promptly of controversies on their merits if no facts are disputed or only a question of law is at issue. *W. Va. R. Civ. P. 56(c)*; *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994)*; Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995). If a party moves for summary judgment and presents "affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in *W. Va. R. Civ. P. 56(f)".* Syl. Pt. 3, *Williams*, 194 W. Va. 52, 459 S.E.2d 329. Immaterial facts are irrelevant, and summary judgment is required if the non-movant cannot establish an essential element of her case. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995); Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "genuine issue" for summary judgment purposes is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party; the opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "material fact" is one that has the capacity to sway the outcome of litigation under the applicable law. *Jividen*, 194 W. Va. 705. For purposes of determining whether there is a genuine issue of material fact sufficient to preclude summary judgment, factual disputes that are irrelevant or unnecessary will not be counted. *Id.* The nonmoving party must, at a minimum, offer more than a

"scintilla of evidence" to support his claim. *Id.* The mere contention that issues are disputable is not sufficient to deter the trial from the award of summary judgment. *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995). Summary judgment "*shall* be entered against" an adverse party, *W. Va. R. Civ. P. 56(e)* (emphasis supplied), who cannot point to "specific facts demonstrating that, indeed, there is a 'trialworthy' issue." *Williams*, 194 W. Va. at 60.

Although the non-movant for summary judgment is entitled to the most favorable inferences that may reasonably be drawn from the evidence, it cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another. *Marcus v. Holley*, 217 W.Va. 508, 516, 618 S.E.2d 517, 525 (2005). Unsupported speculation is not sufficient to defeat summary judgment. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995).

II. The Circuit Court correctly found that misrepresentations in the Petitioners' application for coverage render the Allstate Policy void.

In this case, the application electronically signed by Petitioner Damon McDowell on May 17, 2019 indicated that the Highland Avenue property was the Petitioners' "primary" residence. (A.R. 922) That fact is important because, when asked about the issue of primary residences vs. second homes or rental properties, Allstate's agent, Lilly Hoover testified that the agency did not even write policies for second homes, and stated as follows:

> Q. And you say that they do not write at all for an applicant who is insuring a second home or a vacation home or something like that, they have no coverage for that at all; is that correct?
> A. Correct.

(A.R. 926) Thus, it is apparent that if the correct information had been provided in the Application, the Allstate agent would not have been in a position to accept it in the first place. The Application also represented that McDowell lived in the home as the owner; that the roof was replaced in 2009;

that the dwelling was not currently in the course of construction; that it had a current market value of $300,000, and that it would be occupied within the next thirty days. (A.R. 922) When asked about the importance of such information to the insurance company, Ms. Hoover testified:

> Q. On page 3 of 6 of this application form, there's information regarding the structure, the property to be insured; is that right?
> A. Yes.
>
> Q. For example, it asks the year that the property was built, whether it's a one-family or more-than-one-family residence with living area square-footage, whether there's a cathedral ceiling, whether there's a basement, a crawl space, the type of roofing material used, whether it's painted or has wallpaper or vinyl or Sheetrock. All that information, is that important to determine whether or not the risk is acceptable to the insurance company for whom the application is being taken?
> A. Yes, sir.
>
> Q. And is all that information important with respect to whether or not the risk is one that will be covered and taken on by the carrier?
> A. Yes, sir.

(A.R. 927) Because a number of the Petitioners' material representations in their Application were false, the Circuit Court correctly found there is no coverage under the Allstate Policy.

Under applicable West Virginia law, if an applicant for insurance coverage misrepresents material facts in applying for insurance, the insurer may void the policy. (See generally, *W. Va. Code §33-6-7(b), (c)*; *Massachusetts Mut. Life Ins. Co. v. Thompson*, 194 W.Va. 473, 460 S.E.2d 719, 724 (1995) (citing *Powell v. Time Ins. Co.*, 181 W.Va. 289, 382 S.E.2d 342, 350 at Syl. Pt. 5). In that regard, *W. Va. Code §33-6-7* provides:

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

(b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or

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

This Court applied that statute in *Thompson* and found that *W. Va. Code §33-6-7* "'adopts the test of whether a reasonably prudent insurer would consider a misrepresentation material to the contract.'" *Thompson*, 460 S.E.2d at 724 (quoting Syl. Pt. 6, *Powell*, 382 S.E.2d 342). The Court found that, under *W. Va. Code §33-6-7(b)* or *(c)*, an insurer need not prove "that an insured specifically intended to place misrepresentations, omissions, concealments of fact, or incorrect statements on an application..." *Id.* Instead:

> [T]he insurer must establish that the misrepresentation was material to the issuance of the policy ...:
>
> > ... Materiality is determined by whether the insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

Thompson, 460 S.E.2d at 724 (quoting *Powell*, 382 S.E.2d at 350, and Syl. Pt. 5). Therefore, as noted in *Thompson*, West Virginia has adopted the majority view that an insurer may avoid an insurance policy regardless of causal connection between a misrepresentation and a claim that the policy might otherwise cover. *Id.* at 724-27. An insurer need only " show that the misrepresentation, omission, concealment of fact, or incorrect statement substantially affected or impaired its ability to make a reasonable decision to assume the risk of coverage." *Id.* at 727.

