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~~No. 04745~~

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

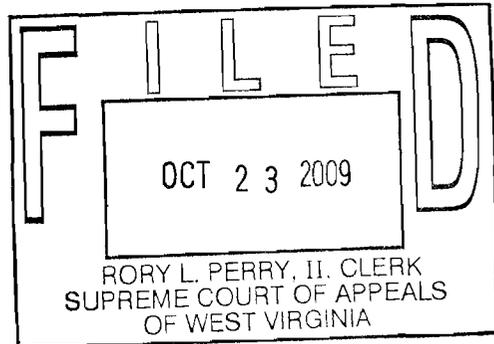
STATE AUTO INSURANCE COMPANY,

Petitioner/Defendant Below,

v.

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

Respondents/Plaintiffs Below.



**DORIS MICHAEL and TODD BATTLE, by his Next Friend, Doris Michael and  
KITRENA MICHAEL RESPONSE BRIEF ON CERTIFIED QUESTION**

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## I. INTRODUCTION

Pursuant to this Court's Order entered on September 11, 2009<sup>1</sup>, the respondents Doris Michael and Kitrena Michael submit this brief on the Question of Law to be answered in the Order of Certification to the Supreme Court of Appeals of West Virginia in *DORIS MICHAEL and TODD BATTLE, by his Next Friend, Doris Michael v. APPALACHIAN HEATING, LLC AND STATE AUTO INSURANCE COMPANY, Civil Action No. 07-C-2617 (Circuit Court of Kanawha County, April 23, 2009) (Order of Certification is attached as **Exhibit A**)*

For the following reasons, this Court should find that a plaintiff may present a cause of action against a tortfeasor's insurance carrier pursuant to the **West Virginia Human Rights Act, West Virginia Code 5-11-9(7)(A)**, when it is alleged that a tortfeasor's insurance carrier discriminated against the plaintiff because they are African American and reside in public housing. First, the term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate. **W.Va. Code 5-11-3 (h)**. It is undisputed that Kitrena Michael, Doris Michael and Todd Battle are members of a protected class under the West Virginia Human Rights Act as they are black and reside in public housing.

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1. This Court's briefing schedule requires Respondent's brief to be filed 30 days from receipt of Petitioner's Brief. Respondent was notified on September 25, 2009 that the Petitioner intended to rely on its original filing with this Court as its "brief for arguing this matter." Hence, Respondents' brief is due on October 26, 2009.

Second, the Legislature has declared it "the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property." **West Virginia Code § 5-11-2 (Supp.1984)**. In defining the parameters of this fundamental concept of equal opportunity, the Legislature has stated that "equal opportunity" is the "human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap" to employment, housing, and public accommodations. **Id**

Third, a motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. **West Virginia Canine College, Inc. v. Rexroad**, 191 W.Va. 209, 444 S.E.2d 566 (1994). If there is a plausible reading of facts that gives rise to colorable legal argument, plaintiff meets its burden in resisting a motion to dismiss for failure to state a claim upon which relief can be granted.

Finally, and despite the defendant, State Auto's proclamation that it and the insurance industry are immune from the fundamental core principles outlined by the United States Constitution, there is nothing in the revised version of the Unfair Claims Practices Act enacted in 2005 supporting such a declaration. The forceful language used by the Legislature in the West Virginia Human Rights Act mandates the eradication of unlawful discrimination. If this mandate is to be carried to fruition the provisions of the

1967 Human Rights Act and the amendments thereto it must be given the significance intended so as to provide for meaningful enforcement.

## **II. STATEMENT OF THE CASE**

### **a. Doris Michael and her children**

For more than ten (10) years, Doris Michael and her children made their home at 671 South Park Road, Charleston, West Virginia. Doris always felt comfortable and safe in her home and was very proud of the lifestyle she managed to provide for herself and her children. Doris, a single mother, never looked to others for assistance and always managed to successfully raise her children on her own. Doris is employed as a Day Habitation Trainer with ARC of the Three Rivers. She works overtime when available to make ends meet for her family. The home in which Doris and her children reside is provided by the Kanawha-Charleston Housing Authority to low-income families in need of assistance. Doris and her children, Todd Battle and Kitrena Michael are African American.

