

No. 33285

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

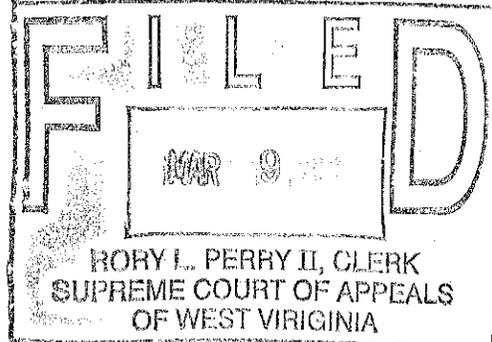
STACEY A. STRUM and
NICOLE A. ELLIOTT,
As Co-Administrators of the Estate of
Cheryl Ann Kettlewell, deceased,

Appellees / Plaintiffs Below

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellant / Defendant Below.



*Appeal from the Circuit Court of
Tyler County, West Virginia
Case No. 00-C-29K*

APPELLANT'S BRIEF

E. Kay Fuller
(WV State Bar No. 5594)
Christopher R. Moore
(WV State Bar No. 10255)
MARTIN & SEIBERT, L.C.
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209

Michael G. Gallaway
(WV State Bar No. 5071)
SPILMAN, THOMAS & BATTLE, PLLC
1217 Chapline Street
P.O. Box 831
Wheeling, WV 26003
(304) 230-6950

Co-Counsel For Appellant

TABLE OF CONTENTS

I. NATURE OF PROCEEDINGS AND RULINGS BELOW.....1

II. STATEMENT OF FACTS.....2

III. ASSIGNMENTS OF ERROR.....4

IV. STANDARD OF REVIEW.....5

V. POINTS & AUTHORITIES5

A. Ms. Elliott lacks standing to individually pursue a wrongful death claim.....5

B. Even assuming, *arguendo*, that Ms. Elliott could individually recover under the Wrongful Death Act, her policy would not provide coverage for the damages alleged.....10

VI. CONCLUSION.....18

TABLE OF AUTHORITIES

W.VA. CASES:

<i>Adkins v. Meador</i> , 201 W.Va. 148, 494 S.E.2d 915 (1997)	13
<i>Bowyer v. Hi-Lad, Inc.</i> , 216 W.Va. 634, 576 S.E.2d 807 (2002)	6
<i>Bradshaw v. Soulsby</i> , 210 W.Va. 682, 558 S.E.2d 681 (2001).....	7
<i>Cantrell v. Cantrell</i> , 213 W.Va. 372, 582 S.E.2d 819 (2003)	14-15
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W.Va. 138, 459 S.E.2d 415 (1995).....	5
<i>Chafin v. Norfolk & W. Ry. Co.</i> , 80 W.Va. 703, 93 S.E. 822 (1917).....	7
<i>Dairyland Ins. Co. v. Fox</i> , 209 W.Va. 598, 550 S.E.2d 388 (2001).....	5
<i>Davis v. Foley</i> , 193 W.Va. 595, 457 S.E.2d 532 (1995).....	7, 9, 10-11
<i>Findley v. State Farm Mut. Auto. Ins. Co.</i> , 213 W.Va. 80, 576 S.E.2d 807 (2002).....	6
<i>Hubbard v. State Farm Indem. Co.</i> 213 W.Va. 542, 584 S.E.2d 173 (2003).....	5
<i>Horace Mann Ins. Co. v. Adkins</i> , 215 W.Va. 297, 599 S.E.2d 720 (2004).....	9
<i>Jones v. George</i> , 533 F.Supp. 1293 (U.S. Dist. Ct, S.D. W.Va. 1982).....	8
<i>Karlet v. Federal Kemper Ins. Co.</i> , 189 W.Va. 79, 428 S.E.2d 60 (1993).....	10,11
<i>Morgan v. Leuck</i> , 137 W.Va. 546, 72 S.E.2d 825 (1952)	8
<i>Murray v. State Farm Fire & Cas. Co.</i> , 203 W.Va. 477, 509 S.E.2d 1 (1998)	5
<i>Payne v. Weston</i> , 195 W.Va. 502, 466 S.E.2d 161 (1995).....	5
<i>Pristavec v. Westfield Ins. Co.</i> , 184 W.Va. 331, 400 S.E.2d 575 (1990).....	13
<i>Richardson v. Kennedy</i> , 197 W.Va. 326, 475 S.E.2d 418 (1996).....	9
<i>Smith v. Animal Urgent Care, Inc.</i> 208 W.Va. 664, 542 S.E.2d 827 (2000).....	12
<i>West Virginia Fire & Cas. Co. v. Stanley</i> , 216 W.Va. 40, 602 S.E.2d 483 (2004).....	7

OTHER CASES:

Allstate Ins. Co. v. Hammonds, 865 P.2d 560 (Wash.App.1994)..... 14

Auto Club Ins. Assoc. v. DeLaGarza, 444 N.W.2d 803 (Mich. 1989)..... 17

Bartning v. State Farm Fire & Cas. Co., 793 P.2d 127 (Ariz.Ct.App. 1990)..... 14

Delancey v. State Farm Mut. Auto. Ins. Co., 918 F.2d 491 (5th Cir. 1990)..... 13

Eaquinta v. Allstate Ins. Co., 125 P.3d 901 (Utah 2005)..... 14, 17

Farmers Ins. Exch. v. Chacon, 939 P.2d 517 (Colo.Ct.App.1997)..... 14

Gillespie v. S. Farm Bureau Cas. Ins. Co., 343 So.2d 467 (Miss. 1977)..... 14

Gloe v. Iowa Mut. Ins. Co., 694 N.W. 2d 238 (SD 2005)..... 13, 14-15

Hedges v. Nationwide Mut. Ins. Co., 846 N.E. 2d 16 (2006)..... 16-17

Jacoby v. Brinckerhoff, 250 Conn. 86, 735 A.2d 347 (1999)..... 7

Johnson v. Am. Family Ins., 827 N.E.2d 403 (Ohio App. 6th Dist. 2005)..... 16

Jones v. Zagrodnik, 600 So.2d 1265 (Fla.Dist.Ct.App. 1992)..... 11

Ledman v. State Farm Mut. Auto. Ins. Co., 601 N.W.2d 312 (Wis. 1999)..... 14

Livingston v. Omaha Property & Cas. Co., 927 S.W.2d 444 (Mo.Ct.App. 1996)..... 14