In this case, it is obvious that the fact that the house was not the Petitioners' primary residence, was uninhabitable, had broken windows which were open to the elements, and was covered

in vines was material to the risk Allstate would be assuming when it issued the Policy to the Petitioners. In fact, the application specifically asked if the property was "in course of construction," and the Petitioners expressly represented that it was not. (A.R. 922) Moreover, the fact that the home was not the Petitioners' primary residence had a significant impact on the nature of the risk. See A.R. 1049-1050, the Affidavit of Allstate employee Megan Thompson-McKenna, wherein she indicates:

> Based upon its underwriting policies and procedures in effect on May 17, 2019, Allstate Vehicle And Property Insurance Company would not have issued Policy No. 801386360 to Plaintiffs Damon and Mary McDowell if the application completed on that date had not indicated that the premises to be insured was going to be occupied in May of 2019 as the insureds' primary residence, but had instead disclosed that the property had been acquired as an investment or "flip" property.

(A.R. 1049-1050) Here, there can be no question that the property was not being used as the Petitioners' "primary residence," since the Petitioners have admitted their intent was "to remodel the home for subsequent sale" (See A.R. 24, the Petitioners' *Complaint,* Paragraph 6), and have further alleged that "the dwelling was being remodeled and was, within the language of the Policy considered under construction." (See A.R. 26, the Petitioners' *Complaint,* Paragraph 11.)[2] Accordingly, it is clear that the misrepresentations and omissions made by Petitioner Damon McDowell in the Application were material to the risk and that Allstate would not have issued the policy if it had been informed of the true status of the home. Therefore, pursuant to *W. Va. Code §33-6-7* and the principles set forth in *Thompson* and *Powell* supra., the Circuit Court correctly found that Allstate was entitled to

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[2] Such statements in pleadings are considered judicial admissions. See *Lotz v. Atamaniuk*, 172 W. Va. 116, 120, 304 S.E.2d 20, 24 (1983) ("Statements made by parties in the course of judicial proceedings may be "judicial admissions"... Statements in verified pleadings clearly are within that rubric. Although they are not conclusive in a subsequent proceeding between the same parties..., they are admissible and may be given whatever evidentiary weight the trier of fact deems appropriate.")

summary judgment that Policy No. 801386360 was void due to the material misrepresentations in the application and provided no coverage for the Petitioners' claims.

III. The Petitioners have failed to offer any evidence to dispute that Damon McDowell signed the subject Application or that the representations made therein are binding upon them.

At Pg. 6 of their *Brief*, the Petitioners assert that "[d]isputes exist as to the answers given in a conversation between Damon McDowell and Lillie Hoover." However, the Petitioners are careful to avoid representing that Mr. McDowell did not electronically sign the Application. Instead, they suggest that there were delays in producing the Application and that it contains a "typed" signature. (See the *Brief* at Pg. 7.) These attempts at obfuscation cannot avoid the fact that when specifically asked about whether he electronically signed the Application in his deposition, Mr. McDowell did not deny that he had done so. (See A.R. 939, the excerpts from the deposition of Damon McDowell.) Nor can the Petitioners escape the fact that Mr. McDowell also verified that much of the personal information contained in the Application, such as his date of birth and social security number, were correct and that he had, in fact, provided that information to Allstate's agent, Ms. Hoover. (See A.R. 931-932)

Mr. McDowell's unwillingness to deny that he had signed the Application electronically is important because the Application also contained the following statement on the same page as the electronic signature:

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

(See A.R. 924) Therefore, by signing the Application, Mr. McDowell acknowledged he had read it and that the information it contained (including the purported "mistakes") was correct.

