

No. 33080

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

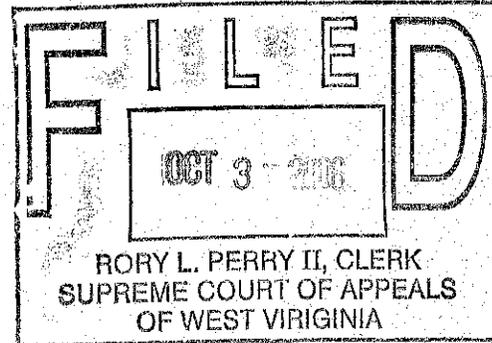
TERRY R. MACE and DONALD MACE,

Appellants,

Vs.

LIBERTY MUTUAL INSURANCE  
COMPANY, a Massachusetts Corporation

Appellee.



**REPLY BRIEF OF APPELLANTS TERRY R. MACE  
AND DONALD MACE**

COUNSEL FOR APPELLANTS:

A handwritten signature in cursive script, appearing to read "Edgar Heiskell, III".

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AND DONALD MACE**

Appellants Terry R. Mace and Donald Mace, her husband, hereby reply to the Appellee's Brief, as follows:

**SUMMARY OF THE REPLY**

Confronted with the absurdity of its attempt to re-write *Hannah v. Heeter*, Liberty Mutual has now abandoned its position (which induced the lower court to change the term "potential" to "impending" and was pivotal in the lower court's granting of summary judgment) and has retreated into a position which asks the Supreme Court of Appeals to resolve all of the genuine issues of material fact in Liberty Mutual's favor, falsely claiming that they are "undisputed."

Liberty Mutual's revised position is as devoid of supporting law or facts as its first attempt, and the lower court's order granting summary judgment, having been the result of that court's (1) abrogation of a legal standard expressly established by the Supreme Court of Appeals and (2) unsupportable findings of disputed facts, should be reversed and the case remanded for a trial on the merits.

1. **"Potential" vs. "Impending;" Liberty Mutual Retreats**

Clearly central to Judge Bloom's ruling was this finding at Paragraph 3 of his Order, as follows:

With respect to the first requirement of *Hannah*, the evidence is undisputed that *there was no pending or impending case* at the time the Plaintiffs sold their vehicle to Liberty... (Italics added). The Plaintiffs had not filed suit against Ford and never informed Liberty of any intention to file suit against Ford in the future. Thus, the Court concludes that the first requirement of *Hannah* is not met and Liberty is entitled to summary judgment.

R-2590-2598.

The absurdity and arrogance of Liberty Mutual's successful attempt to have Judge Bloom abrogate the holding in *Hannah* by changing the word "potential" to "impending" was fully exposed in Appellants' Opening Brief. As a result, Liberty Mutual's responsive Brief scarcely mentions the term "impending" and no longer seriously urges that it can be properly substituted for "potential." Nonetheless, Liberty Mutual still clings to the notion that, despite the facts that Liberty Mutual had itself previously filed a product liability claim against Ford expressly alleging that the Explorer was dangerously defective and had paid out millions of dollars on hundreds of claims involving "upsets" (rollovers) of Explorers, and despite the fact that Liberty Mutual had been directly notified by Mr. Mace that his wife had been injured in the rollover of their Explorer, Liberty Mutual had not had "actual knowledge" as required under *Hannah*. R-2590-2598. Liberty Mutual now urges this Court to make the same finding.

Appellants respectfully submit that, properly applying the language expressly set forth in *Hannah*, the only rational conclusion is that Liberty Mutual, having filed its own claim that the Explorer was defective by reason of insufficient resistance to rollover and having paid out millions in Explorer rollover claims, knew that every Explorer rollover incident involving one of its insureds was a *potential* claim, and when Liberty Mutual received *actual notice* (Mr. Mace's phone call describing his wife's Explorer rollover accident), the *Hannah* standard was met: Liberty Mutual then had actual knowledge of a potential claim. The lower court's finding to the contrary was reversible error. Finally, in response to Liberty Mutual's policy argument that it would be oppressive to require an insurer to comply with *Hannah* and preserve as evidence a vehicle it knows to be defective, Appellants hereinafter demonstrate the simplicity of a reasonable means by which the insurer can and should discharge that duty.