London v. Farmers Ins. Co., 63 P.3d 552 (Okla.Civ.App. 2002)..... 13

Moore v. State Auto. Ins. Co., 723 N.2d 97 (Ohio 2000)..... 15-16

Pacific Indemnity Co. v. Linn, 766 F.2d 754 (3d Cir.1985)..... 5

Sexton v. State Farm Mut. Auto. Ins. Co., 69 Ohio St.2d 431 (1982)..... 16

Smith v. Royal Ins. Co., 186 Cal.App.3d 239 (1986)..... 14

Spurlock v. Prudential Ins.Co., 448 So.2d 218 (La.App:1984)..... 14

State Farm Mut. Auto. Ins. Co. v. George, 762 N.E.2d 1163 (Ill.App.3d 2002)..... 14

State Farm Mut. Auto. Ins Co. v. Wainscott, 439 F.Supp. 840 (1977)..... 8, 14

Temple v. Travelers Indem. Co., 2000 WL 33113814 (Del.Super. 2000)..... 14

Valiant Ins. Co. v. Webster, 567 So.2d 408 (Fla. 1990).....13

Wobio v. Farmers Ins. Exchange, 2003 WL 22342770 (Mich. App. 2003).....17

STATUTES AND RULES:

Ohio Rev. Code § 3937.18.....16

2000 Ohio Sen. 267 § 3.....16

South Dakota CL § 58-11-9.....14-15

W.Va. Code § 33-6-3(a).....13

W.Va. Code § 33-6-31(b).....1-2, 5, 9, 13

W.Va. Code § 55-7-5.....1, 6, 11

W.Va. Code § 55-7-6.....4, 7, 12

W.Va. R. Civ. Pro. 36.....2

W.Va. R. Civ. Pro. 54.....5

TREATISES:

74 Am.Jur.2d *Automobile Ins.* § 314.....14

Black's Law Dictionary 1413 (7th ed. 1999).....6

Couch on Insurance 3d §171:7.....14

Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr.
Litigation Handbook on West Virginia Rules of Civil Procedure § 12(b) (Supp.2004)6

COMES NOW the Appellant, State Farm Mutual Automobile Insurance Company, (hereinafter "State Farm"), by and through its co-counsel, Michael G. Gallaway and Spilman, Thomas and Battle, PLLC; E. Kay Fuller, Christopher R. Moore, and Martin and Seibert, L.C., presenting the Appellant's Brief, respectfully requesting that this Honorable Court reverse the decision of the Circuit Court of Tyler County.

I. NATURE OF PROCEEDINGS AND RULINGS BELOW

This Appeal follows the April 19, 2006, Order of the Circuit Court of Tyler County granting Appellees' Motion for Summary Judgment regarding underinsured motorist coverage and denying State Farm's Motion for Summary Judgment regarding the same. This Court granted Appellant's Petition for Appeal via its January 10, 2007 Order.

Appellee Nicole A. Elliott, as well as Stacey A. Strum, acting as co-administratrices of the Estate of Cheryl Ann Kettlewell, brought a civil action seeking a declaration that their personal auto insurance policies provided underinsured motorist (UIM) coverage for emotional distress damages each suffered as a result of the death of their mother.¹ Appellees' theory of recovery is that they are individually entitled to collect emotional distress damages under the Wrongful Death Act, W.Va. Code § 55-7-5, and as such can expand recovery to their own underinsured motorist policies which have no nexus to the underlying collision. The Circuit Court held that Ms. Strum and Ms. Elliott "would be legally entitled to collect damages for the loss of their mother" and that the intent of the underinsured motorist statute, W.Va. Code § 33-6-31(b), is "to allow an insured to collect all damages to which he is legally entitled from the operator of an underinsured motor vehicle" so that no limitation of UIM coverage to "bodily injury-type

¹ Ms. Elliott is personally insured by State Farm. Ms. Strum is personally insured by Allstate. Both sought the same declaration of coverage under their respective auto insurance policies.

damages" would be permissible. See Circuit Court's Order attached hereto as **Exhibit "A."** This appeal concerns the invalidity of the Court's rulings relative to the State Farm policy issued to Ms. Elliott.

II. STATEMENT OF FACTS

The relevant facts are not in dispute and are taken from the Circuit Court's April 19, 2006, Order, State Farm's Requests for Admissions, which, having been served on Appellees and not responded to, are deemed admitted pursuant to Rule 36 of the West Virginia Rules of Civil Procedure, and Appellees' deposition testimony.