This Court has noted:

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

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

The Court has further explained:

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

State ex rel. U-Haul Co. of W. Virginia v. Zakaib, at 441, 595. The Court has also recognized that signing an acknowledgment that a party has read and accepted the terms of an electronic document can bind that party even if they did not actually read the instrument. For example, in *Navient Sols., Inc. v. Robinette*, No. 14-1215, 2015 WL 6756859 (W. Va. Nov. 4, 2015), the Court considered whether a party who had signed such an acknowledgment as part of an online application for a student loan was bound by that signature and explained:

> More significant, however, is that by signing each contract, Ms. Robinette expressly agreed to be bound by the terms contained in the promissory note portion of the documents. Her signature further acknowledged that the "terms and conditions set forth in the Promissory Note constitute[d] the entire agreement " between herself and Navient. Finally, Ms. Robinette unambiguously declared in each contract: "I have read and agree to the terms of the Promissory Note accompanying this application." The repeated references to the promissory note, and the clearly expressed importance ascribed thereto, leave no doubt that the promissory note was a critical part of each loan agreement executed by Ms. Robinette.

> **Moreover, the fact that Ms. Robinette failed to locate and read the promissory note portions of the contracts she entered does not excuse her from their terms:**
>
> **The law of this State is clear in holding that "[a] party to a contract has a duty to read the instrument."**

Navient Sols., Inc. v. Robinette, No. 14-1215, 2015 WL 6756859, at 4. (Emphasis supplied.)

Similarly, in *Nationstar Mortg., LLC v. West*, 237 W. Va. 84, 785 S.E.2d 634 (2016), the Court noted:

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

Nationstar Mortg., LLC v. West, at 91, 641. (emphasis added.) Thus, the Petitioners' arguments that the Application contained errors or was never read by Mr. McDowell are simply without merit. Having acknowledged that he had read the Application and that the information it contained was true and correct, Mr. McDowell is bound by his electronic execution of the Application.

Next, the Petitioners suggest, at Pg. 28 of their *Brief*, that the Circuit Court could not properly rely upon the material misrepresentations in the Application completed by Damon McDowell because the Application is inadmissible pursuant to *W. Va. Code §33-6-6.* In particular, the Petitioners suggest that because Allstate allegedly did not produce the Application within thirty (30) days of receiving Petitioners' written discovery requests seeking a copy, it was inadmissible and could not be used to support Allstate's argument that the subject Policy was void *ab initio* due to material misrepresentations in the application. These arguments simply ignore the facts of this case and are unsupported.

The Petitioners' arguments regarding the admissibility of the Application signed by Mr. McDowell appear to be based upon *W.Va. Code §33-6-6(c),* which provides as follows:

> As to kinds of insurance other than life and accident and sickness insurance, 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 arising out of the policy so applied for, if the insurer has failed, at expiration of thirty days after receipt by the insurer of written demand therefor by or on behalf of the insured, to furnish to the insured a copy of such application reproduced by any legible means.

Petitioners suggest that after being served with their written discovery requests seeking a copy of the application, Allstate did not provide a response within thirty (30) days as required by the Statute. Leaving aside the fact that the Petitioners acknowledge that the subject discovery requests were served with the Petitioners' *Complaint* in September of 2019 and were, therefore, subject to a forty-five (45) day response deadline under *Rule 34(b)* of the *West Virginia Rules Of Civil Procedure*[3], this argument simply ignores the Petitioners' own pleadings.

On July 29, 2019, many weeks before Petitioners' *Complaint* was filed and the subject discovery requests were served. Petitioners' counsel sent a letter to Allstate taking issue with Allstate's decision to deem the Allstate Policy void *ab initio* due to misrepresentations in the application. In that letter, Petitioners' counsel stated as follows:

> NOTE: The Application (created by the agent (Heritage) (Exhibit 9) stated that he (agent) had <u>not</u> inspected the property. Of course, if Allstate insists on improperly adjusting this matter all of its underwriting standards will have to be received to compare to the facts, and applicable regulations.

(See A.R.1064-1080, the July 29, 2019 letter with "Exhibit 9" attached.) Thus, it is apparent that long before the Petitioners' discovery requests were ever served, the Petitioners had already been given

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[3] In addition, because this action was removed to federal court and *Rule 26(f)* of the *Federal Rules Of Civil Procedure* does not permit discovery requests prior to the mandatory discovery conference set by the Court, the subject discovery requests were deemed void and no response was required.

