

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

**STATE AUTO
INSURANCE COMPANY,**

Petitioner/Defendant Below.

v.

**DORIS MICHAEL and
TODD BATTLE, by his Next Friend,
Doris Michael, and
KITRENA MICHAEL,**

Respondents/Plaintiffs Below.

CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

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**CERTIFIED QUESTION FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA**

Civil Action No. 07-C-2616 (consolidated with 07-C-2617)
The Honorable Tod Kaufman, Judge, 13th Judicial Circuit

BRIEF OF THE PETITIONER, STATE AUTO INSURANCE COMPANY

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OF WEST VIRGINIA

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INTRODUCTION

Comes now State Auto Insurance Company, by counsel, John R. Fowler, Anna B. Williams and Andrea M. King, John R. Fowler, PLLC, and pursuant to Rule 13 of the Rules of Appellate Procedure, respectfully files this Petition regarding the legal questions that the Honorable Tod Kaufman answered and certified pursuant to West Virginia Code § 58-5-2 (2009).

I. PROCEEDING AND NATURE OF RULING BELOW

The underlying civil action originally commenced as two separate actions on December 6, 2007 in the Circuit Court of Kanawha County, styled *Katrina Michael v. Appalachian Heating and Cooling, Inc. and State Auto Insurance Company* (Civil Action No. 07-C-2616, Judge Kaufman), and *Doris Michael and Todd Battle, by His Next Friend, Doris Michael v. Appalachian Heating and Cooling, Inc. and State Auto Insurance Company* (Civil Action No. 07-C-2617, Judge Stucky). These civil actions were consolidated under Civil Action Number 07-C-2616 by Order entered on May 22, 2008.

State Auto Insurance Company filed a motion to dismiss the Respondents/Plaintiffs' Complaints pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure arguing that the Complaints were barred by West Virginia Code § 33-11-4(a). Plaintiffs responded to the Motion by stating that the West Virginia Code 5-11-9(A), more commonly known as the West Virginia Human Rights Act was independent of West Virginia Code § 33-11-4(a) and an action could proceed under this legislation. Oral arguments were heard and at the conclusion of the argument, this Court ruled that State Auto Insurance Company's Motion to Dismiss would be denied as West Virginia Code § 33-11-4(a) did not preclude an action against an insurance company alleging that their settlement practices violated the West Virginia Human Rights Act West Virginia Code 5-11-9(A).

After this denial, counsel for State Auto orally moved for this Court to certify the question to the Supreme Court of Appeals of West Virginia pursuant to West Virginia Code § 58-5-2 (2009) as the issue deals with the sufficiency of the pleadings. Further, the Court was of the opinion that this issue is one of first impression and presents new and novel issues of law. Accordingly, the Court agreed that a certified question pursuant to West Virginia Code § 58-5-2 (2009) is appropriate, and certified the following question to this Court, ruling as indicated:

May a plaintiff present a cause of action against a tortfeasor's insurance carrier pursuant to the West Virginia Human Rights Act, West Virginia Code § 55-11-9(A), when it is alleged that a tortfeasors' [sic] insurance carrier discriminated against the plaintiffs because they are African American and reside in public housing?

Circuit Court: Yes.

II. STATEMENT OF FACTS

At some time in November of 2006, Defendant in the underlying civil action, Appalachian Heating, LLC, was hired by the Charleston-Kanawha County Housing Authority to perform work on the and/or install the heating and/or cooling units in a public housing development, South Park Village. A fire occurred allegedly as a result of the work performed by Appalachian Heating, LLC causing damage to the Respondents/Plaintiffs' property. After the fire occurred, Petitioner, State Auto Insurance Company, the insurer of Appalachian Heating, LLC, evaluated and paid Respondents/Plaintiffs' claims against Appalachian Heating, LLC which resulted from the fire. Respondent Kitrena Michael signed a release which read in pertinent part:

KNOWN ALL MEN BY THESE PRESENTS that the undersigned, for and in consideration of the receipt of the sum of Three thousand Five Hundred Forty Five & 15/100 (\$3,545.15), paid by State Auto Property & Casualty Insurance Co., do hereby forever release and discharge Appalachian Heating, LLC, its heirs,

executors, administrators, successors, insurers, insureds, employees, employers, principals, agents, assigns and all other firms, corporations, association, and partnerships, or an [sic] from any and all property damage claims which the undersigned may now have or which may hereafter accrue on account of or in any way arise out of or result from any known or unknown, foreseen or unforeseen property damage and the consequences thereof related to or arising out of the fire which occurred on or about November 21, 2006 at 671A South Park Road, Charleston, Kanawha County, West Virginia.

Respondent Kitrena Michael was represented by counsel who negotiated the settlement at the time she entered into this release.

Respondents/Plaintiffs have raised claims against State Auto Insurance Company pursuant to the West Virginia Human Rights Act found at West Virginia Code § 5-11-1, *et seq.* Specifically, Respondents/Plaintiffs have alleged, “[t]hat State Auto Insurance Company ...wrongfully denied [Respondents/Plaintiffs] fair and reasonable compensation for the loss and damages arising out of the fire loss she sustained on November 21, 2006 because of [Respondents/Plaintiffs’] race and the fact that [they] resides in public housing.” See Plaintiffs’ Complaints at ¶¶ 33. Also, the Respondents/Plaintiffs have alleged “[t]hat State Auto Insurance Company...committed the act of inferring and informing the [Respondents/Plaintiffs] that the loss of her personal property and the commensurate damages arising therefrom virtually had no value because of her race and the fact that she resided in public housing.” Id. at ¶¶ 34. Further, the Respondents/Plaintiffs alleged

That the express purpose and spirit of the West Virginia Act was clearly violated by the defendant, State Auto Insurance Company and its agents, employees and representatives when it participated directly in excluding the [respondents/plaintiffs] from and/or refusing to extend to the [respondents/plaintiffs] the same opportunity and consideration when evaluating the [respondents/plaintiffs’] fire loss claims it extends to those persons not of African American descent and those who do not reside in public housing.

See Plaintiffs’ Complaints at ¶¶ 35. Further, the Respondents/Plaintiffs have alleged

That the express purpose of the West Virginia Act was clearly violated by the defendant, State Auto Insurance Company and its agents, employees and representatives when it acted as previously described herein to degrade the [respondents/plaintiffs], to embarrass the [respondent/plaintiffs] and to cause the [respondent/plaintiffs] economic loss as set forth in 5-11-9(A) of the West Virginia Code.

Id. at ¶¶ 36. The Respondents/Plaintiffs have claimed punitive damages as well as damages for emotional distress, embarrassment and mental anguish. Id. at ¶¶ 37 & 38. Essentially, Respondents/Plaintiffs have alleged a third-party bad faith claim. See Plaintiffs' Complaints.

III. ARGUMENT

A. **Plaintiffs' Sole Exclusive Remedy For The Conduct Alleged Against State Auto Insurance Company Is An Administrative Complaint With The Insurance Commissioner.**

The West Virginia Legislature enacted West Virginia Code §33-11-1, *et seq.* expressing as its purpose:

to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of Congress of March ninth, one thousand nine hundred forty-five (Public Law fifteen, seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

W. Va. Code § 33-11-1. As part of this regulation, the West Virginia Legislature eliminated private causes of action for third-party claimants who alleged unfair settlement practices by an alleged tortfeasor's insurance company in West Virginia Code § 33-11-4a. Specifically, that statute provides:

A third-party claimant may not bring a private cause of action or *any other action* against any person for an unfair claims settlement practice. A third-party claimant's sole remedy against a person for an unfair claims settlement practice or the bad faith settlement of a claim is the filing of an administrative complaint with the Commissioner in accordance with subsection (b) of this section. A third-party claimant may not include

allegations of unfair claims settlement practices in any underlying litigation against an insured.

