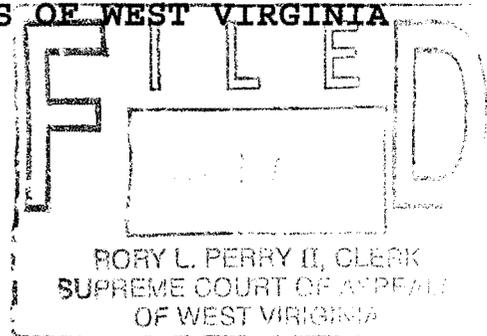


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GUY R. CUNNINGHAM and  
BRIDGETT L. CUNNINGHAM, his wife,

Plaintiffs,



v.

No.: 34862  
(Civil Action No. 07-C-51  
Circuit Court of Boone County)

WALTER LEE HILL, an individual;  
ERIE INSURANCE PROPERTY AND CASUALTY  
COMPANY, a Pennsylvania corporation,  
B. MICHAEL BENTLEY, an individual;  
ENCOMPASS INSURANCE COMPANY OF AMERICA,  
an Illinois corporation; STATE FARM  
MUTUAL AUTOMOBILE INSURANCE COMPANY, an  
Illinois corporation; and WILLIAM WILSON,  
an individual,

Defendants.

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S**  
**REPLY BRIEF UPON CERTIFIED QUESTION**

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## INTRODUCTION

Notwithstanding the obfuscation provided by plaintiffs, this case presents a single, narrow question of law for this Court. Although plaintiffs and the amicus paint with a broad brush, the true issue is whether the unambiguous terms of a contract between an insurer and its policyholder which establish underinsured motorist coverage limits of liability when more than one policy applies will be honored by this Court.

Plaintiffs complain the Court should not have accepted the certified question for, in their view, it is not dispositive of the issues between the parties. (Appellees' Response to Erie's and State Farm's Brief Upon Certified Question ["Plaintiffs' Response"], p. 3, n.1.)<sup>1</sup> This Court correctly accepted the certified question for it involves the type of precise and undisputed factual record required for determination of a question of law which substantially controls the case. *State ex rel. W. Va. Dep't of Health and Human Res. v. Wertman*, 210 W. Va. 366, 368, 557 S.E.2d 773, 775 (2001). The certified question involves a novel issue relating to the "other insurance" provisions of policies issued by State Farm Mutual Automobile

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<sup>1</sup>Plaintiffs refer to themselves as "appellees", but inasmuch as this case is before the Court on certified question, the "parties remain simply the Plaintiff and the Defendant." *Little v. W. Va. Adjutant Gen.*, \_\_\_ S.E.2d \_\_\_, 2009 WL 1543896, n.2 (W. Va. 2009). State Farm, therefore, refers to Mr. and Mrs. Cunningham as the plaintiffs.

Insurance Company ["State Farm"] and Erie Insurance Property and Casualty Company ["Erie"]:

When two insurers issue separate automobile liability insurance policies upon different vehicles containing underinsured motorist coverages which provide coverage for the same loss, is policy language which provides that the limits of underinsured motorist coverage available from all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage valid and enforceable?

(See Order upon Certified Question pp. 6-7.)

Because the State Farm policy language is unambiguous and violates neither the spirit nor the intent of the underinsured motorist coverage statutory scheme, the Circuit Court of Boone County erred by answering the certified question in the negative. This Court should correct the Circuit Court's error and answer the certified question in the affirmative.

#### DISCUSSION

**I. State Farm's policy language limiting liability to the highest level of underinsured motorist coverage available does not conflict with W. Va. Code §33-6-31(b).**

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**A. The "other insurance" provision of the State Farm policy is not a "setoff" provision.**

W. Va. Code §33-6-31(b) provides, in part:

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. ... No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy.

Plaintiffs' interpretation of W. Va. Code §33-6-31(b) ignores the fact that application of State Farm's "other insurance" policy provision does not involve a "setoff" nor does it involve a reduction in underinsured motorist coverage "by payments made under the insured's policy or any other policy." This Court consistently has applied the "setoff" language of W. Va. Code §33-6-31(b) as pertaining to and preventing a setoff of liability coverage limits against underinsured motorist coverage limits when determining whether underinsured motorist coverage is triggered.