a copy of the Application, had availed themselves of the opportunity to review it and, in fact, had even sent a copy to Allstate. More significantly, the Petitioners also attached a copy of the Application to their *Complaint* and specifically referenced the language used in the Application. (See A.R. 25-26, the *Complaint* at Paragraph 10, where Plaintiffs assert that the 30-day language of the application was inconsistent with the New York Standard Fire Policy.) Under these circumstances, the Petitioners' suggestion that the Application is inadmissible under *W. Va. Code §33-6-6* because Allstate did not provide it in response to written discovery requests within thirty (30) days is simply unsupported. The Petitioners had obviously received a copy of the Application earlier and they have failed to direct the Court to any earlier request for it which was not met within thirty days. While the Petitioners would prefer that the Court ignore the blatant misrepresentations made in the Application, their own pleadings and correspondence establish that they were, in fact, provided with a copy of the Application long before this action was filed.[4]

IV. The Petitioners' discussion of the July 4, 2019 Notice of Cancellation misses the point.

At Pg. 22 of their *Brief*, the Petitioners devote considerable argument to the purported effect of the Notice of Cancellation Allstate sent to the Petitioners on July 4, 2019. (See A.R. 989-990, the "Notice of Cancellation") In particular, the Petitioners refer to that Notice as Allstate's "first thrust" at cancelling the Policy and suggest that it was ineffective because it indicated that the Policy would be cancelled in August of 2019, which was well after the fire occurred. (See the *Brief*, at Pg. 22.)

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[4] In the same fashion, the Petitioners would have the Court ignore the blatant misrepresentations in the inventory of personal property they provided to Allstate on the novel theory that Allstate "had little or no exposure under Coverage C for items referenced on the Contents Lists as nearly all were excluded from coverage by the Policy Exclusions." (See the *Brief* at Pg. 24.) Worse, they imply that the Court should ignore the misrepresentations in the Contents Lists because Allstate had already denied coverage based upon misrepresentations in the Application and had, therefore, "waived" any right to request that such contents lists be provided in the first place. (See the *Brief*, at Pg. 14.)

They then imply, at Pg. 11 of their *Brief,* that since the Notice indicated coverage would end on August 14, 2019, Allstate could not properly deny coverage for a loss before that date (*i.e.*, in its July 18, 2019 letter). In fact, the Notice to which the Petitioners are referring was sent as a result of Allstate's underwriting inspection of the property, completed on June 12, 2019. As discussed above, that inspection determined that the residence was not an acceptable risk due to broken and missing windows, ivy growing on various parts of the structure, moss growing on the roof, and the generally poor condition of the property. (See A.R. 940-988, the Report.) While Petitioners imply that the Notice of Cancellation was Allstate's "first thrust" at denying coverage for their claims, there was no claim when the underwriting inspection occurred and the Notice represents noting more than the underwriting department's processing of the results of the inspection. Allstate set forth its actual basis for denying the Petitioners' claims by letter dated July 18, 2019, in which Allstate specifically indicated that it was electing to treat the Policy as void due to misrepresentations in the Application. In that letter, Allstate specifically indicated:

> The occupany [sic] is directly correlated to the condition of the home at the time of the application. The home was not habitable at the time of the application, nor was it at the time of the loss. Our underwriting inspection of the home deemed the home was not a desireable [sic] risk, and Allstate would not have written the business had it known the pre loss condition of the home and property, and that it would not be occupied within 30 days.

(See A.R. 1004) Thus, the Petitioners' arguments regarding the validity of the Notice of Cancellation simply miss the point. The subject Notice of Cancellation was never intended as a denial of coverage for a claim and was nothing more than a notification that the subject property did not meet Allstate's underwriting guidelines.

Allstate would also point out that in conjunction with their arguments regarding the Notice of Cancellation, the Petitioners also imply, at Pgs. 13 and 26 of their *Brief,* that the June 12, 2019

underwriting inspection was somehow improper because it occurred twenty-five (25) days after the Policy was issued. However, the Plaintiffs cite absolutely no legal authority for their assertion that such inspections must occur before coverage is bound. In fact, customers routinely ask insurance agents to bind homeowners insurance policies on the day an application is made (often because they are closing on a home purchase or because other coverage is lapsing) with the understanding that the insurer will inspect the property in the near future. That is precisely what happened here and the fact that Allstate's underwriting department did not complete the physical inspection until a couple of weeks after the Application was completed is simply irrelevant.[5]

V. The Petitioners' arguments regarding "occupancy" of the premises are also without merit.

In their *Brief*, the Petitioners devote a great deal of argument, at pgs 31-33, to their assertion that Allstate's denial of coverage was improper because it was based upon the occupancy of the property. Once again, the Petitioners miss the point and are simply incorrect.