(emphasis added). “Third-party claimant” is explicitly defined in the statute, as “any individual, corporation, association, partnership or any other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract for the claim in question.” W. Va. Code § 33-11-4a(j)(1). There is one exclusive remedy available to a third-party claimant who feels that he or she has been treated unfairly, including claims of unfairness due to alleged racial discrimination, by an insurance company. See W. Va. Code § 33-11-4a(b). A third-party claimant may only file an administrative complaint with the West Virginia Insurance Commissioner as all other actions are expressly barred. Id.

The West Virginia Legislature, when it enacted West Virginia Code § 33-11-1, *et seq.* provided that an unfair settlement practice could include “discrimination.” Specifically, the West Virginia Legislature provided:

(7) *Unfair discrimination.*- (a) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract.

(b) No person shall make or permit any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium policy fees, or rates charged for any policy or contract of accident and sickness insurance or *in the benefits payable thereunder*, or in any of the terms or conditions of the contract, or in any other manner whatever.

(c) As to kinds of insurance other than life and accident and sickness, no person shall make or permit any unfair discrimination in favor of particular persons, or between insureds or subjects of insurance having substantially like insuring, risk and exposure factors or expense elements, in the terms or conditions of any insurance contract, or in the rate or amount of premium charge therefor. This

paragraph shall not apply as to any premium or premium rate in effect pursuant to article twenty of this chapter.

W. Va. Code § 33-11-4 (emphasis added). Though State Auto Insurance Company expressly denies that it engaged in any type of discrimination in the handling of Respondents/Plaintiffs' claim whatsoever, as the West Virginia Legislature clearly and unambiguously provided above, a third-party claimant's sole remedy in such a situation is a complaint with the West Virginia Insurance Commission, not a civil action. See W. Va. Code § 33-11-4a.

B. There Is No Common Law Cause of Action for Third-Party Claimants Who Allege That A Tortfeasor's Insurance Company Has Discriminated Against Them In The Settlement Of The Third-Party Claimants' Claim.

Aside from a third-party bad faith claim being expressly prohibited by statute, there is also no common law third-party bad faith. See Elmore v. State Farm Mut. Auto. Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998). In Elmore, this Court stated,

there is simply nothing to support a common law duty of good faith and fair dealing on the part of insurance carriers toward third-party claimants. We therefore decline to expand our prior holdings regarding common law bad faith claims to allow third parties to bring an action against the insurance carrier of another.

Id. at 434. This Court has stated further, “[o]ur holding here places us squarely in line with the overwhelming weight of authority on this issue. In fact, it appears that if we were to recognize a cause of action for third-party common law bad faith, we would be the only jurisdiction so to do.” Id. While it is clear that the Respondents/Plaintiffs are attempting to use the West Virginia Human Rights Act and not common law to bring this action against State Auto Insurance Company, Elmore, coupled with West Virginia Code § 33-11-4a, shows this State's prohibition toward third-party bad faith actions. Elmore shows that an insurance carrier cannot just be sued for bad faith based upon a plaintiff's whim. Further, the Respondents/Plaintiffs are essentially requesting that this Court create a common law third-party bad faith private cause of action

under the West Virginia Human Rights Act and this Act was clearly not intended for alleged unfair insurance settlements. Moreover, even if it was, West Virginia Code § 33-11-4a expressly provides the sole exclusive remedy.