Todd Battle is an excellent student at George Washington High School in Charleston, West Virginia and is a starting offensive and defensive lineman for the George Washington High School Patriots. Todd is an integral part of the success of the football program which is seeking its second State Title run in as many years. Todd's dream is to be granted a Division 1-A Football Scholarship.

Kitrena Michael is the daughter of Doris Michael and the older sister of Todd Battle. Both children have always resided with their mother. Kitrena is a high school graduate and was employed in the cosmetic department of MACY's located in the Charleston Town Center Mall at the time of the fire giving rise to the allegations set forth herein. Clearly, the plaintiffs are productive members of the community and take pride in themselves, their home and their community.

**b. The Fire**

On the morning of November 21, 2006, Kitrena Michael awoke and immediately detected an odor of smoke in the home she shares with her mother, Doris Michael and her younger brother, Todd. Kitrena immediately reported the smell of smoke to the workers associated with defendant, Appalachian Heating, LLC. Ms. Michael's complaints were rebuffed by the Appalachian Heating employees and she was advised that she had nothing to worry about. Shortly thereafter, a friend of Kitrena visited and also detected the odor of smoke. A second inquiry was made of the workers with Appalachian Heating regarding the smell of smoke. The workers again advised Kitrena and her friend that everything was fine and that she should merely go on to work. Believing the workers knew their job and following their advice, Kitrena Michael went to work at her job at Macy's Department Store in the Charleston Town Center Mall.

Around 6:30 p.m. and while on her way home from work, Kitrena received a call from a neighborhood friend who was crying and screaming into the phone. Kitrena was finally able to discern from the frantic screams that her house was on fire. Kitrena was on the KRT bus at the time she received the call and told her friend she would be there as soon as possible. In the meantime, the bus driver pulled to the side of the road and Kitrena got off of the bus and took a taxi-cab to her home. When Kitrena arrived in South Park, the road was blocked with emergency vehicles and the taxi cab was unable to drive into her neighborhood. Kitrena exited the cab at Chesterfield Avenue and ran the rest of the way to her home. The fire was already extinguished when Katrina arrived. All that remained was a home in ruins and a crowd of dumbfounded neighbors and friends.

It is uncontroverted that on the day of the fire, Appalachian Heating, LLC undertook to install and or repair heating and/or cooling units in a Charleston-Kanawha Housing Authority development known as South Park Village. Appalachian Heating, LLC was hired by the Charleston-Kanawha Housing Authority. During the course of the replacement and/or repair of the heating and cooling unit by Appalachian Heating and Cooling LLC, copper piping inside the kitchen wall of the Michael residence was cut and/or damaged with a torch. As the direct result of Appalachian Heating LLC's actions, the inside of the plaintiffs' kitchen wall was ignited and eventually erupted into a fire inside the residence. The eruption of the fire caused extensive fire, smoke and eventual water damage to the home. Furthermore, the fire, smoke and water damage rendered the the home uninhabitable and Doris Michael and her children homeless. Finally, as direct and

proximate result of Appalachian Heating, LLC's acts, the Michael family suffered loss of use of their home, inconvenience, annoyance and aggravation, and mental anguish associated with the loss of their home.

Finally, the devastating fire occurred only a few days before Thanksgiving. At the time of the fire, Doris Michael was actually in Michigan visiting her sister for the Thanksgiving Holidays. Due to Kitrena's employment commitments with Macy's, she was not able to make the trip to Michigan. Kitrena Michael intended to spend Thanksgiving at home with some special friends and extended family. However, and needless to say, the fire left the entire Michaels family homeless and heartbroken for the holidays.

**c. Life after the Fire**

Following the fire, Doris and her children were literally without a roof over their head. The family relied on the kindness and charity of their Church and friends for food, shelter and clothing. After having nowhere to live for nearly a week, Doris and her children were provided alternative housing by Charleston Housing Development Authority. The apartment where they were placed by the Charleston Housing Development Authority was on the top of a hill in the South Park neighborhood. It was necessary to climb a significant number of steps to get to the apartment. Climbing the stairs was very difficult for Doris Michael as she was always weighted down with multiple

necessities she needed for the small empty apartment where she and her children were forced to live.

