

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

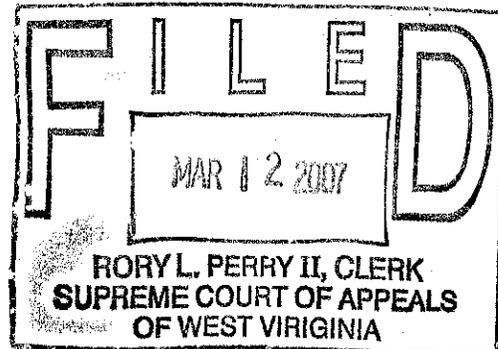
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, Defendant below,

Appellant,

v.

STACEY A. STRUM and NICOLE A. ELLIOT,
As Co-Administrators of the Estate of CHERYL
ANN KETTLEWELL, deceased, Plaintiffs below,

Appellees.



ACTION NO. 33285

FROM THE CIRCUIT COURT OF TYLER COUNTY
CIVIL ACTION NO. 00-C-29K

AMICUS BRIEF OF WEST VIRGINIA INSURANCE FEDERATION
IN SUPPORT OF APPELLANT, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

Mychal Sommer Schulz (WVSB #6092)
Jill Cranston Bentz (WVSB #7421)
Ryan J. Aaron (WVSB #9951)
DINSMORE & SHOHL LLP
900 Lee Street, Suite 600
Charleston, WV 25301
Telephone No. 304.357.0900
Facsimile No. 304.357.0919

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I. STATEMENT OF INTEREST

The West Virginia Insurance Federation (the "Federation") is the state trade association of property and casualty insurance companies doing business in West Virginia. Its members insure approximately eight of every ten automobiles and homes in West Virginia. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has served the property and casualty insurance industry for nearly thirty years. The Federation has a strong interest in promoting a healthy and competitive insurance market in this State to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

This appeal arises from a decision of the Circuit Court of Tyler County resulting from a single vehicle accident on November 25, 1999. This accident involved the death of Cheryl Ann Kettlewell, the mother of Appellees Nicole A. Elliott and Stacey A. Strum¹. At issue is (1) whether coverage under underinsured motorist ("UIM") policies must be extended to include claims of emotional distress arising out of an accident *not* involving an insured or the insured's motor vehicle pursuant to W. Va. Code §33-6-31(b), and (2) whether Ms. Elliott and Ms. Strum have standing, in their individual capacity, to bring individual claims for emotional distress damages in their own name outside of the Wrongful Death Act when such damages arose out of the wrongful death claim of their mother's estate. The Federation agrees with Appellant State Farm Mutual Automobile Insurance Company that Ms. Elliott and Ms. Strum lack standing to bring an individual claim under the Wrongful Death Act and are not entitled to collect damages under their own respective underinsured motorist policies for non-bodily injuries when they themselves -- and, thus, their insurance policies -- were not involved in the auto accident. The Federation, therefore, believes that the Circuit Court's ruling improperly construed and applied the Wrongful Death Act and W. Va. Code § 33-6-31(b), West Virginia's

¹ Upon information and belief, Ms. Strum settled her claims; however, she remains a party to this appeal.

underinsured motorist statute, which, if upheld, will have devastating consequences for West Virginia's insurance consumers and West Virginia's insurance industry.

II. FACTUAL BACKGROUND

Ms. Kettlewell was a passenger in a vehicle driven by Defendant Traci Marie Swanson. Ms. Swanson was intoxicated and, ultimately, lost control of the vehicle and crashed into a wall, killing Ms. Kettlewell. The vehicle driven by Ms. Swanson was covered under a liability policy of \$20,000.00, which was paid to the Estate of Ms. Kettlewell.

Appellees Elliot and Strum serve as personal representatives and co-administratrices of their deceased mother, Cheryl Ann Kettlewell, and her Estate. After settlement of the Estate's claims under the Wrongful Death Act, co-administratrices Ms. Elliot and Ms. Strum -- who were not involved in the accident -- filed a civil action seeking a declaration that their respective personal auto insurance policies provided underinsured motorist ("UIM") coverage for emotional distress damages that each suffered as a result of the death of their mother. They argued that each is entitled to collect emotional distress damages under the West Virginia Wrongful Death Act and, as such, can expand recovery to their own respective UIM policies, even though these policies were not implicated in their mother's automobile accident.