Beginning with *State Automobile Mutual Insurance Company v. Youler*, 183 W. Va. 556, 567, 396 S.E.2d 737, 748 (1990), the Court, relying upon W. Va. Code §33-6-31(b), held "that the tortfeasor's liability insurance coverage is to be set off against the amount of *damages* sustained by the injured person, not against the underinsured motorist coverage limits." [Emphasis in original]. See also *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990) (Applying *Youler*, the Court held liability coverage is to be set off against the injured person's damages, not against the underinsured motorist coverage); *Brown v. Crum*, 184 W. Va. 352, 355, 400 S.E.2d 596,

599 (1990) (Amount paid by liability carrier cannot be offset against underinsured motorist coverage limits.)<sup>2</sup> None of these cases relating to setoff pertain to the instant situation as it is undisputed in this case that underinsured motorist coverage was triggered and there was no attempt to setoff the liability limits against the underinsured motorist coverage limits to make that determination.

W. Va. Code §33-6-31(b) prohibits reduction of "sums payable" under the underinsured motorist coverage by payments made under the "insured's policy or any other policy," but the statute does not direct how the determination of the amount of "sums payable" is to be made. The policy terms and conditions establish the amount of the "sums payable." One must look to the clear and unambiguous language of the State Farm policy in order to ascertain the amount of "sums payable."

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<sup>2</sup>The amicus suggests this Court's decision in *Morrison v. Haynes*, 192 W. Va. 303, 452 S.E.2d 394 (1994), is dispositive, but neither *Morrison* nor any other decision of this Court addresses the issue of the "other insurance" provision which limits the underinsured motorist coverage to the highest limit of liability available under all policies. The *Morrison* Court applied its prior edict from *Youler* that the amount of other insurance received by the plaintiff is to be offset from the insured's damages, not from the uninsured or underinsured motorist coverage limits and, therefore, because the jury verdict in *Morrison* exceeded the limits of all available coverage, there was no offset. *Id.* at 309, 452 S.E.2d at 400. The *Morrison* Court did not have occasion to and did not address policy language remotely similar to the language at issue in this case.

When more than one policy provides underinsured motorist coverage, the State Farm policy unequivocally directs that the amount of "sums payable" shall not exceed the highest limit of liability available from all policies. The State Farm policy provides, in part:

**If There is Other Coverage - Coverage W**

1. If underinsured motor vehicle coverage for **bodily injury** is available to an **insured** from more than one policy provided by us or any other insurer, the total limit of liability available from all policies provided by all insurers shall not exceed the limit of liability of the single policy providing the highest limit of liability. This is the most that will be paid regardless of the number of policies involved, **persons** covered, claims made, vehicles insured, premiums paid or vehicles involved in the accident. ...

(See Order upon Certified Question pp. 5-6.)

This policy language does not implicate a setoff. Instead, it establishes the amount of "sums payable" under the policy. Moreover, plaintiffs' characterization of the State Farm policy language as involving a setoff is puzzling. If a setoff was involved, then no benefits would be available from State Farm. Offsetting Erie's \$100,000 underinsured motorist coverage limits from State Farm's \$50,000 underinsured motorist coverage limits results in a negative \$50,000 and even offsetting Erie's payment of \$66,667.66 against State Farm's underinsured motorist coverage limits of \$50,000 results in a nega-

tive figure. By contrast, State Farm paid Mr. Cunningham \$33,333.34, without a setoff, so that he received \$100,000 in underinsured motorist coverage benefits.

There is no dispute under West Virginia law that underinsured motorist coverage is triggered when the available liability coverage is less than the damages sustained by the injured person.<sup>3</sup> See *State Automobile Mutual Insurance Company v. Youler, supra*. However, plaintiffs' heavy reliance upon *Youler* and its progeny is misplaced for whether underinsured motorist coverage is triggered is not the issue here. The sole issue is whether State Farm's unambiguous policy language is to be applied as written so that the maximum underinsured motorist coverage liability limits available to plaintiffs are \$100,000. Cases discussing whether underinsured motorist coverage is triggered are simply of no assistance.