This case arose from a single vehicle accident on November 25, 1999, in which Cheryl Kettlewell died. Ms. Kettlewell was a passenger in a vehicle driven by Traci Marie Swanson, who was intoxicated, lost control of the vehicle, and crashed into a wall. (Exhibit A, Finding of Fact 1). The vehicle driven by Ms. Swanson provided liability policy limits of \$20,000.00, which were paid to the Estate. (Exhibit A, Finding of Fact 3). The vehicle involved in the accident was not insured under either Ms. Elliott's or Ms. Strum's insurance policies. (Exhibit A, Conclusion of Law 6). Ms. Kettlewell's automobile insurance policy did not include underinsured motorist coverage. (Deposition of Stacey A. Strum, p. 20).

Stacey Strum and Nicole Elliott are the two adult daughters of Ms. Kettlewell. Ms. Kettlewell did not reside with Ms. Elliott at the time of the accident. (Request for Admission 1). Ms. Kettlewell was a resident of, and lived in, her own household at the time of the accident. (Requests for Admission, 3-4). Ms. Kettlewell and her minor daughter, Melinda Kettlewell, were the only residents of Ms. Kettlewell's household at the time of the accident. (Deposition of Stacey A. Strum, p. 11). Ms. Elliott had a

separate insurance policy issued by State Farm insuring her own vehicle with \$100,000.00 of underinsured motorist coverage. Ms. Kettlewell was not a named insured under that policy. Ms. Elliott's State Farm policy² provides that:

[State Farm] will pay compensatory damages for *bodily injury* and *property damage* an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* or *property damage* must be caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle*.

Ms. Kettlewell indisputably suffered bodily injury. However, she is not an "insured" under Ms. Elliott's policy with State Farm. "Insured" for purposes of UIM coverage is defined as:

Insured- means the *person* or *persons* covered by uninsured motor vehicle or underinsured motor vehicle coverage.

This is:

1. you;
2. your spouse;
3. any relative; and
4. any other person while occupying with the consent of you or your spouse:
 - a. your car
 - b. a temporary substitute car
 - c. a newly acquired car if registered in West Virginia; or
 - d. a trailer attached to such a car.
5. any ***person*** entitled to recover damages because of ***bodily injury*** to an ***insured*** under 1 through 4 above.

The policy defines "relative" as "a person related to you or your spouse by blood, marriage or adoption who resides primarily with you. It includes your unmarried and

² A factual dispute, which was stipulated for purposes of the declaratory judgment action, exists as to whether one of Ms. Elliot's policies with State Farm was in effect at the time of the accident.

unemancipated child away at school.” Because Ms. Kettlewell did not live with Ms. Elliott, Ms. Kettlewell does not qualify as a “relative” or as an “insured.” Furthermore, Ms. Kettlewell was not occupying any vehicle insured under the Elliott policy. Moreover, while Ms. Elliott is an insured, she did not sustain bodily injury arising from the operation, maintenance or use of an underinsured motor vehicle. Ms. Elliott was not physically injured in any manner in the accident. (Deposition of Nicole A. Elliott, p. 11). Therefore, she has no bodily injury or property damage claim to assert.

Ms. Strum and Ms. Elliott qualified as co-administratrices of the Estate of Cheryl Kettlewell and instituted a wrongful death action pursuant to W.Va. Code § 55-7-6, asserting that UIM coverage on their own policies should be applied. Interpreting the Wrongful Death Act and the UIM statute, the Circuit Court ruled in favor of Appellees, finding coverage on the grounds, *inter alia*, that the UIM statute does not limit damages to “bodily-injury-type damages.” (Exhibit A., p. 3). Thus, the Court concluded Ms. Elliott could collect individually under her UIM policy for emotional distress.

III. ASSIGNMENTS OF ERROR

1. The Circuit Court of Tyler County erred in holding that Ms. Elliott is entitled to collect emotional distress damages in a wrongful death claim in her individual capacity since actions under the Wrongful Death Act can only be pursued by a personal representative. As such, Ms. Elliott does not have standing in her individual capacity to pursue claims under the Wrongful Death Act.

2. The Circuit Court of Tyler County erred in ruling that Ms. Elliott could collect damages under her individual UIM policy by finding that State Farm’s policy was contrary to W.Va. Code § 33-6-31(b). The Court’s reading of the policy and the statute was flawed.

IV. STANDARD OF REVIEW

"The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." *Dairyland Ins. Co. v. Fox*, 209 W.Va. 598, 601, 550 S.E.2d 388, 391 (2001), quoting *Payne v. Weston*, 195 W.Va. 502, 506-7, 466 S.E.2d 161, 165-66 (1995). "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." *Id.*, quoting *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 483, 509 S.E.2d 1, 7 (1998), quoting *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 760 (3d Cir.1985). "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a *de novo* standard of review." *Id.*, quoting *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).³

V. POINTS AND AUTHORITIES

A. Ms. Elliott lacks standing to individually pursue a wrongful death claim.

Ms. Elliott's claim against State Farm is based upon her contention that she is individually entitled to recover damages for a non-resident relative's death under the

³ It is anticipated that the Appellee will assert that this appeal is premature because the Circuit Court of Tyler County has not certified the Order with respect to coverage under Rule 54(b) of the West Virginia Rules of Civil Procedure. The Order, however, may nevertheless be considered "final" in that it approximates a final Order in its nature and effect. As this Court explained in *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 584 S.E.2d 176 (2003), the key to determining if an Order is final is not whether the language from Rule 54(b) is included, but whether the Order approximates a final Order in its nature and effect. That is, the judgment must completely dispose of at least one substantive claim. Similarly in this matter, the Circuit Court's April 19, 2006 Order should be treated as a final Order with respect to the coverage issue which is final in its nature and effect and is, therefore, ripe for appellate review.