## 2. "Actual" vs. "Constructive" Knowledge

Liberty Mutual devotes much of its brief to the patently false assertion that the Maces' claim is based upon "constructive" notice. *See, e.g.*, Appellee's Brief, at p. 9: "The Maces proceed, not under a claim of actual knowledge, but constructive knowledge - a standard this Court has rejected in negligent spoliation cases." A responsible litigant would be embarrassed to come before this State's highest court and make such an assertion, knowing that its falsity is made apparent by very explicit language in the Complaint of plaintiffs below:

51. As of the date of the accident, *defendant Liberty Mutual*, by reason of having paid out tens of millions of dollars to victims injured in other first-event, single-vehicle rollover accidents involving Ford Explorers manufactured and sold in the United States from Model Years 1991 through 2001; by reason of its own internal risk analyses and communications with attorneys representing Explorer rollover victims; and by reason of its own monitoring of insurance industry data reporting accident rates among sport utility vehicles, *had actual knowledge* of the potential civil action that could be brought on behalf of Appellee. (Emphasis added).

Apparently, it was not enough to deceive the lower court with the "potential-means-impending" misrepresentation; Liberty Mutual now descends to the level of trying to persuade this Court that, even though plaintiffs below specifically pleaded and proved Liberty Mutual's "actual knowledge," they really were proceeding under a claim of "constructive" knowledge. Nowhere in their pleadings or briefs do the Maces suggest that Liberty Mutual, having itself filed a product liability complaint against Ford alleging that the Explorer is defective, had only "constructive" knowledge when it filed that claim or later, when it received notice of Ms. Mace's rollover accident. It is hard to conceive of more convincing evidence of *actual knowledge*, and Liberty Mutual's citations to dozens of cases that can readily be distinguished from the case at bar do nothing to relieve the company from its obligations under *Hannah*.

**3. Material Facts Claimed by Liberty Mutual to be "Undisputed" Are Seriously Controverted and in Dispute**

For ease of reference, Appellants will address each of the points raised by Liberty Mutual in the order in which they were set forth in Appellee's Brief, under "Discussion of Law," as follows:

**A. Standard of review.** The parties are in agreement that the standard of review is *de novo*.

**B. Contrary to Liberty Mutual's assertion that there were "no genuine issues of material fact" the Maces have shown that there are several such issues in dispute.** In the paragraphs that follow, it is apparent that some of the material issues of fact are either in dispute or were wrongly decided by Judge Bloom, and Liberty Mutual's assertion is unwarranted. At a minimum, the following issues are in dispute: (1) whether Liberty Mutual's conduct was "reasonable;" (2) whether the Maces could have survived summary judgment on behalf of Ford

Motor Company, given the effect of the evidence spoliation on their burden to show that the Explorer's stability defect was the proximate cause of Ms. Mace's injuries, where Ford could be expected to raise (as Liberty Mutual raised) the possibility of the "unrepaired ball joint" as a proximate cause of Ms. Mace's accident; (3) whether the Maces' \$50,000 was a "substantial" sum, foreclosing their claim under *Hannah*, or whether it was a "small fraction of its value in recognition of the fact that the defective product at issue in the case had been destroyed," as the Maces allege; (4) the extent of Ms. Maces injuries, which are minimized in Liberty's Brief, at p. 11, as "relatively minor," but which, in fact, caused her to be hospitalized and to suffer chronic problems and surgeries; and (5) whether Liberty Mutual's facilitation of the destruction of the Maces' Explorer was "evidence spoliation" or the mere exercise of "rights of property ownership" which had accrued to their insurer. The fact that Liberty Mutual claimed "Cross-assignments of Error" in its Brief and further claimed that Judge Bloom should have decided these issues of fact in Liberty Mutual's favor demonstrates that they remained as disputed questions of material fact when Judge Bloom entered his Judgment Order dismissing the Complaint. Other genuine issues of material fact, wrongly decided by Judge Bloom, are set forth below.

**C. Liberty Mutual's assertion that "the evidence was undisputed that [Liberty Mutual] had no actual notice that the Maces intended to file suit against Ford" and that "Judge Bloom properly concluded Liberty was entitled to judgment as a matter of law" is an attempt to misapply *Hannah* and is contradicted by the evidence.** As has been clearly shown, the *Hannah* standard is not whether the party claiming spoliation "intended to file suit;" rather, it is whether the spoliator had "actual knowledge of a potential claim." Once again, Liberty Mutual is caught taking liberties with the express language of that opinion of this Court.