Likewise, plaintiffs' assertion, in reliance upon *Allstate Insurance Company v. State Automobile Mutual Insurance*

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<sup>3</sup>The amicus attempts to play upon this Court's sympathies by asserting that Mr. Cunningham was "seriously injured" and even \$150,000 of underinsured motorist coverage would not be sufficient to compensate him for his alleged damages. (Amicus Br. W. Va. Ass'n for Justice Upon Certified Question, p. 2, n.2.) There is no support in the record for this characterization and the parties have undertaken no discovery as to the extent of Mr. Cunningham's claim injuries. Moreover, policy language cannot be ignored based upon the proposition that injuries might exceed that amount of coverage available or in benevolent but improper attempt to increase recovery to an injured party.

*Company*, 178 W. Va. 704, 364 S.E.2d 30 (1987), that West Virginia law does not prohibit recovery from two different insurers misses the mark, for plaintiffs have recovered from two different insurers. State Farm and Erie have made underinsured motorist coverage payments totaling \$100,000.

*Allstate v. State Automobile* is inapposite to the present situation for the Court had no occasion to discuss the applicable liability coverage limits and address policy language similar to that found in the State Farm policy, but simply adopted the general rule that, when pro-rata and excess clauses appear in liability policies held by the owner of the vehicle and the driver of the vehicle, the owner's insurer is "primarily liable." *Id.* at Syllabus Point 1. The Court did not, as plaintiffs erroneously contend, hold that, if the primary liability coverage was exhausted, Allstate would "be required to provide secondary liability coverage." (Plaintiffs' Response, pp. 11-12.) The Court did not address that issue and, more importantly, the Court undertook no analysis of policy language relating to the limits of liability when more than one policy applies.

**B. The validity of State Farm's unambiguous policy language does not depend upon the existence of a multi-vehicle discount.**

Although plaintiffs and the amicus fixate upon the lack of multi-vehicle discount in the State Farm policy and

argue that such a discount is required before State Farm's unambiguous policy language may be applied, State Farm's policy language is valid so long as "such terms, conditions and exclusions as may be consistent with the premium charged." See W. Va. Code §33-6-31(k). There is no dispute that W. Va. Code §33-6-31(k) permits insurers, such as State Farm and Erie, to include "other insurance" provisions within the underinsured motorist coverage portions of their respective policies. W. Va. Code §33-6-31(k) provides:

Nothing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged.

This statutory provision evidences legislative adoption of the proposition that, so long as the requirements of W. Va. Code §33-6-31 are met, insurers are free to include other terms, conditions and exclusions within the insurance policy. In keeping with that principle, this Court has not hesitated to uphold exclusions which eliminate underinsured motorist coverage altogether, even in the absence of a multi-vehicle discount. See, e.g., *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989) ("Owned but not insured" exclusion valid without reference to multi-vehicle discount); *Thomas v. Nationwide Mut. Ins. Co.*, 188 W. Va. 640, 425 S.E.2d 595 (1992) ("Family use" exclusion upheld without discussion of multi-vehicle discount); *Cantrell v.*

*Cantrell*, 213 W. Va. 372, 582 S.E.2d 819 (2003) (Reiterating principles of *Deel v. Sweeney* and continued recognition of the "family use" exclusion.) The assertion that a multi-vehicle discount is necessary before policy language limiting the available underinsured motorist coverage limits is permitted is not borne out by this Court's prior decisions.

In fact, Mr. Cunningham has received greater underinsured motorist coverage benefits than he would have had he been using the 1995 Harley-Davidson motorcycle insured under the State Farm policy. If he had been using the motorcycle, his underinsured motorist coverage recovery would have been limited to \$50,000, the underinsured motorist coverage limits from State Farm. If he had been using a vehicle insured by Erie, his underinsured motorist coverage recovery would be limited to \$100,000, his underinsured motorist coverage limits under the Erie policy.