Once in the small apartment, Doris and her children slept on used mattresses placed on the floor. The family literally had no furniture, very little food and only the clothes on their backs. The Evangelist from their Church gave Doris and the children a small amount of money and some used clothing to assist them shortly after the fire. It was a very, very difficult situation for Doris and her children. The shock and grief associated with the total loss of their home was virtually impossible to overcome.

Doris Michael, and her children, Todd and Kitrena Michael remained out of their home for the next 113 days. This time frame included significant holidays such as Thanksgiving, Christmas, New Years and even Kitrena's birthday. Doris Michael describes her family's Thanksgiving as "horrible" and uses the same words to describe the Christmas holiday as the family was in a cramped, barely furnished apartment at Christmas.

Following the fire, Doris and her children endured a tremendous amount of stress. Todd suffered from frequent nightmares. In fact, Doris Michael lost her hair due to the stress associated with losing her home. Doris lost count of the sleepless nights due to the worry and stress associated with the loss of a family's home. Further, Todd Battle has severe asthma and must utilize nebulizer during an asthma attack. Following the

fire, Todd began to have frequent bouts of asthma due to the stress of the losing his home.

Following the fire, Doris struggled to rebuild her home and to put her family back together. Over the course of the next 15 months Doris has tried in vain to return her life and that of her children to some sense of normalcy. As Doris attempted to deal with the extreme stress associated with the loss of her home, she continually found herself seeking recourse from her physicians. Specifically, Doris Michael experienced stress induced bronchitis, weight loss and hair loss. She relied heavily on emotional support from her Church family as well as close friends and neighbors.

Clearly, Doris Michael and her children were entitled to be fairly and reasonably compensated for the aggravation and inconvenience associated with being displaced from their home. Likewise, Doris Michael and her children were entitled to be compensated for the mental anguish and emotional distress associated with being displaced from their home. Finally, Doris Michael was entitled to be fairly and reasonably compensation for the mental anguish she experienced in trying to comfort her children who were devastated by the literal extinguishment of their home and lives.

**d. Liability for causation of the fire**

Neither Appalachian Heating, LLC. or State Auto Insurance Company has denied responsibility for starting the fire at the Michaels home. However, from the installation of the heating and cooling system by the defendant, Appalachian Heating, LLC to the final failure to acknowledge the plaintiffs' losses by State Auto Insurance Company the Michael family were denied equal treatment because of their race and the fact that they reside in public housing. It should be noted that with the exception of one small stipend of \$2,500.00 paid in December of 2006, Doris Michael was not provided with a penny to put her life back together.

Incredibly, and despite the fact that the plaintiffs were rendered homeless, State Auto Insurance Company placed a value of Two-Thousand Five-Hundred Dollars (\$2,500.00) on Doris Michael and Todd Battle's general damages associated with the total destruction of their lives as they knew them. This would include damages for:

- The shock and grief associated with the total loss of their home;
- damages for being displaced from their home for 113 days including Thanksgiving, Christmas, New Years and even Kitrena's birthday;
- damages for frequent nightmares and asthma attacks suffered by Todd Battle;
- damages for Doris Michael's hair and weight loss due to the stress associated with losing her home;

- damages for the medical treatment sought for the stress induced bronchitis;
- aggravation and inconvenience associated with being displaced from their home;
- mental anguish and emotional distress associated with being displaced from their home;
- mental anguish experienced in trying to comfort her children who were devastated by the literal extinguishment of their home
- mental anguish experienced by Todd Battle for the loss of the only photographs of his father who died when Todd was two years old