Moreover, it has been clearly shown that Judge Bloom's granting of summary judgment was wholly predicated upon the abrogation of the express language of *Hannah* and was thereby reversible error.

**D. The Maces did, indeed, identify the "special circumstances" giving rise to Liberty Mutual's obligation not to destroy evidence, and Judge Bloom's finding to the contrary was reversible error.** The Maces have shown the following special circumstances: Liberty Mutual, being in a unique position with special knowledge not generally available to its lay customers, having taken possession of the evidence (the Explorer), having itself been a plaintiff alleging vehicle stability defects in an Explorer rollover case, having paid out millions in losses in Explorer rollovers, having been previously found to have committed spoliation in a product liability action in Pennsylvania, and having been notified that Ms. Mace had been injured in an Explorer rollover implicating the same design defect that gave rise to its own defect claim, created the "special circumstances" contemplated by *Hannah* to give rise to a duty to preserve that evidence.

**Liberty Mutual did not meet the Standard of "Reasonableness"**

As was shown in Appellants' Opening Brief, this Court's decision in *Hannah* finds robust support in the reasoning of other courts, and in at least two of the leading cases imposing a duty to preserve evidence, Liberty Mutual was a party. A standard of "reasonableness" was applied to the insurer's conduct, and in each case, as in the case at bar, Liberty Mutual's conduct came up short. In *Pirocchi v. Liberty Mutual Insurance Co.*, 365 F.Supp. 277, 282 (E.D. Pa. 1973), the court disagreed with Liberty Mutual's position, holding as follows:

Under the general law of torts, a defendant may voluntarily assume a duty by affirmative conduct which would not exist in the absence of such conduct. See Prosser, *Handbook of the Law of Torts*, 4 ed. (1971), § 56 and cases cited therein. Under the law of Pennsylvania, a person who makes an engagement, even though gratuitous, and actually enters upon its performance, will incur tort liability if his negligence thereafter causes another to suffer damages. *Pascarella v. Kelley*, 378 Pa. 18, 105 A.2d 70 (1954); *Rehder v. Miller*, 35 Pa.Super. 344 (1908).

The standard required in the performance of a duty created by affirmative conduct is *reasonable care under all of the circumstances*, and the duty may be terminated when circumstances permit by giving notice of the intention to terminate and disclosing what remains to be done. Prosser, *supra*, § 56.

Breach of duty under Pennsylvania law is the failure to exercise reasonable care under all the circumstances of a particular situation. *Smith v. Philadelphia Transp. Co.*, 173 F.2d 721 (3<sup>rd</sup> Cir. 1949). **Summary judgment is usually not appropriate in negligence cases**, Wright and Miller, *Federal Practice and Procedure*, Civil § 2729, **since the application of the standard of conduct of the reasonable man usually requires a full exposition of all the underlying facts and circumstances. While it is clear that plaintiff has the burden of proof with respect to assumption of a duty and its subsequent breach, it is equally clear that he is entitled to his day in court to present the evidence he has....**

*Pirocchi v. Liberty Mutual Insurance Co.*, at p. 282 (Emphasis added).

In the case at bar, a jury could reasonably conclude that Liberty Mutual, having voluntarily taken possession of the Maces' Explorer and knowing that the vehicle was the basis of a potential defect claim similar to the one Liberty Mutual had filed in Florida, and then facilitating its destruction, did not exercise reasonable care toward the Maces. Rather, it would have been reasonable for Liberty Mutual to have informed the Maces of what the company knew about the Explorer's stability defect and to afford them the opportunity to preserve the vehicle at their own expense until they made a determination as to whether to file a claim. Instead, Liberty Mutual kept to itself what it knew about the Explorer's defective design and proceeded with some haste

to dispose of the evidence, and Judge Bloom foreclosed the Maces from having their day in court and presenting the full exposition that justice requires.

