

No. 33285

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
at Charleston**

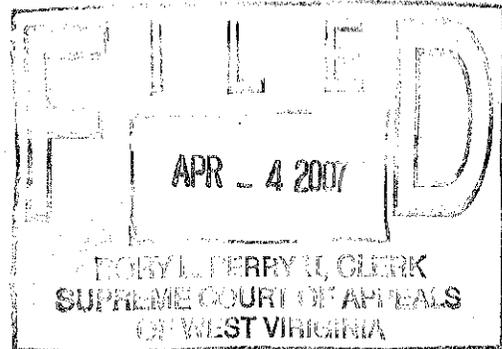
STACEY A. STRUM and
NICOLE A. ELLIOT,
As Co-Administrators of the Estate of
Cheryl Ann Kettlewell, deceased,

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**

APPELLEES' BRIEF

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The Appellees, Stacey A. Strum and Nicole A. Elliot, through their counsel, Christine Machel and William Watson, submit their Brief and request that this Honorable Court affirm 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 and finding that there was coverage under the Appellees' Underinsurance Motorist policies for the wrongful-death damages suffered by the Appellees on account of the death of their mother.

Appellees are the Administrators of their mother's Estate. Their mother, Cheryl Kettlewell, died in November 1999 while a passenger in a vehicle driven by a drunk driver. The Appellees, as Co-Administrators, are the only persons permitted to file an action to recover damages. Each Appellee had a policy of underinsurance coverage. The Appellee, Stacey Strum, had a policy with Allstate Insurance Company. Allstate settled the claim and paid the policy. The Appellee, Nicole Elliott, had a policy of insurance which included underinsurance with the Appellant State Farm. She asserted a claim under her policy based on the language of the Underinsurance Motorist statute, West Virginia Code 33-6-31(b), which permits an insured to collect *all* damages to which she is legally entitled from the operator of an underinsured motor vehicle. The Appellant's policy limits recovery to "bodily injury-type damages". The statute permits recovery for all damages. In this action, the Appellees seek to have the Appellant's policy conform to the language of the statute.

II. STATEMENT OF THE FACTS

Appellees' mother, Cheryl Kettlewell, died on November 25, 1999 from injuries sustained while a passenger in a vehicle driven by Defendant Swanson. Ms. Swanson was intoxicated; she was prosecuted and convicted of manslaughter and her liability carrier paid the \$20,000 coverage under her policy.

The decedent, Ms. Kettlewell, had three daughters. Her two adult daughters, the Appellees, were appointed as Co-Administrators of her estate. Her third daughter was a minor at the time and resided with her. Each of the two Appellees had an insurance policy which included underinsurance. The Appellees as Co-Administrators sued Ms. Swanson and the two insurers seeking a determination that their individual policies provided coverage for their losses. An action for wrongful death must be brought by the personal representatives of the estate under W. Va. Code §55-7-6. The Appellees' losses included funeral expenses, loss of income of decedent, sorrow, solace and mental anguish. The Appellant's Brief repeatedly refers to these losses as "emotional distress" to minimize the severity of such losses.

It is not disputed that the Appellees were insured under their own policies which they had purchased and which included underinsurance motorist coverage of \$100,000. It is not disputed that the vehicle in which the decedent was killed was an underinsured motor vehicle. The decedent was not an insured under the policies; Appellees never maintained that she was an insured. The decedent did not live with her two adult daughters. Coverage for Appellees under their own policy for their losses is not dependent on the status of the decedent.

The applicable section of Appellant's State Farm policy states it "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 policy further provides that the "bodily injury must be sustained by an insured" and must be caused by an accident arising out of the operation, maintenance or use of an underinsured motor vehicle.

The essence of this dispute is whether the State Farm policy can limit recovery to an insured (and Nicole Elliott was an insured) to bodily injury if the underinsurance statute provides greater coverage. The issue is *not* whether the decedent was covered under the Appellees' policy. The Appellant's Brief confuses this issue by suggesting that the Appellees are seeking a determination that the decedent was covered under their Appellees policy. That is *not* the issue. The Appellees are seeking coverage under their *own* policies for the injuries *they* sustained as a result of an underinsured driver. The driver that killed Appellees' mother was unquestionably an underinsured driver. The only question is whether the insurer can limit recovery to its insured to bodily injury only instead of "all" losses that the statute provides.