There is no statutory nor public policy reason to obviate the plain language of the State Farm policy and permit Mr. Cunningham to receive greater underinsured motorist coverage benefits due to the fortuity he was occupying a non-owned vehicle, which did not have underinsured motorist coverage. He has received the maximum amount he would have received had he been occupying one of his own vehicles. There is no reason to increase the coverage and permit him to receive more because he

was occupying a vehicle which had no underinsured motorist coverage at all.

Plaintiffs and the amicus misconstrue the nature of and the importance of the Insurance Commissioner's approval of State Farm's policy language. The Insurance Commissioner's approval evidences, not only the validity of the State Farm policy language under West Virginia law, but that the policy language is "consistent with the premium charged," in keeping with W. Va. Code §33-6-31(k).<sup>4</sup>

Under the statutory scheme, no policy of insurance nor any endorsements to a policy may be utilized by an insurer unless filed with the Commissioner at least sixty days prior to delivery and approved by the Commissioner. W. Va. Code §§33-6-8(a), (b)(1). The Insurance Commissioner has been charged with guaranteeing the forms comply with West Virginia law. The Insurance Commissioner "shall" disapprove of forms which violate or do not comply with the statutory mandates of Chapter 33 of the West Virginia Code. W. Va. Code §33-6-9(a). Furthermore, the Insurance Commissioner "shall" disapprove of any forms if

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<sup>4</sup>Plaintiffs complain that the Insurance Commissioner's approval of State Farm's policy language "cannot fairly be said to be an approval of the particular language addressed herein." (Plaintiffs' Response, p. 17.) It is difficult to understand how the Insurance Commissioner's approval could be anything less than a full approval, given the Insurance Commissioner's mandatory duty to disapprove any form filing which does not comport with West Virginia law or charges a premium inconsistent with the benefits provided. See W. Va. Code §33-6-9.

"the benefits provided therein are unreasonable in relation to the premium charged." W. Va. Code §33-6-9(e). As this Court has long-recognized, use of the word "shall" reflects a mandatory requirement. *Dantzic v. Dantzic*, Syllabus Point 9, 222 W. Va. 535, 668 S.E.2d 164 (2008); *Nelson v. W. Va. Pub. Employees Ins. Bd.*, Syllabus Point 1, 171 W. Va. 445, 300 S.E.2d 86 (1982). Thus, the Insurance Commissioner's approval of State Farm policy language reflects the benefits are reasonable in "relation to the premium charged."

Plaintiffs' reliance upon *Joy Technologies, Inc. v. Liberty Mutual Insurance Company*, 187 W. Va. 742, 421 S.E.2d 493 (1992), is misplaced. The Court in *Joy Technologies* observed that, during hearings conducted by the Insurance Commissioner into proposed changes to language of general liability policies and in memoranda presented to the Insurance Commissioner, insurers and the rating organization advised the Commissioner that the exclusion at issue simply clarified existing policy language. *Id.* at 747-48, 421 S.E.2d at 498-99. Based upon that representation, the Court therefore concluded the exclusion did not alter coverage as it existed in the original policies. *Id.* at 749, 421 S.E.2d at 500. That discussion has no bearing upon the issues presented in this case and does not negate the Insurance Commissioner's approval of the State Farm policy language at issue.

Plaintiffs' dependence upon *Starr v. State Farm Fire and Casualty Company*, 188 W. Va. 313, 423 S.E.2d 922 (1992), also misses the mark. Unlike the instant case, the focus in *Starr* was upon the definition of an "insured" under an insurance policy. In *Starr*, plaintiff was a guest passenger in a vehicle owned by William Cline, a State Farm insured, when an accident occurred with another vehicle. *Id.* at 314, 423 S.E.2d at 923. Plaintiff sought to recover underinsured motorist coverage from another State Farm policy issued to Mr. Cline, which provided coverage upon a vehicle not involved in the accident. *Id.* at 314-15, 423 S.E.2d at 923-24.