Liberty Mutual, in its brief, describes a hypothetical case in which the company might be required to preserve a vehicle *ad infinitum*; however, a very simple solution is available to the company. There is no reason why Liberty Mutual cannot, upon receiving notice that one of its insureds has been injured in an Explorer rollover, send out with its initial paperwork (written claim form, power of attorney, title transfer documents, etc.) a simple notice on a 3" x 8" piece of paper (one-third of a page, requiring no additional postage), with these words:

Liberty Mutual is aware that a number of persons injured in Explorer rollover incidents have filed lawsuits against Ford Motor Company alleging that the vehicle is defectively designed. You may potentially have such a claim and, if so, preservation of your vehicle as evidence may be necessary. As a service to you, our Valued Customer, Liberty Mutual will arrange to have your vehicle stored in a secure facility to and until [date specified as thirty (30) days from the date of the letter] in order to afford you time within which to seek legal advice, if you so desire, and determine your rights and obligations. Should you desire to have the vehicle preserved after [date specified], it will be **your obligation** to (1) provide Liberty Mutual with written notice of such intention on or before [date specified]; (2) make the arrangements for further storage of the vehicle; and (3) pay the costs thereby incurred. Should you not desire to have the vehicle preserved, you may notify Liberty Mutual of that fact and we will proceed to dispose of it in accordance with our usual procedures.

Such a simple notification would enable Liberty Mutual reasonably to discharge its duty not to destroy potential evidence. In the case of infants, the process becomes admittedly more complicated but can nonetheless be resolved by a summary proceeding designed to protect the rights of the injured child. "Reasonableness" would certainly prevail in such circumstances, especially where the preservation of evidence is so fundamental to our system of justice.

In *Baliotis v. McNeil*, 870 F.Supp. 1285 ( M.D. Pa. 1994), cited in Appellants' Opening Brief, the federal court faulted Liberty Mutual for destruction of evidence in a product liability/fire case, holding (870 F.Supp. at 1290) that Liberty Mutual was *under a duty to preserve evidence which it knows or reasonably should know is relevant to the action*. "Accordingly," said the Court, "Liberty Mutual owed a duty to preserve evidence relevant to the origin and cause of this fire as soon as it identified a potentially responsible party." All Appellants ask in the case at bar, in essence, is that Liberty Mutual be required, in the cause of reasonableness, to share with its injured customers what the company itself knows and/or has alleged about a defective product and the need to preserve the vehicle for a reasonable time. We respectfully submit that such a requirement is wholly consistent with the letter and spirit of *Hannah*. At the time of Ms. Mace's accident, Ford already had knowledge as to the identity of the "potentially responsible party," namely, Ford Motor Company, and Liberty also knew that Ms. Mace's Explorer was critically important evidence.

Despite a lengthy survey of case law involving insurance companies and evidence spoliation, Liberty Mutual remains unable to cite any cases with similar facts or credible authority for the proposition it seeks to advance, namely: that an insurance company having actual knowledge of a potential claim can be vindicated in its destruction of evidence supporting that claim by the mere fact that it acquired the victim's vehicle and could do with it as it pleased.

As the Maces have previously shown, *Pirocchi* was decided in 1973, nearly twenty (20) years before Ms. Mace's Explorer rollover accident. *Baliotis* came down in 1994, some eight (8) years before. Despite the lessons from these two cases, and despite the clear language of *Hannah*, Liberty Mutual failed to implement procedures that would have provided safeguards against the destruction of

the Maces' evidence after Liberty Mutual had received actual knowledge of their potential claim. Judge Bloom's decision, at the urging of Liberty Mutual, effectively approved of that result; only reversal by this Court can right that wrong.

**Cross-assignment of Error A:** Liberty Mutual urges that "[b]ecause there is no evidence that the vehicle was altered when it was owned by Liberty, Judge Bloom should have concluded that Liberty was entitled to judgment as a matter of law on this issue." This assertion, of course, ignores the reality that, the moment Liberty delivered possession of the vehicle to the operator of the salvage yard, its destruction as evidence was assured. In Liberty Mutual's own words, when a vehicle is sold for salvage, it gets "'cut up . . . for parts,' which, of course, is how salvage works." Appellee's Brief, at p. 18. Knowing this, Liberty Mutual owed a duty to see that the evidence was not "cut up for parts" and thereby destroyed.