It is abundantly clear that there is *no private cause of action for third parties claiming unfair settlement practices* and unfair settlement practices include instances of discrimination. W. Va. Code §§ 33-11-4a(a), 33-11-4. The Respondents/Plaintiffs are attempting to use the West Virginia Human Rights Act as a “backdoor” method of bringing a third-party bad faith claim in West Virginia which is against all public policy and West Virginia Code § 33-11-4a. Under the Respondents/Plaintiffs’ reasoning, there are no individuals who would be prohibited by West Virginia Code § 33-11-4a from bringing a third-party bad faith action in this state’s Courts by stating that the reasons behind the alleged bad faith were somehow related to some protected characteristic under the West Virginia Human Rights Act as the Act protects the handicapped, those with other disabilities, the aged, minority ethnic and racial groups and gender. Therefore, applying the Respondents/Plaintiffs’ logic, a person who is old, any member of a minority racial or ethnic group, female, person with a disability or a handicap, or person with HIV or AIDS or person living in public housing could simply proclaim to be a member of one of these groups and use the West Virginia Human Rights Act to create a third-party bad faith cause of action despite the fact that third-party bad faith actions or any similar types are *expressly* prohibited by West Virginia Code § 33-11-4a. Essentially, the Respondents/Plaintiffs’ cause of action would render West Virginia Code § 33-11-4a null and void, and the West Virginia Human Rights Act would become the “new third-party bad faith” statute. Such an interpretation cannot stand.

The Respondents/Plaintiffs have attempted to disguise their bad faith cause of action within West Virginia Code § 5-11-9(7)(A)¹ which provides a general “catch-all” in the West Virginia Human Rights Act which prohibits

any person... [from] engage[ing] in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section.

C. Even if West Virginia Code § 33-11-4a Did Not Expressly Exclude Plaintiffs’ Cause of Action, The Rules Of Statutory Construction Lead To The Conclusion That Such Claims Are Barred.

Though this Defendant vehemently denies that the West Virginia Human Rights Act can be used by an unhappy insurance claimant to bring a third-party bad faith claim disguised as a Human Rights claim as it is expressly prohibited by West Virginia Code § 33-11-4a, to the extent that this Court feels that West Virginia Code § 5-11-9(7)(A) and West Virginia Code § 33-11-4a are in conflict and cannot be reconciled, the rules of statutory interpretation of conflicting statutes must be applied.

First, the Court should adopt the plain meaning of a statute if it is clear and unambiguous. State v. Williams, 196 W.Va. 639, 474 S.E.2d 569 (1996). Further, the Court should “avoid a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” State v. Kerns, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990). However, in interpreting conflicting statutes, the Court must first attempt to harmonize the statutes. Stanley v. Department of Tax and Revenue, 217 W. Va. 65, 614 S.E.2d 712 (2005). The West Virginia Supreme Court of Appeals stated,

¹ The Plaintiffs’ Complaints cite West Virginia Code § 5-11-9(A). However, upon review of the statute and this Defendant’s belief, the Respondents/Plaintiffs were referring to West Virginia Code § 5-11-9(7)(A).

A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

State v. Snyder, 64 W.Va. 659, 63 S.E. 385 (1908). The West Virginia Supreme Court of Appeals also stated, “where two distinct statutes stand in *pari materia*, and sections thereof are in irreconcilable conflict, that section must prevail which can properly be considered as the last expression of the law making power” State ex rel. Pinson v. Varney, 142 W.Va. 105, 109, 96 S.E.2d 72, 74 (1956). Specific statutes govern over general statutes. Carvey v. W. Va. State Bd. of Ed., 206 W.Va. 720, 731, 527 S.E.2d 831, 842 (1999). A Court should not limit its reading of the statutes to one section, but must look at the Act in its entirety in order to determine the legislative intent. See Albright v. White, 202 W.Va. 292, 503 S.E.2d 860 (1998).

In the instant matter, West Virginia Code § 5-11-9(7)(A) and West Virginia Code § 33-11-4a do not deal with the same subject matter, are wholly self contained, were enacted at entirely different periods of time, and can be effortlessly reconciled. West Virginia Code § 5-11-9(7)(A) clearly deals with discriminatory practices in housing, employment and places of public accommodation, not insurance settlements. See West Virginia Code § 5-11-2. Though Respondents/Plaintiffs meekly attempted to assert that this was a “housing” issue, such an argument is tenuous. The Respondents/Plaintiffs are clearly attempting to bring an action based on a perceived unfair insurance settlement. The convenient fact that the settlement happened to deal with the Respondents/Plaintiffs’ housing cannot change the fact that this is an unfair settlement case. On the other hand, West Virginia Code § 33-11-4a plainly prohibits third-party

actions by plaintiffs feeling that an insurance company did not deal with them fairly, *for whatever reason*. It does not carve out an exception allowing for third-party bad faith actions based on alleged motivations of the insurance companies for their actions.