The Court concluded, relying upon the plain language of the State Farm policy, plaintiff did not meet the definition of an insured for the purposes of underinsured motorist coverage under the policy insuring a vehicle not involved in the accident. *Id.* at 318-19, 423 S.E.2d at 927-28. The *Starr* Court observed that "Class One" insureds, such as the named insured receive "relatively broad" coverage and need not be occupying a covered vehicle for coverage to apply, whereas "Class Two" insureds are entitled to coverage due solely to their occupancy of a covered vehicle. *Id.* at 317, 423 S.E.2d at 926.

There is no disagreement over the fact Mr. Cunningham was an insured under his State Farm policy and was entitled to underinsured motorist coverage benefits, even though he was not

occupying a covered vehicle at the time of the accident. Mr. Cunningham's status as a so-called "Class One" insured reflects he was the named insured under the policy, but it has no impact upon the State Farm policy language limiting the underinsured motorist coverage limits to the highest limits of underinsured motorist coverage available. The "Class One" and "Class Two" distinction reflects one's status as an insured eligible for underinsured motorist coverage benefits, but it has no bearing upon the amount of underinsured motorist coverage available under the policy.

**II. The issue of alleged estoppel is not properly before this Court.**

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The issue before the Court is a narrow issue of law involving application of State Farm's unambiguous policy language relating to the limits of liability under the underinsured motorist coverage. Despite this, plaintiffs attempt to interject into the discussion an extraneous factual issue relating to estoppel. Estoppel is not germane to the certified question, was not addressed by the lower court and is an issue upon which no discovery was undertaken.

Plaintiffs neglect to advise this Court that, although they asked the lower court to include a certified question as to whether State Farm and Erie were estopped from relying upon the language of their respective policies relating to "other insurance," the lower court declined to do so. (See Order upon

Certified Question, p. 6.) Moreover, no discovery was undertaken upon plaintiffs' theory of estoppel and there is no factual foundation for the unsupported assertions that Mr. Cunningham somehow detrimentally relied upon any alleged conduct by State Farm. (Plaintiffs' Response, p. 25.)

Inasmuch as the lower court declined to include plaintiffs' theory of estoppel within the certified question, the issue is not before the Court. Nonetheless, even if the Court is inclined to examine plaintiffs' argument, plaintiffs have not presented sufficient evidence to invoke the doctrine of estoppel and avoid application of the State Farm policy language.

Plaintiffs have the burden of establishing the existence of estoppel and their attempt to do so falls short.

*Potesta v. U. S. Fid. & Guar. Co.*, 202 W. Va. 308, 317, 504 S.E.2d 135, 144 (1998). Estoppel only applies "when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." *Id.* at Syllabus Point 1, quoting *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989). According to the *Potesta* Court:

"In the law of insurance the elements of estoppel against an insurer are conduct or acts on the part of the insurer which are sufficient to justify a reasonable belief on the part of the insured that the insurer will not insist on a compliance with the provisions of the policy and that the insured in reliance upon such conduct or acts has changed his position to his detriment." Syllabus point 4, *Knapp v. Indepen-*

*dence Life and Accident Ins. Co.*, 146 W.Va. 163, 188 S.E.2d 631 (1961).

*Id.* at Syllabus Point 2.

Plaintiffs cannot demonstrate the necessary elements of estoppel. There was no conduct on the part of State Farm which would indicate, in any manner whatsoever, that it would be willing to overlook the plain provisions of the State Farm policy. Concomitantly, plaintiffs did not detrimentally rely upon any conduct on the part of State Farm.

The two pieces of correspondence which plaintiffs claim support their theory of estoppel merely evidence State Farm's consent to Mr. Cunningham's settlement with the liability carrier and its efforts to obtain information in order to evaluate Mr. Cunningham's underinsured motorist claim. (See Exs. J and K attached to Pls.' Combined Mot. for Summ. J. against Def. Erie Ins. Prop. & Cas. Co. & State Farm Mut. Auto. Ins. Co. with Regard to Applicable UIM Limits.) Absolutely nothing in these two letters gave rise to an indication State Farm would not insist on compliance with the policy provisions.