In this case, as was indicated in the July 18, 2019 denial letter (A.R. 1004), the basis for Allstate's decision to deem the Policy void was the multiple misrepresentations made by the Petitioners in the Application regarding the condition and occupancy of the dwelling. Specifically, Damon McDowell represented in the Application that the dwelling was **not** under construction and that the Plaintiffs were going to occupy the dwelling **as their primary residence** within thirty days of the application. (See (A.R. 919-924, the Application.) In fact, it is undisputed that, at the time of

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[5] Allstate would point out that Petitioners vague reference to the Court's holding in *Filatreau v. Allstate Ins.* 178 W.Va. 268, 358 S.E. 2d 829 (1980), in support of the existence of some duty to physically inspect the property before binding coverage simply ignores the holding in *Filatreau* which involved the duty to make a reasonable inquiry as to a potential insured's ownership interest in the property. Physical inspections were not discussed at all in the opinion. *Filatreau* at 271-272, 832-833.

the Application, the home was being remodeled, was overgrown with vegetation, had a number of broken and/or missing windows and was not in habitable condition. The fact that the dwelling was "occupied" by tools and a few old appliances while it was being remodeled is simply irrelevant. It clearly was not the Petitioners' "primary residence," it clearly did not have a roof that was replaced in 2009, and it clearly was undergoing construction which rendered it uninhabitable. For obvious reasons, few insurers would consider the risk associated with an overgrown shell of a dwelling with broken windows to be the equivalent of the risk associated with a secure home which a family was actively using as their primary residence. The Petitioners' suggestion that the condition of the property was not "material" to the risk Allstate was being asked to assume is simply preposterous.

Next, Allstate would address the Petitioners' theory that Allstate's decision to void the Policy based upon misrepresentations of material fact in the Application is somehow inconsistent with the requirements of the Standard Fire Policy required under *W.Va. Code §33-17-2*. (See the *Brief,* at Pg. 31.) Specifically, the Petitioners assert that the Application could not properly require the Plaintiffs to occupy the property within thirty (30) days without being inconsistent with the mandatory requirements of the New York Standard Fire Policy which West Virginia has adopted in *W.Va. Code §33-17-2*. This argument concerning a possible conflict between the underwriting questions on an application and the New York Standard Fire Policy reflects an obvious misunderstanding of the legal effect of *W.Va. Code §33-17-2*, which requires that any fire insurance policy issued in this state be "at least as favorable to the insured" as the New York Standard Fire Policy. Apparently seizing on the fact that the New York Standard Fire Policy contains an exclusion of coverage when an insured premises "is vacant or unoccupied beyond a period of sixty consecutive days[,]" the Petitioners leap to the incorrect conclusion that such a sixty day window must somehow also apply to questions on

the Application regarding occupancy which they answered when they applied for coverage. Without any factual or legal basis for doing so, they then assume that neither an insurer nor an agent could legally include a question about the occupancy of an insured premises in an application which mentions a time period shorter than the sixty day vacancy period addressed in the New York Standard Fire Policy.

In this case, Allstate has not denied coverage based upon a "vacancy" of more than sixty days. Instead, as discussed above, Allstate has deemed the Policy void based on multiple material misrepresentations in the Petitioners' Application concerning the condition, use and occupancy of the premises. Specifically, Allstate asserts that the Petitioners misrepresented the fact that they were living in the dwelling as their primary residence and the fact that the dwelling was in habitable condition and not under construction at the time of the application. In that regard, under West Virginia law, if an applicant for insurance coverage misrepresents material facts in applying for insurance, the insurer may void the policy. (See generally, *W. Va. Code §33-6-7(b), (c)*; *Massachusetts Mut. Life Ins. Co. v. Thompson*, 194 W.Va. 473, 460 S.E.2d 719, 724 (1995) (citing *Powell v. Time Ins. Co.*, 382 S.E.2d 342, 350 at Syl. Pt. 5). The Petitioners' arguments concerning the requirements of the New York Standard Fire Policy simply miss the point. Here, the condition of the property and the issue of whether it was going to be occupied as the Petitioners' primary residence were clearly material to risk Allstate was being asked to assume. Nothing in the New York Standard Fire Policy prohibits an insurer from seeking such information in an application.

VI. The Petitioners arguments concerning "untimely" coverage denials and "reasonable expectation of coverage" are without merit.

At Pg. 26-27 of their *Brief*, the Petitioners suggest that Allstate's denials of coverage were somehow "untimely" in light of their "reasonable expectation of coverage." Initially, Allstate would

point out that as discussed above, the July 4, 2019 Notice of Cancellation was not a denial of coverage for any loss, but was instead notice that the Policy was going to be cancelled because the property did not meet Allstate's underwriting guidelines. (A.R.989-990) More importantly, the Petitioners' arguments simply misunderstand the application of the doctrine of "reasonable expectations" under West Virginia law.

