

No. 33285

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston

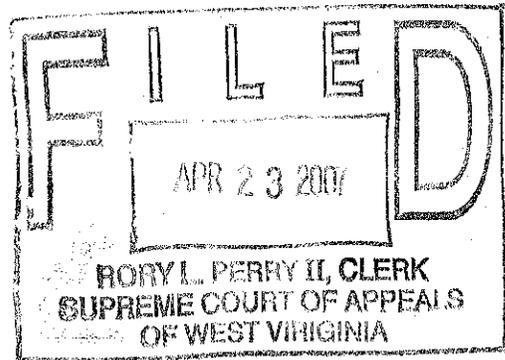
STACEY A. STRUM and  
NICOLE A. ELLIOTT,  
As Co-Administrators of the Estate of  
Cheryl Ann Kettlewell, deceased,

*Appellees / Plaintiffs Below*

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

*Appellant / Defendant Below.*



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

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**REPLY BRIEF**

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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*

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**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 Reply Brief, respectfully requesting that this Honorable Court reverse the decision of the Circuit Court of Tyler County.

### ARGUMENT

The Appellees fail to appreciate the fundamental principle of the Wrongful Death Act. As the Legislature set forth in W.Va. Code § 55-7-5, wrongful death suits are permitted to be brought on behalf of a decedent's estate for damages sustained by the estate as "if death had not ensued." Thus, by definition, wrongful death claims are derivative in nature. They are to be brought only by the personal representative acting on behalf of the decedent's estate. There is no provision in West Virginia law for an individual beneficiary to bring a wrongful death claim nor is there any provision in West Virginia law, as now advocated by the Appellees, to split the beneficiaries because some wish to pursue individual claims against their own insurance carriers.

As demonstrated by the case at bar, certain of Cheryl Kettlewell's beneficiaries have individual underinsured motorist policies. One beneficiary, however, does not. The purpose of the Wrongful Death Act is to permit the personal representative of the estate to marshal all claims of the Estate to pursue a unitary action and to divide proceeds among all beneficiaries. There is no provision that certain beneficiaries may pursue additional claims outside these parameters because they have underinsured motorist coverage.

There is simply nothing in the Wrongful Death Statute or in any case law interpreting the statute which would permit individual recovery such as the Appellees seek herein. Contrary to statements made in the Appellees' Brief, Nicole Elliott seeks to obtain recovery under her underinsured motorist policy issued by State Farm that simply is not available to other beneficiaries of the Estate, namely Melinda Kettlewell, who did not have any automobile insurance at the time of the her mother's death. This act in and of itself is contrary to the purpose of the Wrongful Death Statute.

Appellees also incorrectly argue that they seek coverage for injuries they sustained. Again, that is foreign to the concept of the Wrongful Death Act. The Statute was designed to permit an estate, acting through a personal representative, to recover damages the estate sustained. Appellees further confuse - or fail to appreciate - the basis of recovery under the Wrongful Death Statute arguing that W.Va. Code § 55-7-6 limits the right of recovery to a specific class of persons who were dependent upon the decedent. (See Appellees' Brief, p. 14). That statement, however, is directly contrary to the statute. W.Va. Code § 55-7-6(b) sets forth those who may receive distribution in a wrongful death action as the surviving spouse and children, including adopted children and step-children, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his/her death or would otherwise be equitably entitled to share in such distribution... There is no restriction in the West Virginia Wrongful Death Statute that a recovery only goes to a person who was financially dependent upon the decedent at the time of the decedent's death and, therefore, the Appellees' argument again must fail.

In addition to misconstruing the purpose of the Wrongful Death Act, the Appellees misconstrue application of the Underinsured Motorist Statute.

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.

The key language of this provision is that UIM recovery is available to pay the insured sums he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle. Under the facts of the present civil action, Nicole Elliott is not legally entitled to recover damages from the owner or operator of the underinsured motor vehicle. The only entity which has a claim against the owner or operator of the underinsured motor vehicle is the Estate of Cheryl Kettlewell. It is for this reason that it, therefore, becomes incumbent to examine Cheryl Kettlewell's status at the date of her death to determine if she was in any way insured under the State Farm policy issued to Ms. Elliott. As the Appellees agree, Ms. Kettlewell did not meet any of the definitions of an insured under the State Farm policy. Thus, there is no nexus between the State Farm policy issued to Ms. Elliott and the incident which led to the death of Cheryl Kettlewell. Moreover, Ms. Elliott does not present any claim which would entitle her individually to recovery under either the Underinsured Motorist Statute or her policy because she was not involved in an automobile accident with an underinsured motor vehicle and did not sustain bodily injury. Ms. Elliott admits such. In that Ms. Elliott did not sustain damages from the owner or operator of an underinsured motor vehicle, she lacks the requisite standing to pursue an individual

claim. The Estate of Cheryl Kettlewell is the only entity which may pursue damages from the incident of November 25, 1999.