The two statutes are not in conflict and do not deal with the same subject matter because settlement with an insurance company in no way relates to equal opportunity in housing, employment or places of public accommodation. Allowing the Respondents/Plaintiffs' action to continue will have severe consequences for West Virginia Code § 33-11-1, *et seq.* as the statute that was enacted for the purpose of dealing with unfair claims settlement practices by insurance companies will be usurped by a completely separate and unrelated area of statutory law.

If Respondents/Plaintiffs' claim stands, insurance companies will be defending third-party bad faith actions under the pretext of the West Virginia Human Rights Act and this was clearly not the intent of the Legislature in enacting the West Virginia Human Rights Act or the Unfair Insurance Claim Settlement Act. The Unfair Insurance Claim Settlement Act expressly gives insurance companies the guidance they need to avoid liability in their handling of claims. If the West Virginia Human Rights Act is now used to bring actions against insurance companies, what will be their guidance as the West Virginia Human Rights Act is so completely inapplicable to the unique world of insurance claims management? This action would open a flood of baseless litigation which the West Virginia Legislature has already determined is prohibited in this State and has fully dealt with in a separate area of statutory law. The Respondents/Plaintiffs simply cannot use an irrelevant and inapplicable but "convenient" statute to bypass the relevant and applicable statute which bars their claim. The implications of the Respondents/Plaintiffs' proffered cause of action are grave.

State Auto Insurance Company has nothing to do with the housing of the Respondents/Plaintiffs, aside from insuring the separate and independent company which was involved with the heating/cooling system at a public housing facility, State Auto Insurance Company is not the Respondents/Plaintiffs' employer and State Auto Insurance Company is not a place of public accommodation. Therefore, under no reading of the West Virginia Human Rights Act is it in any way in conflict with West Virginia Code § 33-11-1, *et seq.* as West Virginia Code § 33-11-1, *et seq.* clearly and expressly deals with the exact type of action the Respondents/Plaintiffs are attempting to bring while the West Virginia Human Rights Act has nothing to do with insurance settlements, but deals with discrimination in the areas of housing, employment and places of public accommodation. The Respondents/Plaintiffs cannot ignore the "Declaration of Policy" found in West Virginia Code § 33-11-2 while relying on one tiny general provision in West Virginia Code § 5-11-9.

However, to the extent that this Court feels that these two statutes do stand *in pari materia*, West Virginia Code § 33-11-4a should be applied rather than the West Virginia Human Rights Act. First, West Virginia Code § 33-11-4a was enacted in 2005. The most recent amendment made to West Virginia Code § 5-11-9 was in 1998. Further, no statute in West Virginia Code Chapter 5, Article 11 has been amended since 2001. Therefore, the statute which was most recently enacted by the West Virginia Legislature was West Virginia Code § 33-11-4a. The West Virginia Legislature was aware that the West Virginia Human Rights Act existed at the time it enacted West Virginia Code § 33-11-4a and was clear that a "third-party claimant may not bring a private cause of action or *any other action* against any person² for an unfair claims

² "Person includes an individual, company, insurer, association, organization, society, reciprocal, partnership, syndicate, business trust, corporation or any other legal entity." W. Va. Code § 33-1-3.

settlement practice.” (emphasis added). It provided for no exceptions for Respondents/Plaintiffs’ theory of their case.