As this Court has explained:

> The Court adopted the doctrine of reasonable expectations in Syl. pt. 8, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. United States Fidelity & Guaranty Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998), holding, "With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though a painstaking study of the policy provisions would have negated those expectations." When *McMahon & Sons* was decided, the doctrine of reasonable expectations was applied only as a canon of construction for evaluating ambiguous insurance contracts. Since then, the doctrine of reasonable expectations has evolved to apply to cases, such as *Romano* and *Keller,* in which a policy provision on which denial of coverage is based differs from the prior representations made to the insured by the insurer. *See Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 755, 613 S.E.2d 896, 903 (2005); *Am. Equity Ins. Co. v. Lignetics, Inc.*, 284 F.Supp.2d 399, 404-06 (2003).

New Hampshire Ins. Co. v. RRK, Inc., 230 W. Va. 52, 58, 736 S.E.2d 52, 58 (2012). In *Keller v. First National Bank*, 184 W. Va. 681, 403 S.E.2d 424 (1991), the case cited by the Petitioners, at Pg. 26 of their *Brief,* for the proposition that some thirty day limitation would apply, the Court found that coverage applied under a credit life policy issued through a bank even though the insurer later concluded that the offer had been a mistake and no policy was actually issued, noting that a reasonable expectation of coverage can be created by procedures which foster "a misconception about the insurance to be purchased." *Keller* at 685, 428. Importantly, the Bank in *Keller* was aware of the insured's health problems, but purportedly failed to advise the insured that those health problems

would prevent her from obtaining the coverage and thereby prevented her from obtaining the coverage elsewhere. The Court explained that, under those circumstances, the Bank should have notified the insured that the credit life policy would not be issued within thirty days of making that determination. *Keller* at 684, 427.

In this case, Allstate does not dispute that a Policy was issued. Instead, Allstate asserts that it was only issued because the Petitioners had made material misrepresentations in the application. Once those misrepresentations were discovered and a claim was made, it denied coverage because the Policy was void *ab initio* due to the misrepresentations. Neither *Keller* nor any other authority cited by the Petitioners stands for the proposition that an insurer must somehow discover that misrepresentations have been made and then cancel the policy within thirty days of issuance or face a waiver of the right to deny coverage. Moreover, the Petitioners have not offered any evidence to suggest that they had a "reasonable expectation" of coverage when they had blatantly misrepresented the nature of the property and their occupancy of it on the application. Unlike the insured in *Keller*, there is no evidence here that the Petitioners provided the true information and were then mislead as to whether a policy would be issued. Instead, the property burned within a few days of Ms. Hoover notifying the Petitioners of the problems with the property and the fact that it was not a property that would be covered by Allstate. (A.R. 929) Therefore, the Petitioners' suggestion that Allstate's coverage denial was somehow "untimely" because it was not made within thirty days of the issuance of the Policy is simply without merit.

VII. The Circuit Court correctly found that the absence of coverage eliminated the Petitioners' other claims.

Because there is no coverage and the Allstate Policy is void, the Circuit Court correctly found that the Petitioners' allegations that Allstate acted in bad faith and violated West Virginia's Unfair

Trade Practices Act (*W.Va. Code §33-11-4(9)* also fail as a matter of law. Specifically, because Allstate has no duty to pay for the Petitioners' damages, its refusal to do so does not breach the contract, the common-law duty of good faith, or the Unfair Trade Practices Act as alleged by the Petitioners.

This Court has noted, "[a]bsent a contractual obligation to pay a claim, no bad faith cause of action exists, either at common law or by statute." *Hawkins v. Ford Motor Co.*, 211 W.Va. 487, 492, 566 S.E.2d 624, 629 (2002) (citation omitted) Here, Allstate never had a duty to pay and, therefore, cannot be held liable for failing to do so in bad faith. Likewise, the Petitioners' Unfair Trade Practices Act claims are premised upon a failure to pay a claim when it is owed. For example, *W.Va. Code §33-11-4(9)(f)* requires insurers to attempt to settle claims in which the insurer's liability is "reasonably clear." Because the Petitioners made multiple material misrepresentations in the Application, the Policy was void *ab initio* and Allstate's liability was never "reasonably clear." Allstate had no duty to attempt to settle the Petitioners' claims. Similarly, *W.Va. Code §33-11-4(9)(g)* prohibits insurers from "compelling insureds to institute litigation in order to recover amounts due under an insurance policy." Because Allstate had no duty to provide coverage, there were no "amounts due" under the Policy. By necessity, the Petitioners' allegations of "bad faith" presuppose that Allstate had a duty to pay their claims. Due to the absence of coverage, no such duty existed and the Circuit Court correctly found that the Petitioners' claims fail as a matter of law.