**Cross-assignment of Error B:** Liberty Mutual alleges that "because the evidence is undisputed that Maces' claim against Ford would have survived summary judgment, Judge Bloom should have concluded that Liberty was entitled to judgment as a matter of law on this issue." Here again, Liberty Mutual would have this Court ignore material issues of fact, including the facts that (1) former Ford Vice-president Thomas Feaheny had filed a sworn affidavit averring that the spoliated evidence was vital to plaintiff's ability to prevail in a pending or potential civil action and that plaintiffs encounter extreme difficulty in defending against Ford's spoliation motions in such cases, and (2) in their case against Ford, the Maces would have the burden of proof on the issue of proximate cause and, even though they could show the existence of a design defect, the absence of the vehicle would allow Ford to suggest to the trial court that, because they could not prove that the "unrepaired ball joint" or some other mechanical failure was not the proximate cause of the accident, Ford should

be granted summary judgment. Without a fully-developed record, it is exceedingly presumptuous to suggest that the Maces would have survived a motion for summary judgment in their case against Ford. Judge Bloom's premature order deprived the Maces of the opportunity to develop those facts.

**Cross-assignment of Error C:** Liberty Mutual alleges that "because the evidence is undisputed that Maces settled their claim for a substantial sum in excess of their claimed special damages, Judge Bloom should have concluded that Liberty was entitled to summary judgment on this issue." In attempting to support this proposition, Liberty cites two cases which have no conceivable bearing on the issues in this case (*Florida Evergreen*, in which plaintiffs had apparently failed to "allege facts that would show the required degree of impairment," and *Hernandez*, in which the plaintiff had not timely filed her claim), and then goes on to assert that, because the Maces' settlement was "substantial," their spoliation claim is barred. Liberty offers nothing to support such a suggestion by way of what the Maces may show as their total economic and non-economic losses, the magnitude of which will support their argument that the settlement with Ford was a mere token amount by comparison. There is no basis whatsoever to take this genuine issue of material fact away from the jury, and Liberty's Brief could not be more deficient on this point. It is properly left to the jury to determine what is "substantial" and what is "nominal."

**Cross-assignment of Error D:** Liberty Mutual alleges that "because the evidence is undisputed that Maces' expert could not opine that a product defect, rather than an unrepaired ball joint, caused the accident, Judge Bloom should have concluded that Liberty was entitled to summary judgment on this issue." Here again, Liberty Mutual is implicitly asking the court to view the evidence in the light most favorable to the moving party, rather than the non-moving party, contrary to the mandate of Rule 56 and applicable case law. In attempting to prop up this argument, Liberty refers to

selected responses given by Thomas Feaheny, a former Ford Vice-president, carefully not informing the Court of the material statements made by this witness in an Affidavit outlining his proposed testimony at trial. Among the affirmative statements made by Mr. Feaheny but not mentioned by Liberty are the following:

4. Affiant has expressed the opinions, among others, that Ford placed the 1991-2001 Model Years Explorers on the market in a defective condition, unsafe, and unreasonably dangerous for their intended use by foreseeable users, insofar as (a) the vehicle is unstable in foreseeable handling situations and (b) the vehicle had an unreasonable propensity to roll over.

5. A principal component that is central to the stability defect in the 1994 Explorer is the Twin I-Beam suspension, which, in dynamic turning maneuvers, has been shown to cause "jacking" or the raising of the vehicle's center of gravity, and control and rollover resistance are thereby adversely affected, making the vehicle more prone to roll over.

6. In numerous Explorer rollover cases in which I have been retained as an expert, Ford has settled the injured plaintiffs' claims by paying substantial sums of money; in other cases, juries have awarded millions of dollars in verdicts in favor of injured plaintiffs. In the case of *Buell-Wilson vs. Ford Motor Company*, a San Diego, California jury rendered a verdict in excess of Two Hundred Million Dollars (\$200,000,000.00), including punitive damages, to a woman injured when her Explorer rolled over.

7. Based upon the information provided to me in the Mace case, the subject Explorer was sold for salvage soon after the rollover accident. According to the photographs provided to me, the vehicle's Twin I-Beam front suspension had been removed from the vehicle.