Wrongful Death Act. However, the Wrongful Death Act only permits the personal representative of the decedent's estate to recover. W.Va. Code § 55-7-5. Ms. Elliott is acting as a personal representative of Ms. Kettlewell's Estate, not in her individual capacity. Because Ms. Elliott's UIM policy with State Farm covers her individually, she is not entitled to pursue her own insurance company for another's wrongful death.

It is black letter law that a party must possess standing to assert a lawsuit. This Court has repeatedly held that "standing is defined as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). Although Appellee asserts that State Farm waived the standing issue, "[s]tanding is a jurisdictional requirement that cannot be waived, and may be brought up at any time in a proceeding." *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 655, 609 S.E.2d 895, 916 (2004), quoting Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b), at 21 (Supp.2004).⁴ Because Ms. Elliott does not have standing to individually pursue a wrongful death claim, her State Farm policy which is limited to damages sustained personally by Ms. Elliott is inapplicable here.

The Wrongful Death Act clearly states that actions are to be brought by, and recoveries received by, the personal representative of the decedent. W.Va. Code § 55-7-6(a).

⁴ Appellee argued in response to State Farm's Petition for Appeal that the standing issue was waived. Lack of standing was alleged in State Farm's Answer (See separate Answer of State Farm, Third and Eighth Defenses).

Under common law, a cause of action for injury to the person is extinguished upon the death of the injured individual. *Chafin v. Norfolk & W. Ry. Co.*, 80 W.Va. 703, 93 S.E. 822 (1917). The purpose of the Wrongful Death Act, which was intended to avoid the harsh result of the common law, is "to compensate the beneficiaries for the loss they have suffered as a result of the decedent's death." *Bradshaw v. Soulsby*, 210 W.Va. 682, 687, 558 S.E.2d 681, 686 (2001). As such, wrongful death claims are derivative of the injury to the deceased. *Davis v. Foley*, 193 W.Va. 595, 599, 457 S.E.2d 532, 536 (1995). "It is inherent in the nature of a derivative claim that the scope of the claim is defined by the injury done to the principal." *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 54, 602 S.E.2d 483, 497 (2004), quoting *Jacoby v. Brinckerhoff*, 250 Conn. 86, 93, 735 A.2d 347, 351 (1999). The derivative nature of a wrongful death claim is demonstrated in § 55-7-6(b),⁵ which governs distribution of damages awarded in wrongful death actions. That section instructs the jury or court to apportion damages awarded among listed beneficiaries or, if no such beneficiaries exist, per the terms of the decedent's will or the laws of intestate succession. By so directing, the Legislature has made clear that the proceeds of a wrongful death suit are not individually recoverable. Instead, one single action, brought by the personal representative, is required, the proceeds of which are then divided among the decedent's beneficiaries.

⁵ W.Va. Code § 55-7-6(b) states: In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of descent and distribution as set forth in chapter forty-two of this code. If the jury renders only a general verdict on damages and does not provide for the distribution thereof, the court shall distribute the damages in accordance with the provisions of this subsection.

A plaintiff, even if she is in fact the decedent's personal representative, who brings a wrongful death claim in her individual capacity is subject to dismissal as an individual. *Jones v. George*, 533 F.Supp. 1293 (S.D. W.Va. 1982). Ms. Elliott entered into her insurance policy with State Farm in her individual capacity, not as personal representative to Ms. Kettlewell. She is personally insured against damages she suffers as an individual. She is not insured for her acts as personal representative for a decedent. In an analogous case involving a parent's attempt to recover UM benefits under the parent's policy for the death of a child, the U.S. District Court for Alaska ruled that coverage was not available because the parent was not "insured in the capacity as personal representative or potential beneficiary under his uninsured motorist coverage." *State Farm Mut. Auto. Ins Co. v. Wainscott*, 439 F.Supp. 840, 844 (1977). That reasoning is equally applicable to the present case.

This Court has also recognized the legal distinction between bringing an action as a personal representative under the Wrongful Death Act and bringing suit as an individual. In *Morgan v. Leuck*, 137 W.Va. 546, 72 S.E.2d 825 (1952), the respondent, acting as personal representative for her deceased father, brought a wrongful death action against her husband, whose negligence had caused her father's death. The husband's defense was that, under the common law rule of unity of marriage, one spouse is prohibited from recovering damages in tort from the other. However, recognizing that the action was brought by the wife as personal representative and not individually, this Court held that the action was "not one brought by a wife against a husband and . . . not within the common law rule." *Id.*, 72 S.E. 2d at 826. This Court allowed the action to go forward because the unity of marriage defense was unavailable. Regardless of the modern validity of the common law rule, the distinction

between personal representative and individual capacity is clear. As this Court noted in *Davis v. Foley*, the personal representative requirement is not for mere convenience. *Id.*, 457 S.E.2d at 536.

In an attempt to refute her lack of standing, Appellee relies upon *Horace Mann Ins. Co. v. Adkins*, 215 W.Va. 297, 599 S.E.2d 720 (2004); such reliance is misplaced. That case did not present any issues regarding the parents' legal right to collect damages under their UIM policy as a result of the death of their minor son because there was no question the son qualified as an "insured" under the policy. As stated above, Ms. Kettlewell was not an "insured" under Ms. Elliott's UIM policy.

Furthermore, *Richardson v. Kennedy*, 197 W.Va. 326, 475 S.E.2d 418 (1996), upon which Appellee also relies, does not diminish the personal representative to a nominal party; "the personal representative is still the *real* party in interest as mandated by W. Va.Code § 55-7-6 (1992)." *Richardson*, 475 S.E.2d at 332 (emphasis added). Although any recovery passes through the personal representative to the beneficiaries, it is still the personal representative – and only the personal representative - who is legally entitled to bring the wrongful death claim. Thus, any attempt to expand the scope and sources of recovery beyond that permitted by the Legislature is inappropriate and any ruling to the contrary must be reversed.