The Circuit Court agreed with Appellees' arguments in granting them summary judgment, holding that they "would be legally entitled to collect damages for the loss of their mother" and that the intent of the underinsured motorist statute is "to allow an insured to collect all damages to which he is legally entitled from the operator of an underinsured motor vehicle." The Circuit Court determined that a limitation to "bodily injury-type damages" included in a

UIM policy is not permissible under the statute. The West Virginia Insurance Federation disagrees with this interpretation and application of the underinsured motorist statute. It improperly allowed Ms. Elliott and Ms. Strum to bring individuals claim under the Wrongful Death Act and incorrectly construed the underinsured motorist statute to allow an insured to be compensated under her UIM policy for non-bodily injuries. This ruling, if upheld, will turn West Virginia's insurance industry on its head.

III. ARGUMENT

The West Virginia Insurance Federation objects to the Circuit Court's disregard of (1) the purpose and intent of W. Va. Code §33-6-31(b), West Virginia's underinsured motorist statute, and (2) the explicit language contained in West Virginia's Wrongful Death Act. Indeed, the Circuit Court's Order could have a devastating – albeit perhaps unintentional – impact on insurance companies doing business in West Virginia and, most certainly, on West Virginia's insurance-buying public.

A. Insurers must be able to rely on West Virginia law in order to adequately ascertain risk and to fairly price policies as uncertainty necessarily leads to increased premiums for West Virginia's insurance consumers.

Insurance is not a typical consumer product that has a readily ascertainable cost. It is not like a car, a house, a desk, a light bulb, or a pencil. All of these items -- indeed, most consumer products -- have an easily ascertainable cost to manufacture, to build, or to create. Companies that sell consumer products know the cost of the product they sell at the time they fix the price. Insurance, however, does not work like that. An insurer does not know the precise cost of its product (i.e., the insurance policy) at the time it sells that product. It must *predict* how much that product will cost by *predicting* the risk of loss under the policy. Insurers rely on past

claims experience in making this prediction, and here, this past claims experience did *not* include such a broad expansion of coverage.

Relying on W. Va. Code § 33-6-31(b) (and policy provisions that are clearly permitted by that statutory provision), no insurance company doing business in West Virginia would have *predicted* that a court would have permitted a UIM claim that falls so clearly outside the UIM statute. No insurance company, therefore, has considered (or would have had reason to consider) payment on such a claim when it predicted the risk of loss under a UIM policy and calculated a premium to charge for that coverage.

An affirmation of the Order of the Circuit Court, therefore, will increase significantly the risk to which insurers are exposed in underwriting UIM policies, thereby threatening the financial stability of West Virginia's insurance market, which can only serve to harm West Virginia insurance consumers. The increased risk borne by insurers ultimately and inevitably will (1) lead to more intrusive and detailed underwriting inquiries of insureds and (2) result in higher premiums for West Virginia's insurance consumers. West Virginia consumers will be forced to pay higher premiums for the increased risk the insurers assume pursuant to a greatly expanded scope of UIM coverage. Ultimately, fewer West Virginians will be able to afford UIM coverage, which will take more money out of their pockets; more West Virginians will be forced to forego obtaining UIM coverage, leaving more citizens harmed by underinsured motorists to suffer from inadequate compensation for their injuries and damages; and more West Virginians will be left underinsured. Clearly, these outcomes undermine a public policy objective of the UIM statute, which is to encourage consumers to acquire UIM coverage so as to ensure that *insured* individuals who suffer bodily injuries and property damages inflicted by an underinsured driver are adequately compensated. This subversion of public policy that will

result from the Order of the Circuit Court surely *could not* and *cannot* be the intention of this Court or the Legislature.

W. Va. Code § 33-6-31(b) states, in part, that UIM coverage must "pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an . . . underinsured motor vehicle up to" the UIM coverage limits. This appeal focuses on whether the insured under a UIM policy is permitted to "recover" under the UIM policy when (1) the insured was *not* involved in the accident with the underinsured driver, and (2) the *only* damages alleged are emotional distress damages sustained when a relative of the insured, who neither lives with nor is dependent upon the insured, is involved in the accident with the underinsured motorist. Clearly, public policy militates against coverage in this scenario for a number of reasons.