West Virginia Code 33-6-31(b) in pertinent part states what underinsurance coverage must provide:

...Provided further, that such a policy or contract shall provide an option to the insured with the appropriate adjusted premiums to pay the insurer *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 set off against the insured's policy or any other policy.

The statute does not limit the recovery by an insured to bodily injuries but specifically states "all sums which he shall legally be entitled to recover as damages from the owner or operator of an underinsured or uninsured motor vehicle..."

The Circuit Court concluded that the plain meaning of the statute entitled the Appellees to coverage under their own policies for the losses they sustained as a result of their mother's death. The Circuit Court did not consider the issue of standing because it was never raised by the Appellant below.

III. ASSIGNMENTS OF ERROR

The Circuit Court of Tyler County was correct to find that the Appellees' policy of underinsurance provided coverage under the underinsurance statute for the losses they suffered when their mother was killed by an underinsured motorist despite the limited language in the policy.

IV. STANDARD OF REVIEW

The Appellees agree that the interpretation of an insurance contract, including the question of whether it is ambiguous, is a question of law that shall be reviewed de novo on appeal. Riffe v. Home Finders Associations, Inc. 205 W.Va. 216, 517 S.E. 2d 313 (1990).

Appellees disagree that the Circuit Court's Order is a Final Order under Rule 54(b) of the West Virginia Rules of Civil Procedure. When a Final Order dismissing *fewer* than all the parties or *fewer* than all the claims in the civil action, this Court may elect to defer consideration until an appeal was taken from the Order terminating the entire action or the time for the appeal of the terminating Order expires. Riffe v. Armstrong, 477 S.E.2d 535, 547 (W.Va. 1996). The granting of this appeal is discretionary with the Court.

V. POINTS AND AUTHORITIES

A. Ms. Elliot, as Co-administrator of her mother's estate, is not only the proper party but the only party who could bring a claim for underinsurance under her own policy.

On appeal, the Appellant raises for the first time the issue of whether the Appellee, Nicole Elliot, who is a Co-Administrator of her mother's Estate, has standing to bring a suit for wrongful death damages under her own policy. The Appellant did not raise this issue with the Trial Court. Standing is a party's right to make a legal claim and seek judicial enforcement of a duty or right Findley v. State Farm Mutual Automobile Insurance Company, 213 W.Va. 80, 576 SE 2d 807 (2002). Nicole Elliott could not have filed this suit as an individual for wrongful death damages. The law requires that such a claim be brought by the personal representative of the decedent's estate under West Virginia Code 55-7-6. The Administrator of an estate is merely a nominal party and any recovery passes *directly* to the beneficiaries designated in the wrongful death statute and not the decedent's estate. Richardson v. Kennedy, 475 S.E. 2d 418 (W.Va. 1996). Therefore, Ms. Elliott has standing and properly filed the case as a Co-Administrator in order to seek the coverage provided by her own policy.

The Appellant argues that an individual who has coverage for losses under their underinsurance policy cannot recover if they are both the individual entitled to the proceeds and the personal representative of the decedent's estate as well. West Virginia law does not support such a result. The only cases cited by the Appellant actually support Appellees' position. In Jones v. George, 533 F.Supp. 1293 (S.D. W.Va. 1982), a Plaintiff, who was the widow of a decedent and who had filed actions against State officials for false imprisonment and wrongful death, filed an action both in her individual capacity and as Administratrix seeking to recover damages. She was

dismissed in her individual capacity and allowed to proceed as the Administratrix even though she was to be the beneficiary of the proceeds. In Morgan v. Leuck, 72 S.E 2d 825 (W.Va. 1952), the Court held that the wife who would be the sole beneficiary of a wrongful death lawsuit must bring the action as the personal representative of his estate. In Savilla v. Speedway Superamerica LLC, 639 S.E 2d 850 (W.Va. 2006), this Court reiterated that *every* claim for wrongful death must be brought by the personal representative.