Appellee seeks to impermissibly expand the scope of UIM coverage. W.Va. Code § 33-6-31(b) states in relevant part:

Provided further, That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured without setoff against the insured's policy or any other policy.

Key here is the Legislature's language that UIM recovery is available to pay the insured sums he shall legally be entitled to recover as damages. Ms. Elliott is not legally entitled to recover damages because she is not legally entitled to pursue a claim. The Estate of Cheryl Kettlewell is legally entitled to pursue a claim. The Estate of Cheryl Kettlewell, however, has no claim against State Farm.

B. Even assuming, *arguendo*, that Ms. Elliott could individually recover under the Wrongful Death Act, her policy would not provide coverage for the damages alleged.

Even if Ms. Elliott would be entitled to an individual recovery beyond the Wrongful Death Act, she cannot collect policy proceeds under her UIM policy with State Farm because neither the policy nor the UIM statute contemplate recovery for the wrongful death of a third party who is not an insured under the policy.

In *Davis v. Foley, supra*, this court analogized wrongful death and loss of consortium claims, both of which are derivative in nature. *Davis* involved a surviving spouse's claim that, because she and her children were all potential beneficiaries under the Wrongful Death Act, the "per occurrence" (rather than "per person") UIM coverage limits should apply. Relying upon *Karlet v. Federal Kemper Ins. Co.*, 189 W.Va. 79, 428 S.E.2d 60 (1993), in which this Court ruled that minor children's claims for loss of parental consortium were subject to per occurrence UIM limits due to the derivative nature of the claims, the *Davis* Court noted that "[t]he estate and the survivors suffered loss, not directly from the collision, but from the loss of the deceased who was killed in the accident. All their claims are derivative from the deceased' Essentially, the beneficiaries have not suffered bodily injury as defined by many insurance policies." 193

W.Va. at 599, quoting *Jones v. Zagrodnik*, 600 So.2d 1265, 1266 (Fla. Dist. Ct. App. 1992).

The *Davis* and *Karlet* Courts both reasoned that because claims for loss of consortium or wrongful death arise out of, and are derived from, the injuries to the individual who suffered bodily injury or death in an automobile accident, the per person coverage limits should be applied. By so holding, this Court acknowledged the derivative nature of the claims permitted under the Wrongful Death Act.

W.Va. Code § 55-7-5 creates liability for the wrongful death as "if death had not ensued."⁶ Although a personal representative may recover damages, recovery is still dependent upon the injury sustained by the decedent. Under the present facts, Appellee, acting as representative, may bring a wrongful death cause of action against the parties responsible for Ms. Kettlewell's death. However, such action is derivative and, therefore, Ms. Elliott cannot expand the scope of her claim and seek benefits under her personal UIM policy because she has not sustained any injury covered under the policy. Had she survived, Ms. Kettlewell could not have recovered UIM benefits under Ms. Elliott's policy. Thus, Ms. Elliott cannot recover UIM benefits under her own policy for derivative claims.

Moreover, applicable policy language would cover only bodily injury sustained by an insured which is not present herein.

⁶W.Va. Code §55-7-5 states in relevant part: "Whenever 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 . . ."

Ms. Elliott's policy as amended by Endorsement 6038GG states:

[State Farm] will pay compensatory damages for *bodily injury* and *property damage* an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* or *property damage* must be caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle*.

The controlling terms, for purposes of the case at bar, is that bodily injury be sustained by an insured. Ms. Elliott is an "insured" under her policy with State Farm. However, Ms. Elliott did not suffer "bodily injury . . . caused by accident arising out of the operation, maintenance or use of an underinsured motor vehicle." Her loss is encompassed within the wrongful death claim and does not trigger separate UIM coverage.⁷ In *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000), which involved a sexual harassment claim with no physical manifestations, this Court noted that purely emotional damages do not fall within the definition of "bodily injury." While Ms. Elliott may have suffered grief following the death of her mother, her auto insurance policy does not cover such claims.

⁷ W.Va. Code § 55-7-6(c)(1) states that the jury verdict in a wrongful death action

shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses.

Appellee contends that the UIM statute disallows the "exclusion," which would prevent an insured from recovering from his or her own UIM policy for wrongful death damages arising from the death of a third person unrelated to the policy.⁸

In making such argument, Appellee argues there is no restriction within W.Va. Code §33-6-31(b) to bodily injury damages. This argument is also incorrect in that W.Va. Code §33-6-31(b) references "such policy" which is earlier defined as a policy or contract of bodily injury liability insurance, or property damage liability insurance. W.Va. Code § 33-6-3(a) (emphasis added).

Appellee further argues and the Circuit Court concluded that *Pristavec v Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990), mandated UIM coverage. A close inspection of *Pristavec*, however, demonstrates otherwise. The statute and the case interpreting the statute both require bodily injury – as does Ms. Elliott's policy. The insured, Nicole Elliott, sustained no such bodily injury. Thus, she is again not entitled to UIM coverage from her individual auto policy. Moreover, UIM coverage is triggered only when injuries are causally connected to use of an insured vehicle. *Adkins v Meador*, 201 W.Va.148, 494 S.E.2d 915 (1997). The insured vehicle under the Elliott policy was not in any way connected to the underlying claim and again UIM coverage is inapplicable herein.

In examining the identical question under similarly-worded statutes, the vast majority of foreign jurisdictions⁹ have ruled that the statutes only "mandat[e] coverage if

⁸ The policy language at issue is not an exclusion, but rather is included in the insuring agreement of an amendatory endorsement to the policy.