First, if the Court removes the condition that an insured actually be involved in the accident with an underinsured motorist, as is reasonably and understandably required in the typical UIM policy, it will expand significantly the risk attendant to each and every UIM policy issued in West Virginia. At present, the risk is finite and well-defined as only the "insured" (as defined under the insurance contract) may recover, and then only for damages incurred as a result of a motor vehicle accident in which *the insured* was involved. These types of risks are readily ascertainable and serve to keep UIM premiums at the lowest possible level commensurate with those risks. If, however, the Court were to so vastly expand coverage as to include damages to an insured as the result of a motor vehicle accident in which any family member of an insured -- *not* limited to those who are insured under the policy -- is injured or killed, it would increase dramatically the number of people who could trigger UIM coverage. That is, instead of a motor vehicle accident involving an *insured* triggering UIM exposure, an

accident involving *any* family member -- whether or not an insured and whether or not a dependent -- would trigger UIM exposure. This would exponentially increase UIM risk as UIM coverage would be triggered by tens of thousands of individuals -- most of whom are unknown to the UIM insurer -- who would not otherwise be able to trigger coverage.

In an analogous situation, the court in Livingston v. Omaha Property and Casualty Ins. Co., 927 S.W.2d 444, 446 (Mo. Ct. App. 1996), rejected as unreasonable the plaintiff's statutory construction that would have extended coverage:

To accept plaintiff's interpretation, would permit plaintiff to recover under her uninsured motorist policy for the death of any person from whom she is legally entitled to bring a claim under the wrongful death statute, such as the death of her children, any lineal decedents, her brothers and sisters, her parents, or any other descendant. It would provide coverage by plaintiff's insurance company for hazards associated with the operation of the vehicles of all of these individuals, none of whom are insured under her policy. While uninsured motorist coverage is to be given a liberal interpretation, *coverage should not be created where there is none. (emphasis added).*

Similarly, the court in Eaquinta v. Allstate Ins. Co., 125 P.3d 901, 905 (Utah 2005) noted that such an approach

would mandate an insurance company to provide UIM coverage to a wrongful death beneficiary simply because the beneficiary has an automobile insurance policy and the decedent happens to be a relative for which the beneficiary is legally entitled to maintain a wrongful death action. To judicially extend UIM coverage to include members of the family who are not residing with the insured would, in effect, require automobile insurance companies to insure any lineal descendant from whom an insured may inherit for hazards associated with the operation of vehicles.

As recognized by the courts in Livingston and Eaquinta, a UIM insurer simply cannot define accurately the risk to which it is exposed in the UIM policy if any extended family members of an insured can trigger a claim for UIM coverage by being involved in a motor vehicle accident. The inevitable result of this inability to define the risk is substantially higher premiums to protect against the unknown risk.

Second, expansion of coverage under UIM policies would increase substantially UIM premiums to be paid by West Virginia's insurance consumers. This result clearly is contrary to the Legislative finding that "it is in the best interest of the citizens of this state to ensure a stable insurance market." See W. Va. Code § 33-6-30(b)(7). As the court in Eaquinta concluded, "[a]n interpretation that would allow an insured to recover UIM benefits under her insurance policy for the death of a third party who is not covered under that policy would impose an unfair risk on insurance companies without the attendant consideration in the form of a premium and, possibly, increase the cost of insurance for all consumers." Eaquinta, 125 P.3d at 905. While not determinative, clearly this Court should be, and has been, sensitive to increasing the costs of insurance to West Virginia consumers. See Elmore v. State Farm Mut. Auto. Ins. Co., 504 S.E.2d 893, 900 (W. Va. 1998) (Court noted, in rejecting plaintiff's position, that adoption of the position would result in "increasing both the number of litigated insurance claims and insurance costs of consumers."). See also Rose v. St. Paul Fire and Marine Ins. Co., 599 S.E.2d 673, 689 (W. Va. 2004) (J. Maynard, dissenting) (Court's decision "will have the effect of increasing the cost of purchasing insurance for all West Virginia consumers. That means premiums will increase, and premiums are paid *only* by consumers." (emphasis in original)).

Third, W. Va. Code § 33-6-31, when read as a whole, clearly intimates that UIM coverage extends only to an insured that received personal injuries when *the insured* is involved in an accident with an underinsured driver. For example, the definition of "underinsured motor vehicle" in § 33-6-31(b) refers to a motor vehicle in which a liability policy "has been reduced by payments *to others injured in the accident . . .*" That is, the very definition of an "underinsured motor vehicle" strongly implies that an insured is "injured in the accident" that involves the underinsured vehicle.