8. It is my opinion that preservation of the Twin I-Beam suspension was vital to plaintiffs' ability to prevail in their civil action against Ford Motor Company, and the destruction thereof severely impaired the ability of accident reconstructionists and vehicle dynamics experts to give definitive opinions on the issue of proximate cause in said pending civil action. Ford Motor Company could be expected to file a motion for summary judgment on the grounds of spoliation, supported by affidavits of its mechanical engineers and accident reconstructionist asserting that, without this critical component, they cannot determine the proximate cause of the accident. Plaintiffs encounter extreme difficulty in defending against such motions.

9. It is my further opinion that, but for the aforesaid spoliation of evidence, plaintiffs clearly would have prevailed in their aforesaid action against defendants Ford Motor Company, as have countless other plaintiffs.

Thus, it is clear that, at worst for plaintiffs below, there were genuine issues of material fact as to both the defect and causation. Mr. Feaheny is clear that the spoliation of evidence was very damaging to the Maces' case against Ford Motor Co., and his unwillingness to speculate about the significance, if any, of the allegation that the "unrepaired ball joint" had to do with the proximate cause of Terry Mace's injuries points up precisely the damaging effects of evidence spoliation. These are genuine issues of material fact which are not properly the subject of a motion for summary judgment. Moreover, it is not up to Mr. Feaheny to testify as to whether Ms. Mace's injuries were suffered in the collision with the guardrail or in the rollover; Ms. Mace and her physicians are the best sources of that information. Liberty's suggestion that Judge Bloom should have resolved such issues betrays a lack of understanding of the meaning of Rule 56 and the principles that circumscribe the trial court's granting of summary judgment.

**Cross-assignment of Error E:** Liberty asserts that Judge Bloom should have granted summary judgment "because imposition of liability would have violated Liberty's rights under the United States and West Virginia constitutions." Liberty goes on to argue that no person or corporation can be required to preserve its own property for the benefit of a third party where the person or corporation was never requested or placed under any legal compulsion to preserve such property.

Liberty Mutual's argument here, of course, leaves out material facts. In processing the Maces' claim, Liberty was informed of the Explorer rollover accident and had paid out millions in Explorer rollover cases; moreover, it had filed its own claim alleging that the Explorer was defectively designed.

All this was known to Liberty Mutual *before* it acquired title to the vehicle which was the evidence in the Mace case. Liberty was thus acquiring a vehicle that was evidence that could be used in a court of law. It stands to reason that, with such knowledge, whether actual or imputed, Liberty could not properly acquire ownership rights unfettered by the obligation to preserve the evidence. It is inconceivable that any court would buy into Liberty's preposterous theory that it could purchase a vehicle it knew could be material evidence in a potential lawsuit and then facilitate the destruction of that evidence in the name of "private ownership of property." It is not surprising, then, that Liberty Mutual has not been able to cite any authority for the proposition it seeks to advance, namely, that an insurance company having actual knowledge of a potential claim can be vindicated in its destruction of evidence supporting that claim by the mere fact that it acquired the victim's vehicle and could do with it as it pleased.

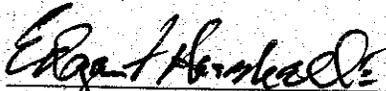
#### **CONCLUSION AND REQUEST FOR RELIEF**

The Maces, having shown that the court below committed reversible error in abrogating the standards expressed in *Hannah*; having shown that they have met all of the standards set forth in *Hannah* or, at the least, that genuine issues of material fact remain for jury determination; and having shown that Liberty Mutual owed to them a duty to preserve the Ford Explorer as evidence in this case, respectfully pray that the judgment of the court below be reversed and the case be remanded to the trial court for further proceedings consonant with the order of the Supreme Court of Appeals.

Respectfully submitted this 2nd day of October, 2006.

TERRY R. MACE AND DONALD MACE,  
APPELLANTS

BY COUNSEL:



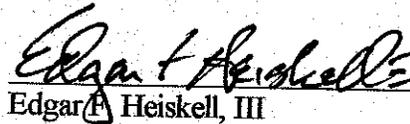
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**CERTIFICATE OF SERVICE**

The undersigned, Edgar F. Heiskell, III, counsel for Appellant, hereby certifies that on this 2nd day of October, 2006, he served two copies of the foregoing Appellants' Reply Brief upon Ancil G. Ramey, counsel for Appellee, *via* United States Mail, first class postage prepaid, at his offices at Steptoe & Johnson, 1200 Bank One Center, Charleston, West Virginia 25301.

  
Edgar F. Heiskell, III