The Appellant's Brief confuses the issue by arguing that the Appellee Nicole Elliott is not insured under her own policy for her "acts as a personal representative of the decedent." Nicole Elliott is *not* seeking coverage for her "acts as personal representative"; she is seeking the proceeds as an insured under her own policy for losses caused by an underinsured driver. Anything she recovers is not because she is the personal representative but because she is a beneficiary under the statute. The personal representative can also be the real party in interest in a lawsuit. Nothing in the law precludes this.

In Horace Mann Insurance Co. v. Charles W. Adkins, 215 W.Va. 297 599 S.E. 2d 720 (2004) the parents of a deceased child who were Administrators of his estate were parties to a wrongful death suit for benefits under their *own* underinsurance policy. They were both nominal parties in their capacity as personal representatives as well as the real party in interest since they sought benefits under their own policy. While Horace Mann did not involve a coverage issue, procedurally the case shows that a person can be both the personal representative of the estate and the real party in interest when they seek coverage under their own policy. This is a common sense interpretation of the requirement of the wrongful death statute.

The Appellant's argument that this expands the scope of the law and sources of recovery is off base. If that were the case, an individual who was entitled to coverage for losses under their own underinsurance policy could not recover if they were also the administrator of a decedent's estate. The Appellant did not raise this issue at the trial court level because it was not a serious issue.

B. This Court does not have to extend the law to find coverage for Appellees' claim; it should apply the plain meaning of the underinsured statute so that the Appellees' policy conforms to the law.

In analyzing this case, the purpose of the underinsurance motorist statute must first be acknowledged. In *Horace Mann Ins. Co. v Adkins*, 215 W.Va. 297, 599 S.E. 2d 720 (2004) this Court noted that UIM coverage, unlike UM and liability coverage, is optional insurance that is not statutorily required. It is coverage that an insured may purchase to provide excess coverage to compensate an insured against losses for which there would otherwise be no coverage. *Id at 725*. As optional coverage, an insured's interest in collecting the UIM benefits must be scrupulously guarded to accomplish the purpose of the UIM coverage. In *Horace Mann*, even though an exclusion in the policy was unambiguous, this Court said the purpose of the UIM coverage and the attendant public policy consideration which underlie the creation of underinsurance should be given greater weight than the policy exclusion. In *Deel v. Sweeney*, 171 W.Va. 460, 383 S.E. 2d 92 (1989), the Court said that

Insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions *do not conflict* with the spirit and intent of the Uninsured and Underinsured Motorist Statutes.

There is a public policy to assure financial compensation to innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible underinsured drivers and who have purchased insurance for that very reason.

Against this backdrop, the language of the underinsurance statute must be considered. It states:

...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.

The statute does not require or specify that an insured *must* sustain bodily injury in order to recover their damages. It plainly states that an underinsurance policy *shall* 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. The Appellees' policy, however, requires that the insured sustain bodily injury in order to recover which is contrary to the statute. The statute allows for all sums, not just bodily injury damages, up to the limit of the coverage. Appellant's Brief characterizes the Appellees' losses as being derivative in nature and argues that this makes it an exception to the "all sums" provision of the statute although the statute does not make such a distinction or exception.

A majority of jurisdictions that have defined "legally entitled to recover" have held it to mean simply that the Plaintiff must be able to establish fault on the part of the uninsured or underinsured motorist which gives rise to damages and to prove the

extent of those damages. Wetherbee v. Economy Fire and Casualty Co., 508 N.W. 2d 657 (Iowa 1993).