In fact, the overwhelming majority of courts that have addressed this issue apply the same logic and common sense and find that UIM coverage does not extend to provide coverage to an insured who is not involved in a motor vehicle accident with an underinsured driver. See Eaquinta, 125 P.3d at 904, n.6 (identifying at least 13 states that "have interpreted their respective UM/UIM statutes as only mandating coverage if an insured person sustains bodily injuries.") Interestingly, of six state courts that extended coverage, at least five were subsequently overruled by statute. See Eaquinta, 125 P.3d at 904, n.6 (identifying Maryland, Nebraska, and Ohio as states that have overruled by statute judicial decisions extending coverage). Georgia and Maine have also amended their statutes to supersede judicial decisions extending coverage by limiting damages to bodily injuries or death sustained by *the insured*. See Ga. Code Ann. § 33-7-11(a)(1); ME ST T. 24-A § 2902.1. Therefore, only one of the six state courts (as identified in Eaquinta) originally adhering to the minority view remains in support of the significant expansion of UIM coverage. Clearly, the majority of courts take a broad view of statutory UM/UIM language and place it within the context of the purpose and function of UM/UIM coverage and public policy underlying such coverage. The majority view (and the clear modern trend) stands in marked contrast to the finding of the Circuit Court in this case that "[t]he intent of the Underinsurance Statute is to allow an insured to college [sic] all damages to which he is legally entitled from the operator of an underinsured motor vehicle" without limitation to "bodily injury-type damages." The majority view, and the dear modern trend, makes sense, and this Court should follow it.

In addition, allowing recovery in this case would result in an unreasonable anomaly where the insured can recover when a relative dies, but not when the relative merely sustains a serious injury. This occurs because the Wrongful Death Statute creates a right of

recovery in the insured when a close relative dies, but not when that relative is simply injured. Courts have identified that paradox as an illogical result of extending coverage under the circumstances present in this case, which simply *cannot* be what the legislature intended. See Gloe v. Iowa Mut. Ins. Co., 694 N.W.2d 238 (S.D. 2005).

This Court will open the floodgates to UIM claims and litigation by UIM policyholders seeking recovery under their respective UIM policies if the Circuit Court's Order is upheld. Allowing an insured to recover under UIM policies for damages allegedly caused by personal injuries or death to family members not an "insured" under the UIM policy *cannot* be what the Legislature intended in drafting the UIM statute. "If the legislature had intended such a momentous expansion of UIM coverage, it would have made that intent explicit in the UM/UIM statute." Eaquinta, 125 P.3d at 905.

This Court would do justice to common sense and reason -- and to consumers in West Virginia -- by denying the extension of coverage advocated in the Circuit Court's Order. In addition, this Court would be following the majority of jurisdictions that reject this extension of UIM coverage. To do otherwise would expose the insurance industry to greater risk in insuring individuals from damages caused by underinsured motorists and would result in substantially higher premiums to West Virginia's insurance consumers. Ultimately, higher premiums take more money away from consumers and make UIM coverage less attractive and less affordable to more individuals, all in contravention of public policy.

B. Respondents lack standing to pursue claims in their individual capacities under the Wrongful Death Act.

Should this Court uphold the Order of the Circuit Court, it effectively would redefine who has standing to pursue claims under W. Va. Code § 55-7-5 and § 55-7-6, West

Virginia's Wrongful Death Act (the "Act"). Under the Act, *only* a personal representative of a decedent has standing to bring a damages claim for death caused by "wrongful act, neglect, or default[.]"

Specifically, the Act states that

[w]henver the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured[.]

W. Va. Code § 55-7-5. Further, the Act states that "[e]very [wrongful death] action shall be brought by and in name of the personal representative of [the decedent.]" W. Va. Code § 55-7-6.

Thus, the Legislature has mandated that *only* a personal representative of a decedent has standing to bring a claim for damages as the result of the wrongful death of an individual and such claims must be brought under the Act. If a claim for damages resulting from the wrongful death of an individual is not permitted under the Act, then such a claim *cannot be made*.

Clearly, in this case, Ms. Elliott could bring only claims for damages resulting from the death of her mother under the Act, and, therefore, only in her capacity as the representative of her mother's estate. It is generally understood that "personal representative" refers to the representative capacity in which an individual acts on behalf of a decedent's estate, as opposed to an individual capacity where the individual acts on his or her own behalf. It is the capacity in which the individual is acting that determines whether or not the individual's claim may stand under the Act.

Only an individual serving in a representative capacity, therefore, may bring claims under the Wrongful Death Act on behalf of the decedent and her estate. This same individual, however, may not bring claims under the Act in which she is acting in her individual

capacity. Claims brought by a person in her individual capacity are not permitted under the Act because such claims did not originally exist with the decedent and are not representative of the decedent and/or her estate. Since a personal representative lacks standing to bring a claim under the Act in an individual capacity, therefore, any claim brought under the Act by an individual in her individual capacity is subject to dismissal, even if the plaintiff is also the decedent's personal representative. Jones v. George, 533 F.Supp. 1293 (S.D. W. Va. 1982).