The law is clear with respect to who may bring a claim, in what capacity a wrongful death claim may be pursued, the damages which are recoverable and to whom damages are to be distributed. The attempts by the Appellees to expand the parameters of the Wrongful Death Statute to permit individual recoveries by certain beneficiaries who may have the benefit of additional insurance coverage is not contemplated within the Wrongful Death Statute nor is it contemplated within the Underinsured Motorist Statute.

The Appellees improperly attempt to expand the scope of the Wrongful Death Statute and the Underinsured Motorist Statute in an attempt to seek coverage for the loss of a family member. The Appellees point to the low number of automobile deaths in West Virginia to bolster their quest to expand coverage. This argument is again, however, misplaced in that neither the Wrongful Death Statute nor the Underinsured Motorist Statute limits recovery to West Virginia automobile accidents. To accept the Appellees' argument would permit an insured to recover, under his or her individual underinsured motorist policies, any time a family member is killed in an automobile accident because the insured suffered emotional distress. This is foreign to the definition of bodily injury; *Smith v. Animal Urgent Care*, 208 W.Va. 664, 542 S.E.2d 827 (2000); W.Va. Code § 33-6-31(b); it is outside the scope of the Wrongful Death Statute, W.Va. Code § 55-7-5; as to the type of claims and the capacity in which claims may be pursued; and it is an improper expansion of the risks insured under an underinsured motorist policy. Thus, it should not be accepted by this Court.

## CONCLUSION

Ms. Elliott is not legally entitled to collect damages, in her individual capacity, for the death of Cheryl Kettlewell. Recovery is limited to the Estate of Cheryl Kettlewell with damages to be apportioned between all beneficiaries per statute. There is no provision to divide the class of beneficiaries to permit additional individual recoveries for those who have other insurance. Moreover, there is simply no provision to permit an individual beneficiary to pursue a claim outside the Wrongful Death Statute. Such claims can only be brought by the personal representative on behalf of all beneficiaries of an estate.

Notwithstanding the fact that Ms. Elliott is not entitled to individually collect damages as a result of another's wrongful death, any damages she may recover are outside the scope of coverage she separately maintains with State Farm under an underinsured motorist policy. Ms. Elliott's UIM policy provides coverage for bodily injury sustained by an insured. Ms. Elliott suffered no bodily injury and, thus, she is precluded from coverage.

To adopt Appellees' argument is contrary to public policy in that it requires UM/UIM insurers to insure against the wrongful death of any person from whom an insured might inherit and improperly converts UIM policies into personal bereavement policies which is contrary to the purpose of UIM coverage as set forth in W.Va. Code § 33-6-31(b). This is also contrary to specific policy language in the State Farm policy issued to Ms. Elliott. Underinsured Motorist 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.

For the foregoing reasons the Appellant, State Farm Mutual Automobile Insurance Company, respectfully requests that this Court refuse to legislate and to re-write the UIM statute to expand its provisions or to permit individual recoveries outside the parameters of the Wrongful Death Statute and, therefore, 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:

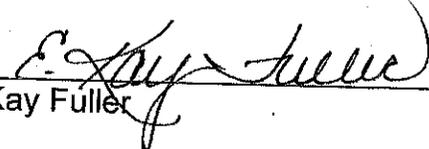
*E. Kay Fuller*  
E. Kay Fuller  
(WV State Bar No. 5594)  
1453 Winchester Avenue  
P.O. Box 1286  
Martinsburg, WV 25402-1286  
(304) 262-3209

**CERTIFICATE OF SERVICE**

This is to certify that I, E. Kay Fuller, Co-Counsel for the Appellant, served the foregoing **Reply Brief** upon the following individual by United States Mail, first class, postage prepaid on this the 20<sup>th</sup> day of April, 2007:

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

Mychal Sommer Schulz, Esquire  
Jill Cranston Bentz, Esquire  
Ryan J. Aaron, Esquire  
DINSMORE & SHOHL LLP  
900 Lee Street, Suite 600  
Charleston, WV 25301  
Ph: (304) 357-0900  
Fax: (304) 357-0919

  
\_\_\_\_\_  
E. Kay Fuller