The Appellant places great emphasis on two cases and they merit discussion. In Eaquinta v. Allstate Insurance Company, 125 P. 3d 901 (Utah 2005), the Utah Supreme Court held that underinsurance motorist coverage under the Utah statute did not entitle a named insured to benefits for the death of her adult child because the insured did not suffer bodily injuries from her adult child's death. Ms. Eaquina argued that although her policy limited her to recovery for bodily injury, the UIM statute preempted her policy. In analyzing the case, the Utah Supreme Court said her entitlement to benefits was a matter of statutory interpretation. The Utah UM/UIM Statute specifically provided that

“underinsured motorist coverage under this section applies to *bodily injury, sickness, disease or death of an insured* while occupying or using a motor vehicle owned by, furnished or available for the regular use of the insured, a residence spouse, or resident relative of the insured, only if the motor vehicle is described in the policy under which a claim is made, or if the motor vehicle is a newly required or replacement vehicle covered under the terms of the policy.”

The Utah Court reasoned that the Legislature did not intend to require insurance companies to provide UIM Coverage to an insured in situations where a third party, not covered by the insurance policy, was injured. The Utah statute is different from West Virginia's statute. The West Virginia statute does not state, as the Utah statute does, that UIM coverage applies only to *bodily injury, sickness, disease, or death of an insured*. The West Virginia Statute is worded differently and therefore the Utah result is not a fair comparison. The Utah Court expressed the concern that UIM benefits would be paid to insureds who did not pay premiums. However, as this Court stated

in Horace Mann, UIM coverage is optional and therefore a person cannot obtain benefits unless they make the decision to purchase the coverage and pay for it.

In Gloe v. Iowa Mutual Insurance Co., 694 N.W. 2d 238 (S.D. 2005) the South Dakota Supreme Court denied coverage to an insured under the insured's UIM policy for the death of the insured's parents based on its belief that the Legislature intended to mandate coverage only for the insured's bodily injuries or death caused by an underinsured motorist. Their analysis of the purpose of South Dakota's underinsurance statute is different from what this Court has said is the purpose of West Virginia's underinsurance statute. In State Auto Mutual Insurance Company v. Youler, 396 S.E. 2d 737 (W.Va. 1990), this Court said that it was obvious from the language of West Virginia Code 33-6-31 (b) that the Legislature articulated a public policy of full indemnification under the underinsurance motorist coverage in this State and that the insured person should be fully compensated for damages not compensated by a negligent tortfeasor. In Deel v. Sweeney, supra, this Court said it would be vigilant in holding insurer's feet to the fire in instances where exclusion or denials of coverage strike at the heart of the purpose of the underinsurance statute 383 S.E.2d at 95. This Court noted in Youler that there are public policy reasons not to limit underinsurance coverage unduly, unlike liability insurance contracts, which are private agreements not subject generally to the same rules. 396 S.E.2d at 746.

The damages suffered from the loss of the parent should not be limited to bodily injury damages. The non-bodily injuries are obviously far more grievous and permanent. The insurer should not be permitted to limit recovery to only one kind of damage when the statute does not and the person who bought the protection is seeking the indemnification they paid for. The Appellant argues that it would be

inequitable to allow coverage because it would impose an unfair risk on insurance companies to pay benefits without a premium. The Appellee paid a premium for her underinsurance coverage and so does everyone else who elects to purchase it.

The Appellant's Brief raises the concern that allowing coverage would mean that an insured could recover for the loss of any relative or decedent. Such a concern is not reasonable. The wrongful death statute West Virginia Code 55-7-6 is not wide open as the Appellant suggests. It limits the right to recover to a specific class of persons who were dependent on the decedent and who must prove the dependency if they were not related to the decedent.

The intent of the statute should be determined from what our Legislature said; it did not limit coverage. The *Gloe* and *Eaquinta* cases are materially distinguishable from this case, our statute and our public policy as it relates to underinsurance. There is nothing ambiguous about the language used in the West Virginia statute. This Court should not look to other jurisdictions to interpret West Virginia law. It is reasonable to conclude that the statute was intended to compensate a person who purchased coverage and suffered damages other than bodily injury from the negligence of an underinsured driver. That is what the statute says and that is what it should mean. This Court should not read into the statute an exception not expressly provided by the Legislature. If the Legislature does not like the outcome, it can change the law. Some Legislatures have in fact done that but this Court should not legislate such a change.