⁹ See, e.g., *Valiant Ins. Co. v. Webster*, 567 So.2d 408 (Fla. 1990); *Gloe v. Iowa Mut. Ins. Co.*, 694 N.W.2d 238 (S.D. 2005); *London v. Farmers Ins. Co.*, 63 P.3d 552 (Okla.Civ.App. 2002); *Delancey v. State Farm Mut. Auto. Ins. Co.*, 918 F.2d 491 (5th Cir. 1990); *State Farm Mut. Auto.*

an insured person sustains bodily injuries." *Eaquina v. Allstate Ins. Co.*, 125 P.3d 901, 904 (Utah 2005). Only six jurisdictions have ruled that their statutes require UIM or UM coverage in situations where the injury is the wrongful death of a relative who is not an "insured" under the policy, and, of those six, "at least three of the respective legislatures have amended those statutes to disallow such coverage." *Id.* Indeed, the majority position is so heavily favored that American jurisprudence decisively states that "insured relatives of a decedent may not recover on their uninsured motorist policy for the wrongful death of the decedent . . . where the decedent herself was not insured under the policy." 74 Am.Jur.2d *Automobile Ins.* § 314. Commentators concur as well: "an insured cannot recover under the [UM] clause of an automobile policy for the wrongful death of a relative, since the surviving insured suffered no bodily injury or wrongful death." Couch on Insurance 3d §171:7.

In *Gloe v. Iowa Mut. Ins. Co.*, 694 N.W. 2d 238, 243 (SD 2005), a son ("Gloe") sought recovery against his own UIM policy for the wrongful deaths of his parents. The parents were not insureds under the policy and did not reside with Gloe. Gloe's argument was that, even though the policy did not provide coverage, the South Dakota UIM statute required coverage for "uncompensated damages as [the] insured may recover" as a result of "bodily injury or death" and did not specify that the bodily injury or death must be suffered by the insured. *Id.*, quoting South Dakota CL § 58-11-9. The

Ins. Co. v. Wainscott, 439 F.Supp. 840 (D.Alaska 1977); *Bartning v. State Farm Fire & Cas. Co.*, 793 P.2d 127 (Ariz.Ct.App. 1990); *Smith v. Royal Ins. Co.*, 186 Cal.App.3d 239 (1986); *Farmers Ins. Exch. v. Chacon*, 939 P.2d 517 (Colo.Ct.App.1997); *Temple v. Travelers Indem. Co.*, 2000 WL 33113814 (Del.Super. 2000); *State Farm Mut. Auto. Ins. Co. v. George*, 762 N.E.2d 1163 (Ill.App.3d 2002); *Spurlock v. Prudential Ins.Co.*, 448 So.2d 218 (La.App.1984); *Gillespie v. S. Farm Bureau Cas. Ins. Co.*, 343 So.2d 467 (Miss. 1977); *Livingston v. Omaha Property & Cas. Co.*, 927 S.W.2d 444 (Mo.Ct.App. 1996); *Allstate Ins. Co. v. Hammonds*, 865 P.2d 560 (Wash.App.1994); *Ledman v. State Farm Mut. Auto. Ins. Co.*, 601 N.W.2d 312 (Wis. 1999).

South Dakota Supreme Court, however, recognizing that the intent of a statute is best construed by viewing the statute as a whole, viewed language found in another section of the statute indicating that "coverage is intended for the protection of the insured," as more accurately reflecting the intent of the statute and disallowed coverage. *Id.* at 244.

Similarly, Appellees argue and the Circuit Court concluded that West Virginia's UIM statute does not limit damages to "bodily injury-type damages" as in Ms. Elliott's State Farm policy, but instead the statutory intent is "to allow recovery of all damages." (Order, Conclusion No. 9, Appellees' Motion for Partial Summary Judgment, p. 7). However, this Court has consistently stated "the purpose of optional UIM coverage is to enable the insured to protect himself [or herself], if he [or she] chooses to do so, against losses occasioned by the negligence of other drivers who are underinsured." *Cantrell v. Cantrell*, 213 W.Va. 372, 376, 582 S.E.2d 819, 823 (2003). In other words, the coverage is intended "for the protection of *persons insured* under the policy." *Gloe, supra* at 243. (emphasis in original). Ms. Kettlewell, for whom the Estate is seeking damages, is not insured under the Elliott policy.

Appellees' Motion for Summary Judgment relies upon foreign case law to support their theory of recovery. However, the cases cited represent a small minority of jurisdictions that have examined the question. Furthermore, the Ohio and Michigan cases relied upon are either no longer controlling in their own jurisdictions or severely restricted.

Appellees point to *Moore v. State Auto. Ins. Co.*, 723 N.E.2d 97 (Ohio 2000), to show that the Ohio Supreme Court determined that the intent of the Ohio statute was to provide coverage for all damages an insured is legally entitled to recover from an uninsured motorist, and, therefore, policy language limiting recovery to bodily injuries or

death suffered by an insured is void. The Ohio statute then in effect granted coverage for individuals "legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy."¹⁰

Simply put, *Moore* is not good law. Appellees ask a West Virginia court to accept an Ohio case as persuasive even though Ohio has soundly rejected that case. The Ohio General Assembly was so opposed to the Ohio Supreme Court's ruling in *Moore* it amended the UM/UIM statute the same year *Moore* was decided to state that UM or UIM coverage, if provided, protects against "bodily injury, sickness, or disease, including death *suffered by any insured*," Ohio Rev. Code § 3937.18 (emphasis added). The legislature noted in its uncodified comment to § 3937.18 that:

It is the intent of the General Assembly in amending division (A) of section 3937.18 of the Revised Code to supersede the holdings of the Ohio Supreme Court in *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, and *Moore v. State Auto. Ins. Co.* (2000), 88 Ohio St.3d 27, that division (A)(1) of section 3937.18 of the Revised Code does not permit an insurer to limit uninsured or underinsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, death or disease for any other insured to recover from the insurer.