Also, West Virginia Code § 33-11-4a is extremely specific in its prohibition against the very type of lawsuit the Respondents/Plaintiffs are attempting to place before this Court. West Virginia Code § 33-11-4 clearly defines discriminatory practices by insurance companies as unfair settlement practices and West Virginia Code § 33-11-4a clearly prohibits a third-party claimant from bringing a private cause of action against an insurance company for unfair settlement practices. These statutes are clear, unambiguous and specific. The section of the West Virginia Human Rights Act that the Respondents/Plaintiffs would have this Court adopt as a new path to the Courts for bad faith actions is broad and generic and does not remotely relate to insurance settlements. The specific prevails over the general, so again, West Virginia Code § 33-11-4a should be applied.

IV. CONCLUSION

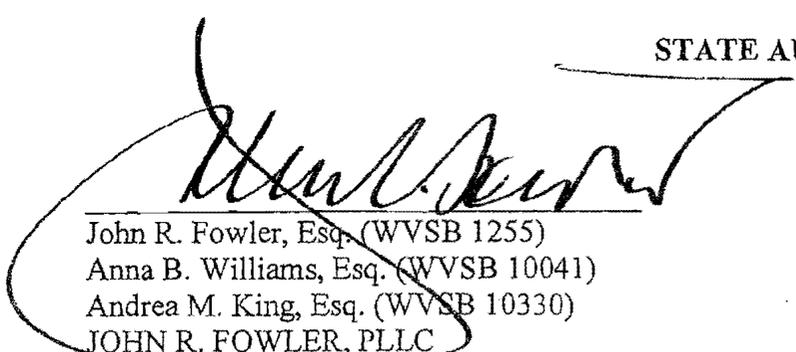
The circuit court answered the certified question incorrectly. The Respondents/Plaintiffs’ Complaint, while imaginative, is expressly prohibited under West Virginia Code § 33-11-4a. A Court should not interpret a clear and unambiguous statute. It would be, no doubt, absurd, if these Respondents/Plaintiffs are permitted to override the West Virginia Legislature’s bar on third-party bad faith claims and to create a brand new cause of action in this state which has already been expressly prohibited by the West Virginia Legislature. If the Respondents/Plaintiffs, and the counsel who represented them throughout the negotiations, felt the settlement offered to them was unfair, Respondents/Plaintiffs could have simply refused to

settle and instituted a civil action against Appalachian Heating, LLC. Or, the Respondents/Plaintiffs could have followed the procedure given in West Virginia Code § 33-11-4a and filed an administrative complaint. Instead, the Respondents/Plaintiffs, while represented by counsel, chose to settle with Appalachian Heating, LLC, execute a valid release of all claims against Appalachian Heating, LLC and then attempt to bring a third-party bad faith action against State Auto Insurance Company under the guise of a Human Rights case. Such actions should not be tolerated by this Court and are not within the spirit of either the West Virginia Human Rights Act or West Virginia Code § 33-11-1, *et seq.*

Accordingly, State Auto Insurance Company urges this Court to adopt its position and reverse the circuit court's ruling on the certified question now before the Court.

STATE AUTO INSURANCE COMPANY

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v.

Civil Action No. 07-C-2616
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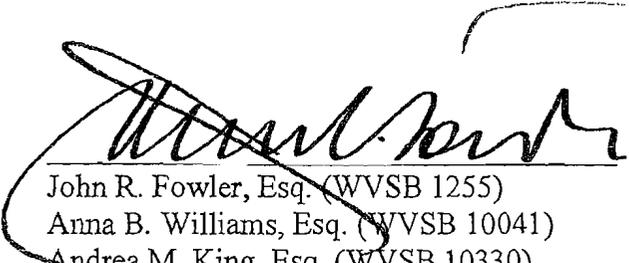
Respondents/Plaintiffs Below.

CERTIFICATE OF SERVICE

The undersigned counsel for State Auto Insurance Company does hereby certify that the foregoing "Certified Question from the Circuit Court of Kanawha County, West Virginia" was served on the following this day by mailing, postage prepaid, true copies thereof in an envelope addressed as follows:

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this 22ND day of June, 2009.


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