Appellant cites the case of *Cantrell v. Cantrell*, 213 W.Va. 372, 582 S.E.2d 819 (2003), wherein this Court stated that "the purpose of optional UIM coverage is to enable the insured to protect himself, if he chooses to do so, against losses

occasioned by negligence of other drivers who are underinsured.” In Cantrell, this Court held that underinsurance benefits cannot be stacked on liability coverage and the underinsurance statute did not mandate such a result.

Appellee Elliot met the definition of an insured under her State Farm policy. That is not contested. Appellee Elliot also suffered losses as a result of the negligence of an underinsurance driver. That is not contested. Appellee Elliot is legally entitled to collect damages from the driver of an underinsured motorist vehicle. That is not contested. What is contested is whether the requirement that Appellee Elliot suffer bodily injury as a result of an underinsured motor vehicle is enforceable under the statute. The decedent, Appellee’s mother, is not an insured under her daughter’s policy and she need not be insured to trigger the coverage for Ms. Elliott. The Appellant’s Brief is confusing on this issue because it argues that the Appellee seeks to have the decedent found to be an insured under the policy. That is not the case.

The Amicus Curiae Brief filed by the West Virginia Insurance Federation parrots the arguments made by the Appellant. However, it does contain exaggerations of the effect of upholding the Trial Court’s ruling. For instance, the Insurance Federation argues that permitting coverage 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.” There are not tens of thousands of individuals who die from automobile accidents in West Virginia. There were 392 deaths in 2003 and 409 in 2004 according to the West Virginia Health Statistics Center, Bureau for Public Health. If the West Virginia Insurance Federation is accurate in arguing that coverage for wrongful death losses will increase the risk, those concerns would be part of

underwriting. It would be reflected in the premium charged consumers who want to purchase it because they want the protection.

The Insurance Federation argues that the public policy objective of the UIM Statute is to encourage consumers to acquire UIM coverage. However, under the interpretation advocated by the Appellant and the Insurance Federation, a class of persons who purchase protection are denied that protection simply because their loss is other than a bodily injury loss. The public policy of this State is not what the insurance industry wants and from which it will profit. The insurance industry will always complain that finding coverage is detrimental to their interests; but their interests are not the public's interest. It was the intention of the Legislature, by the wording used in the statute, to allow protection for all losses and not just for those losses that the insurance industry wants to cover. Public policy should mitigate for coverage in this situation. The outcome of this case will affect more than the two Appellees.

The Appellee does not seek to create a new cause of action as the Insurance Federation suggests. The Appellee only seeks to make the insurance policy conform to the language of the statute and the purpose of the statute as this Court has defined it on many occasions.

C. The loss suffered by Appellee, while not a physical injury, should still be considered a bodily injury within the meaning of the Appellant's policy and the purpose of the underinsurance statute.

In deciding this issue, this Court should give meaningful consideration to the fact that emotional trauma and mental anguish from the loss of a parent is bodily injury even though it is not a physical injury that can be more objectively measured.

It should be compensable as bodily injury. In Jones v. Sanger, 204 W.Va. 333, 512 S.E. 2d 590 (W.Va. 1998), the Court said that under the wrongful death statute, damages for mental anguish are not duplicative of an action for negligent infliction of emotional distress thereby recognizing the severity of such a loss. In Elliott v. Allstate Insurance Co., 859 N.E. 2d 696 (Indiana Court of Appeals 2007), the Court was asked to consider whether a policy for uninsured motorist coverage confines a negligent infliction of emotional distress claim to a single "each person" limit of liability. While the issue in that case is not necessarily similar to this case, the Court's comment about emotional trauma merits consideration. The Court said:

In light of the case law in our sister states and Indiana's exploration into the area thus far, we now hold as a matter of law that a negligent infliction of emotional distress claim unaccompanied by physical manifestation thereof constitutes bodily injury under Allstate's policy. *An individual's mental health is an essential component to the overall operation of the physical structure of his body. As such, we are unable to separate a person's nerves and tensions from his physique. Clearly, emotional trauma can be as disabling to the body as a visible wound.* Instituting a rigid requirement which prevents the Plaintiff from recovering emotional harm except for where a physical injury manifestation has ensued, would completely ignore the advances made in modern and medical psychiatric sciences.