2000 Ohio Sen. 267, § 3, eff. 9-21-2000, quoted in *Johnson v. Am. Family Ins.*, 827 N.E.2d 403, 406 (Ohio App. 6th Dist. 2005). This legislative rebuke of the *Moore* decision shows the inaccurate characterization Appellees seek herein. Moreover, subsequent to the legislative amendment of the statute to clarify that underinsured motorist coverage is not applicable in situations such as Appellees seek herein, the Supreme Court of Ohio again considered the question in *Hedges v Nationwide Mut. Ins.*

¹⁰ *Moore* dealt with uninsured motorist coverage, though the subsequent amendment altered requirements for both UM and UIM coverage.

Co., 109 Ohio St. 3d 70, 846 N.E.2d 16 (2006). In *Hedges*, the Ohio Supreme Court again reiterated the strength of the legislative change to permit an insurer to limit uninsured and underinsured motorist coverage to require bodily injury to an insured. Therefore, any attempt to rely upon superseded law in another jurisdiction is without merit and should not influence a decision in West Virginia under clear and unambiguous policy language that bars the coverage Appellees seek.

Appellees also rely on *Auto Club Ins. Assoc. v. DeLaGarza*, 444 N.W.2d 803 (Mich. 1989). *DeLaGarza* is also inapplicable to the facts at bar. While the Michigan Supreme Court allowed the Respondent in *DeLaGarza* to recover against her own UM policy for the wrongful death of her husband, who was not an insured under the policy, the policy at issue in *DeLaGarza* differs significantly from the State Farm policy. The *DeLaGarza* policy did not explicitly limit recovery for bodily injury to those injuries sustained by insured persons; Ms. Elliott's policy does. It states: "the bodily injury must be sustained by an insured." Endorsement 6038GG.

The Michigan Court of Appeals noted the importance of this policy language in *Wobio v. Farmers Ins. Exchange*, 2003 WL 22342770, 1 (2003), where the Court refused to apply *DeLaGarza* when the policy at issue contained such language restricting coverage to injuries sustained by the insured. The *Wobio* Court found that a grandfather could not recover against his own UM policy for his grandson's death because "[a]pplying the meaning of the word 'sustained' in its plain and ordinary sense, the only person that sustained the death of Respondent's grandson was Respondent's grandson, so Respondent's argument fails." *Wobio*, at 1.

As also noted by the Supreme Court of Utah in *Eaquinta*, public policy concerns also militate in favor of the majority interpretation. *Id.* at 905. The alternative, minority

approach "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." *Id.* This result would be inequitable in that it 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." *Id.* Furthermore, insurers would be required to provide UIM coverage to any insured wrongful death beneficiary "simply because that 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." *Id.* Thus, pursuant to the UIM statute and clear and unambiguous policy language, Ms. Elliott is not entitled to UIM coverage for the death of another.

VI. CONCLUSION

Ms. Elliott is not legally entitled to collect damages in her individual capacity for the death of Ms. Kettlewell. Under the Wrongful Death Act, Ms. Elliott's pursuit of wrongful death damages is limited to her capacity as Ms. Kettlewell's personal representative. Ms. Elliott is insured by State Farm in her individual capacity, therefore, Ms. Elliott does not have standing to assert a claim against State Farm in any action she brings as Ms. Kettlewell's personal representative.

Notwithstanding that Ms. Elliott is not entitled to individually collect damages as a result of another's wrongful death, any damages she can recover are derivative in nature and outside the scope of her UIM coverage. Ms. Elliott's UIM policy provides coverage for bodily injury sustained by an insured. Ms. Elliott suffered no bodily injury. The overwhelming majority of jurisdictions that have considered this question have determined that UIM statutes do not require insurers to provide coverage for the

wrongful deaths of persons not insured under the relevant policy and West Virginia should join this majority.

Additionally, adopting Appellees' interpretation would be contrary to general public policy concerns in that it would require UM/UIM insurers to insure against the wrongful death of any person from whom an insured might inherit. To accept the Appellees' position is to contort UIM policies into personal bereavement policies. The Legislature specifically set forth in the UIM statute the purpose of the coverage. The State Farm policy language makes that intent even clearer. UIM coverage is designed to compensate an insured for bodily injuries caused by an underinsured motorist. It is not designed to compensate an individual for someone else's damages. It is also not designed to compensate an insured for emotional distress damages for an incident wholly unrelated to the operation, use or maintenance of an insured vehicle. While UIM coverage is somewhat remedial in nature, it is not without its limits. It should not be triggered absent a nexus with the insured or an insured vehicle. That, however, is what the Appellees attempt to do. Appellees attempt to expand UIM coverage to essentially cover any loss an insured may suffer - regardless of how attenuated - without regard to whether the individual seeking recovery is an insured or whether the event is in any way related to the vehicle insured under the policy. This is contrary to public policy in and of itself and should not be permitted by this Court. To accept the Appellees' position would also require this Court to legislate and to effectively re-write the UIM statute to expand its provisions. That too is inappropriate.

Therefore, for the foregoing reasons, the Appellant, State Farm Mutual Automobile Insurance Company, respectfully requests that this Court reverse the ruling of the Circuit Court of Tyler County.