In fact, State Farm pointedly advised plaintiffs' counsel its agreement to waive subrogation was not to be taken as an agreement that Mr. Cunningham's claim exceeded the underlying liability limits. (See Ex. J attached Pls.' Combined Mot. for Summ. J. against Def. Erie Ins. Prop. & Cas. Co. & State Farm Mut. Auto. Ins. Co. with Regard to Applicable UIM Limits.)

This was an obvious indication State Farm intended to insist upon strict compliance with the policy.

In addition, W. Va. Code §33-6-26 explicitly provides that, acknowledging receipt of notice of a claim, giving information relative to reporting a claim or "[i]nvestigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim" shall not be deemed "to constitute a waiver of any provision of a policy ..." State Farm's agreement to waive subrogation does not estop State Farm from adhering to the policy language with respect to the available liability limits when more than one policy provides underinsured motorist coverage.

Furthermore, plaintiffs cannot demonstrate the detrimental reliance required to invoke the doctrine of estoppel. Plaintiffs claim Mr. Cunningham was "induced" to act to his detriment, but do not and cannot explain what the purported detriment was. (Plaintiffs' Response, p. 25.) The fact of the matter is that Mr. Cunningham did not change his position to his detriment regardless of what he may have believed the policy limits to be. He has not and cannot show any conduct on his part remotely resembling detrimental reliance.<sup>5</sup>

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<sup>5</sup>To the extent plaintiffs seem to believe that State Farm had a duty to advise Mr. Cunningham, or his counsel, of every provision contained within the State Farm policy, they are mistaken. (Plaintiffs' Response, p. 24.) Under West Virginia law, State Farm had no duty to inform Mr. Cunningham of the

Plaintiffs' reliance upon the theory of estoppel also is flawed because estoppel cannot be utilized to expand the terms of the State Farm policy language, which limits recovery of underinsured motorist coverage to the highest available underinsured motorist coverage limits under all applicable policies. The *Potesta* Court adopted the majority rule, holding "that generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract." *Id.* at 147, 504 S.E.2d at 320. The Court explained the rule was based upon the bedrock principle that the judiciary cannot create a new contract for the parties and cannot expand the policy to include coverage that did not otherwise exist. *Id.* (collecting cases.)

This, however, is exactly what plaintiffs seek to have this Court do. Adopting plaintiffs' theory of estoppel would require the Court to rewrite the policy of insurance and expand coverage beyond that contained in the contract between State Farm and Mr. Cunningham. Estoppel cannot be utilized to achieve the result plaintiffs desire.

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limits of his underinsured motorist coverage. *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 586, 490 S.E.2d 657, 673 (1997) ("[W]e can find no authority requiring an insurer to notify its insured of available coverage following notification of a loss or to advise its insured as to the limits of such coverage.")

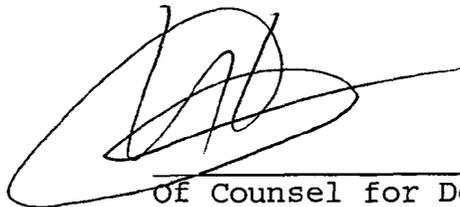
**CONCLUSION**

State Farm's policy language complies with West Virginia law, as well as the public policy of the State of West Virginia. There is no reason why the State Farm policy language should not be applied as written. The lower court erred when answering the certified question in the negative and refusing to apply and enforce the provisions of the contract between Mr. Cunningham and State Farm.

**RELIEF REQUESTED**

State Farm Mutual Automobile Insurance Company respectfully requests this Court answer the question certified from the Circuit Court of Boone County in the affirmative.

Respectfully submitted,



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Of Counsel for Defendant State Farm  
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an individual; ENCOMPASS INSURANCE  
COMPANY OF AMERICA, an Illinois  
corporation; STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY, an  
Illinois corporation; and WILLIAM  
WILSON, an individual,

Defendants.

CERTIFICATE OF SERVICE

The undersigned, of counsel for defendant, State Farm Mutual Automobile Insurance Company, does hereby certify that the foregoing State Farm Mutual Automobile Insurance Company's Reply Brief upon Certified Question was this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

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Done this 17th day of July, 2009.



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