VIII. The Circuit Court correctly found that Allstate was entitled to summary judgment as a matter of law.

Rule 56 of the *West Virginia Rules of Civil Procedure* governs motions for summary judgement and provides, ". . .judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 59, 459 S.E.2d 329, 335, 336 (1995); *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Moreover, to defeat summary judgment, an opposing party "may not rest upon [its] mere allegations[,]" W. Va. R. Civ. P. 56(e), but must "by affirmative evidence demonstrate that a genuine issue of fact exists." *Painter*, 192 W.Va. at 192 n. 5, 451 S.E.2d at 758 n. 5 (1994).

As discussed above, the evidence in this case clearly showed that the Petitioners made material misrepresentations about the condition and residence status of the property which bar their claim for coverage under Allstate Policy No. 801386360. Likewise, the evidence demonstrated that Mr. McDowell electronically signed the Application and represented that the facts set forth therein were true. Pursuant to *W. Va. Code § 39A-1-9*, such electronic signatures are valid and binding. Specifically, the Statute provides:

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

W. Va. Code § 39A-1-9. In this case, Mr. McDowell did not deny that he had signed the Application electronically (A.R. 939), and offered no evidence to suggest that it was not his "act" and attributable to him. In the absence of such evidence, there could be no genuine question of fact with respect to whether the Application contained material misrepresentations attributable to the Petitioners that prevented Allstate from making an informed decision as to whether it would issue the Policy or refuse to provide coverage with respect to the hazard resulting in the loss. Moreover, the absence of such coverage eliminates the Petitioners' remaining claims. Therefore, the Circuit Court below correctly found that Allstate was entitled to summary judgment with respect to all of the Petitioners' claims against it.

IX. The Circuit Court correctly denied the Petitioners' requests for summary judgment because there were significant questions of fact concerning misrepresentations made by the Petitioners in connection with the value of their contents claim.

In their *Brief*, the Petitioners assert that the Circuit Court erred when it refused to grant them summary judgment with respect to their claims against Allstate. However, even if the Allstate Policy was not void due to Petitioners' misrepresentations in the Application, questions of fact surrounding other misrepresentations made by the Petitioners about the value of the lost contents on inventory forms submitted to Allstate eliminated any possibility of summary judgment in favor of the Petitioners. Specifically, as noted above, the Allstate Policy expressly excludes coverage where one or more covered persons has "[c]oncealed or misrepresented any material fact or circumstance[,]" "[e]ngaged in fraudulent conduct; or . . . [m]ade false statements relating to this insurance[.]" (A.R.1038) In this case, Damon McDowell has acknowledged that he submitted inventory forms to Allstate which indicated that the Petitioners had lost approximately Two Million Dollars of contents in the fire. He was asked:

> Q. You understand that you sent an inventory through of items that you claimed to have been present at this property -
> A. Correct.
>
> Q. -- that was present at the time of the fire -
> A. Correct.
>
> Q. -- and lost in the fire; is that right?
> A. Correct.
> McDOWELL DEPOSITION EXHIBIT NO. 1 (List of items reported in house with value of each shown was marked for identification purposes as McDowell Deposition Exhibit No. 1.)
>
> Q. I'm going to hand you what I'm marking as Exhibit 1. Who prepared this?
> A. I'd say I did.

(A.R. 933 and A.R. 1051-1053, the inventory sheets.) He then proceeded to acknowledge that he was claiming $10,000 for a Duncan Phyfe Couch (A.R. 934), $8,500 for a Duncan Phyfe dining room set (A.R. 934), $1,700 for a wing backed chair (A.R. 935), $5,000 for a generator (A.R. 935), $100,000 for Ching Dynasty coins (A.R. 935), over 100 thousand baseball/football cards valued at $250,000 (A.R. 935), over 2000 coins valued at over $300,000 (A.R. 937) and over 200 vintage Barbie Dolls valued at over $100,000. (A.R. 937-938) Remarkably, Mr. McDowell claimed that he had found many of the coins with a metal detector (A.R.937) and had purchased the baseball cards, including Babe Ruth and Mickey Mantle cards, for less than $10,000. (A.R. 936). Despite Petitioners' representations as to the contents allegedly kept in the dwelling at the time of the fire, the fire personnel and police officers who investigated the fire did not find evidence or debris indicating that such items had actually been present. Detective Kevin Willis, who inspected the fire scene, was asked during his deposition:

> Q. This is the inventory list that Mr. McDowell and his wife and Deeanna Lawson has submitted, claiming that this personal property was present at the fire scene at 219 Highland in Oak Hill at the time of this fire. Including Ching Dynasty 23rd or - it says 23th - year silver coins valued at $100,000, over $100,000 ofl baseball - well, I'm sorry. Over 100,000 baseball and football cards valued at $250,000. Over 2,000 coins valued in excess of $300,000. 200 vintage Barbie dolls4 valued at over $100,000. Collection of Beanie Babies valued at over half a million dollars. Stamp collection valued at over $200,000. A knife collection valued at over $200,000. Clothing valued over $50,000. Passload framing gun. A Dewalt drill set. Hundreds of rare Beatles albums valued at $15,000. Gold jewelry, rings, necklaces, et cetera, valued over $100,000. Sterling silver coins, necklaces, valued over $100,000. Vintage coats and hat rack and stuff like that, other things. The total of all this, $1,955,300. Let me ask you, based on your observations from your site visits that you've described, did you observe or identify any of these items, or the remains of any of these items, present at that property?
>
> A. I have not - I don't see any that I can go back on my memory and see that I've noted. I will tell you that, based off of the fire scene, unless

> these items were in the basement, even if they were in the basement, there would still be evidence that these things existed. There was not enough fire progression, natural fire progression, to - the only room that flashed, and it was a brief flash, would have been the basement. When I call – when I describe a flashover fire, that is when all of the air temperatures get hot enough in one particular4 room that ignites everything at one simultaneously time. So, it's - I never seen any of these items and, if they were there at the time of the fire, they would have still been there or they would have - it wouldn't have got hot enough in this fire to damage any of these items.

(A.R. 1055-1057) Thus, there were clearly questions of fact regarding whether the Petitioners made material representations concerning their claim to Allstate on the inventory sheets they submitted. Because the origin and value of lost contents are directly material and relevant to the amount Allstate would pay to replace them, the Circuit Court correctly found that the existence of such questions of fact which must be decided by a jury would preclude summary judgment for the Petitioners on any aspect of their claims.

In West Virginia, insurance coverage is a matter of law when material facts are undisputed. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002). The Court applies clear insurance policy terms. Syl. Pt. 2, *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004) (citation omitted). Likewise, an insurer may validly limit coverage. *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W.Va. 475, 480, 80 S.E.2d 424, 426 (1954). Here, the Allstate Policy clearly and unambiguously excludes coverage where a covered person has misrepresented material facts. (A.R.1038) Because Mr. McDowell was the named insured on the Allstate Policy and there are clearly material questions of fact as to whether the information submitted on the Petitioners' inventory sheets was untrue (A.R. 933 and A.R. 1051-1053), the Circuit Court properly denied the Petitioners' requests for summary judgment.

Conclusion

For all of the foregoing reasons, the Petitioners' appeal should be denied and the Circuit Court's July 6, 2021 *Order* awarding summary judgment to the Respondents should be affirmed.

Respectfully submitted,

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY AND PATRICK O. HAMBRICK, JR.

By counsel

Brent K. Kesner (WVSB 2022)
Ernest G. Hentschel, II (WVSB 6006)
Kesner & Kesner, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Phone: 304-345-5200
Fax: 304-345-5265
Email: bkesner@kesnerlaw.com
Counsel for Respondents
Allstate Vehicle And Property Insurance Company and
Patrick O. Hambrick, Jr.

No. 21-0603

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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, Brent K. Kesner/Ernest G. Hentschel II, counsel for Allstate Vehicle And Property Insurance Company and Patrick O. Hambrick, Jr., do hereby certify that on the **20th day of December, 2021,** service of the foregoing **BRIEF OF RESPONDENTS ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY AND PATRICK O. HAMBRICK, JR.** has been made upon counsel of record by depositing a true copy thereof in the regular United States mail, first-class postage prepaid, addressed as follows:

Erwin L. Conrad, Esq.
Jamison T. Conrad, Esq.
Conrad & Conrad, PLLC
P.O. Drawer 9048
Fayetteville, WV 25840
Counsel for Plaintiffs

Brent K. Kesner (WVSB #2022)
Ernest G. Hentschel II (WVSB #6006)
Kesner & Kesner, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Phone: (304) 345-5200
Fax: (304) 345-5265
Email: bkesner@kesnerlaw.com
Email: egh@kesnerlaw.com
Counsel for Respondents