Here, the Circuit Court failed to acknowledge that the Act restricts the filing of claims based on the wrongful death of an individual to those filed by the personal representative on behalf of a decedent's estate and, consequently, failed to make the *necessary* distinction between the representative capacity and the individual capacity of the individual serving as the personal representative of the estate. As a result, the Circuit Court improperly concluded that Ms. Elliot could bring a claim against her UIM coverage *outside* of the Act in her *individual* capacity for emotional distress damages as the result of the death of her mother.

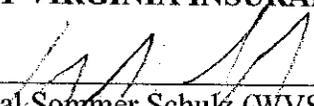
The Order of the Circuit Court opens the door for personal representatives to bring claims under the Act in their individual capacities where the Act itself stipulates they have no standing to do so. To permit this Order to stand would allow personal representatives to bring claims that are outside of the boundaries of the Act itself, i.e. claims that did not originally exist with the decedent and that are not representative of the decedent and his estate. This clearly is not what the Legislature intended in drafting and enacting the Act. Had this been what the Legislature intended, then there would not have been any reason to restrict wrongful death claims to those brought by the personal representative of the decedent and the estate, which, as discussed above, is precisely what the Legislature provided in W. Va. Code § 55-7-6.

As such, this Court should recognize that Ms. Elliot, as personal representative of her mother's estate, is entitled only to collect damages from an underinsured motorist in an action under the Act in her capacity as a representative of her mother's estate, and not in her individual capacity. Consequently, this Court should hold that Ms. Elliot does not have standing under the Act to pursue claims against her UIM insurer for damages resulting from the wrongful death of her mother as such claims may only be brought in her individual capacity, not in her representative capacity.

IV. CONCLUSION

For the foregoing reasons, the Federation urges the Court to reverse the Order entered by the Circuit Court of Tyler County and find that (1) UIM coverage extends only to an insured who sustains bodily injuries as the result of a motor vehicle accident in which the insured is involved, and (2) an individual may not bring a claim for emotional distress damages resulting from the wrongful death of a person outside of the Wrongful Death Act and in an individual capacity. To hold otherwise would erode insurers' ability to predict their risk of loss at the time they issue UIM policies to West Virginians. The resulting uncertainty will undermine insurers' ability to rely on their insurance contracts and the consistent application of West Virginia law, necessarily leading to increased insurance premiums for West Virginia's insurance consumers.

WEST VIRGINIA INSURANCE FEDERATION


Mychal Sommer Schulz (WVSB #6092)

Jill Cranston Bentz (WVSB #7421)

Ryan J. Aaron (WVSB #9951)

DINSMORE & SHOHL LLP

900 Lee Street, Suite 600

Charleston, WV 25301

Telephone No. 304.357.0900

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CERTIFICATE OF SERVICE

I, Mychal S. Schulz, do hereby certify that a true copy of the **AMICUS BRIEF OF WEST VIRGINIA INSURANCE FEDERATION IN SUPPORT OF APPELLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY** was served upon the following named counsel of record by mailing same, via U.S. Mail, postage prepaid, on the 12th day of March, 2007.

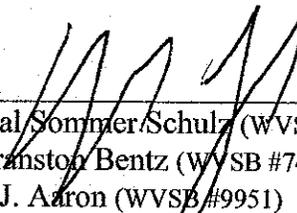
E. Kay Fuller, Esq. (WVSB #5594)
Christopher R. Moore, Esq. (WVSB #10255)
Martin & Seibert, L.C.
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405
Counsel for Appellant

Michael G. Gallaway, Esq. (WVSB 5071)
Spilman, Thomas & Battle, PLLC
1217 Chapline Street
P.O. Box 831
Wheeling, WV 26003
Co- Counsel for Appellant

and

Christine Machel, Esquire (WVSB 2288)
William E. Watson & Associates
800 Main Street
Post Office Box 111
Wellsburg, WV 26070
Counsel for Appellees

WEST VIRGINIA INSURANCE FEDERATION



Mychal Sommer Schulz (WVSB #6092)
Jill Cranston Bentz (WVSB #7421)
Ryan J. Aaron (WVSB #9951)
DINSMORE & SHOHL LLP
900 Lee Street, Suite 600
Charleston, WV 25301
Telephone No. 304.357.0900
Facsimile No. 304.357.0919