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY
BY COUNSEL**

SPILMAN, THOMAS & BATTLE, PLLC

MARTIN & SEIBERT, L.C.

BY:

E. Kay Fuller

for Michael G. Gallaway
(WV State Bar No. 5071)
1217 Chapline Street
P.O. Box 831
Wheeling, WV 26003
(304) 230-6950

BY:

E. Kay Fuller

E. Kay Fuller
(WV State Bar No. 5594)
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209

CERTIFICATE OF SERVICE

This is to certify that I, E. Kay Fuller, Co-Counsel for the Appellant, served the foregoing **Appellant's Brief** upon the following individual by United States Mail, first class, postage prepaid on this the 8th day of March, 2007:

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

E. Kay Fuller

E. Kay Fuller

7150
IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA

2006 APR 25 AM 10:47

STACEY A. STRUM and
NICOLE A. ELLIOTT,
As Co-Administratrix of the Estate of
CHERYL ANN KETTLEWELL, deceased,

CIRCUIT COURT
TYLER COUNTY, WV

Plaintiffs,

v.

Civil Action No. 00-C-29K

TRACI MARIE SWANSON;
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a foreign corporation;
ALLSTATE INDEMNITY COMPANY, and
DEBBIE DALRYMPLE and STEPHEN KELLEY,
doing business as The Lounge, a liquor tavern in
Friendly, Tyler County, West Virginia

Defendants.

ORDER

This matter is before the Court pursuant to Plaintiff's Motion for Summary Judgment regarding the issue of underinsurance coverage to the Plaintiffs for the damages they suffered from the death of their mother. After careful and mature consideration, after a review of the relevant case law and statutes, the Court makes the following Findings of Fact, Conclusions of Law, and Orders.

FINDINGS OF FACT

1. Cheryl Kettlewell, the deceased, was a passenger in a vehicle driven by Traci Marie Swanson, the Defendant. Ms. Swanson was intoxicated and lost control of her vehicle crashing into a wall causing the death of Mrs. Kettlewell on November 25, 1999.
2. Mrs. Kettlewell was survived by her 15 year old daughter, Melinda Kettlewell and her other two daughters, Stacey A. Strum and Nicole A. Elliott, Plaintiffs.

EXHIBIT

3. The Swanson vehicle, in which Mrs. Kettlewell was a passenger at the time she died, provided only \$20,000.00 of liability insurance, which has been paid.
4. Mrs. Kettlewell's two daughters, Plaintiffs, had separate policies on their respective vehicles, which provided \$100,000.00 of underinsurance coverage.

CONCLUSIONS OF LAW

1. 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); Williams v. Precision Coil, Inc., 194 W.Va. 52, 58-59, 459 S.E.2d 329, 335-336 (1995), citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986).
2. If a party moves for summary judgment and presents "affirmative evidence that there is no genuine issue of a 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.
3. Summary judgment "shall be entered against" an adverse party, W. Va. R. Civ. P. 56(e), who cannot point to "specific facts demonstrating that, indeed, there is a trialworthy issue." Williams, 194 W.Va. 52, 60, 459 S.E.2d 329, 337.
4. Under West Virginia Code § 55-7-6, the Wrongful Death statute, the Plaintiffs, as heirs of Cheryl Kettlewell, would be legally entitled to collect damages for the loss of their mother.

5. Plaintiffs, Stacey A. Strum and Nicole A. Elliott, were "insureds" under their own policies with State Farm and Allstate.
6. The motor vehicle involved in the accident, which killed Cheryl Kettlewell, i.e., the Swanson vehicle, was not a vehicle insured under the Strum or Elliot policies, which would make the exclusion in the State Farm and Allstate policies applicable to defeat coverage.
7. Both Plaintiffs suffered uncompensated damages and losses as a result of the acts of an underinsured driver, i.e., Mrs. Swanson, who had only \$20,000.00 of liability coverage.
8. The West Virginia Underinsurance Statute, found at § 33-6-31(b), states:

No policy or contract of bodily injury liability insurance... shall be issued or delivered in the state... unless it shall contain an endorsement or provision that such policy or contract shall provide an option to the insured with appropriately adjusted premiums injury liability to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount no less than limits of bodily liability insurance purchased by the insured without setoff against the insured's policy or any other policy....

9. The intent of the Underinsurance 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 statute does not limit those damages merely to "bodily injury-type damages" that an insured has sustained and any requirement in a policy that does so is contrary.
10. Underinsured motorist coverage is activated when the amount of the tortfeasor's policy is less than the total amount of the damages sustained by the injured person regardless of the comparison between the liability and underinsured limits. Pristavec v. Westfield Insurance Co., 400 S.E.2d 575 (W. Va. 1990).

11. The interpretation of the policy by State Farm and Allstate, which would deny coverage, would not only be contrary to the insurance policy language but contrary to the purpose and remedial nature of the underinsurance statute.

Upon reviewing the matters in controversy, the Court finds no disputed material issues of fact. Accordingly, it is ORDERED, ADJUDGED and DECREED that the Motion of Plaintiff for Summary Judgment regarding underinsurance coverage is GRANTED. Further, it is ORDERED that Defendants' request for Summary Judgment regarding the issue of underinsurance coverage is DENIED.

Plaintiffs' objections and exceptions are noted and saved.

The Clerk is directed to send certified copies of this Order to all counsel of record.

Dated this 19th day of April, 2006.



JUDGE MARK A. KARL

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST: Kay L Keller, Clerk

Circuit Court of Tyler County, West Virginia

BY: Linda Stephenson, Deput