In Evans v. Farmer's Insurance Exchange 34 P. 3d 284 (Wyo 2001), the Wyoming Supreme Court held that emotional distress from an automobile accident that injured a child was bodily injury for purposes of underinsured motorist coverage.

Appellee is mindful that this Court said in Smith v. Animal Urgent Care, Inc., 208 W.Va 664, 542 S.E.2d 827 (2000), wherein an insured sought coverage for a sexual harassment claim under his commercial liability policy, that in an "insurance liability policy, purely mental or emotional harm that arises from a claim of sexual

harassment and lacks physical manifestation does not fall within a definition of "bodily injury" which is limited to "bodily injury, sickness or disease". In Smith, the Court said that an employer seeking protection against sexual harassment claims can purchase special coverage. In the underinsurance motorist context, however, even though an insured purchases protection from an underinsured driver, the insurer can still defeat it by limiting the loss protected against to only bodily injury, thereby leaving the insured with no protection, even though they bought it.

If this Court were to permit coverage for losses incurred from an underinsured driver and not limit them to bodily injury, the insured would at least get some protection and be required to pay for it with their premium. When insurers underwrite coverage, they consider many factors to determine the premium. If the premium for underinsurance rises as the Appellant predicts, the consumer has the choice whether to buy the protection and the amount of protection they can afford.

The Appellant's view is that protection from underinsured losses should be limited to a narrow set of circumstances i.e. the insured must be physically injured to recover losses. If the statute is applied as written, and Appellee's view is adopted, the consumer will get what it pays for which is a fairer result than what Appellant advocates which is no recovery.

VI. CONCLUSION

Appellee Nicole Elliott suffered uncompensated losses as a result of her mother's death at the hands of an underinsured driver. Appellee Nicole Elliott was an insured by definition under her own policy. Those two issues are not contested in this case.

This Court has a long history of holding that underinsurance coverage should be liberally construed to provide for full indemnification up to the limits of the policy. The underinsurance statute itself states that the policy shall provide an option to the insured with appropriately adjusted premium to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an underinsured motor vehicle.

Since the statute does not limit underinsured losses to bodily injury, the Appellant's policy should not exclude them either. The Appellant asks that this Court do something the Legislature did not which is create exceptions to the "all sums" provision of the statute. Appellee does not seek an expansion of the law—only the application of the law as it is written. The Court should not change the statute—that is the province of the Legislature.

STACEY A. STRUM and
NICOLE A. ELLIOT,
As Co-Administrators of the Estate of
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Appellees

BY: Christine Machel
BY COUNSEL

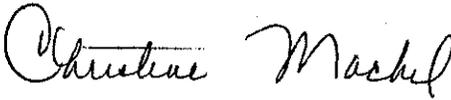
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CERTIFICATE OF SERVICE

Service of the foregoing **Appellee's Brief** was had upon the Appellant by mailing a copy there of, United States Mail, postage prepaid to counsel for the Appellant, E. Kay Fuller, Esquire, 1453 Winchester Avenue, PO Box 1286, Martinsburg, West Virginia 25405-1286 on the 3rd day of April, 2007; also on Michael G. Gallaway, Esquire, 1217 Chapline Street, P.O. Box 831, Wheeling, West Virginia 26003 on the 3rd day of April, 2007. Service of the foregoing was also had on the counsel for the Amicus Curiae, the West Virginia Insurance Federation, by mailing a true copy thereof United States mail postage prepaid to Mychal Sommer Schulz, Dinsmore and Shohl, Huntington Square, 900 Lee Street, Suite 600, P.O. Box 11887, Charleston, West Virginia 25339 on the 3rd day of April, 2007.

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

BY: _____



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