After “evaluating” the Michaels loss and the requisite damages, State Auto clearly placed a “value” which could only be described a discriminatory in nature. The offer of Two Thousand Five Hundred Dollars (\$2,500.00) cannot be described as anything but discriminatory. The defendant, State Auto Insurance Company informed the plaintiffs that loss of their home and the total displacement from their home along with the damages flowing there from has no value. ***It should be noted that State Auto Insurance Company made no offer whatsoever to Kitrena Michael for the loss of her home and all of the damages associated with her loss as outlined above.***

The Respondents had absolutely no control of or input into the selection of the installer for the heating and cooling system in their home. The entire selection process was controlled by the Charleston-Kanawha Housing Authority who contracted with Appalachian Heating, LLC to install and/or repair various heating and cooling units in

South Park Village, Charleston, West Virginia. Further, the respondents had no control over the selection of the insurance carrier for any of the parties involved herein from the Charleston-Kanawha Housing Authority to Appalachian Heating, LLC.

Additionally, when the initial complaint was made by Kitrena Michael and then Kitrena and her friend, both African American, about the smell of smoke they were treated with total disrespect by the employees of Appalachian Heating, LLC. Kitrena Michael and her friend were cordial in making the inquiry about the smell of smoke and in the expression of their genuine concern. However, they were basically told to mind their own business, stay out of the way and to go about what they were doing. It is uncontroverted that the fire loss that occurred at the home of Doris Michael was solely related to the negligence of Appalachian Heating, LLC. It is uncontroverted that State Auto Insurance provided a General Liability policy of insurance to Appalachian Heating, LLC wherein it provided insurance coverage for, among other things, actions by Appalachian Heating, LLC and its employees and agents arising from negligence and resulting in injury and damages to others. It is also uncontroverted that State Auto Insurance Company did not give the plaintiffs the same opportunity and consideration when evaluating their loss and damages as it extends to those persons not of African American descent and who do not reside in public housing and that the Michael family was treated with utter disrespect from the time the initial complaint regarding the smell of smoke was made through and including the purportedly conclusion of the fire loss claim.

### III. STATEMENT OF THE CERTIFIED QUESTION

Pursuant to the Uniform Certification of Questions of Law Act, **W.Va. Code 58-5-2** the Kanawha County Circuit Court has formulated the Question of Law to be answered as follows:

*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 5-11-9(7)(A), when it is alleged that a tortfeasor's insurance carrier discriminated against the plaintiffs because they are African American and reside in public housing?*

*Circuit Court: Yes*

### IV. DISCUSSION

#### A. Standard of Review

This Court consistently applies a de novo standard of review in addressing the legal issues presented by certified questions. See, **Aiken v. Debow**, 208 W.Va. 486, 541 S.E.2d 576 (2000). This Court, however, reviews only issues of law *de novo*, not issues of fact. This matter rises from the sufficiency of a complaint on a Rule 12(b)(6) motion and this Court should proceed as though all the facts set forth in the underlying complaint are true. In other words, a motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. **West Virginia Canine College, Inc. v. Rexroad**, 191 W.Va. 209,

444 S.E.2d 566 (1994). If there is a plausible reading of facts that gives rise to colorable legal argument, plaintiff meets its burden in resisting a motion to dismiss for failure to state a claim upon which relief can be granted.

**B. Statute Violation Committed By The Defendant**

The **West Virginia Human Rights Act** states in pertinent part as follows:

**§ 5-11-2. Declaration of policy**

It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

It is Todd Battle and Doris and Kitrena Michael's contention that State Auto Insurance Company did not give their fire loss claim the same opportunity and consideration when evaluating their loss and damages it extends to those persons not of African American descent and who do not reside in public housing. Assuming the same to be true, the defendant has unequivocally violated the **West Virginia Human Rights Act** which expressly prohibits discrimination based on race or the fact that a person resides in public housing. The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate. **W.Va. Code 5-11-3 (h)** Kitrena Michael, Doris Michael and Todd Battle are members of a protected class under the West Virginia Human Rights Act as they are black and reside in public housing.

This Court has routinely held that "a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the court but will be given full force and effect. **Kasserman & Bowman, PLLC v. Cline**, 223 W.Va. 414, 675 S.E.2d 890 (2009) (quoting **State v. Epperly**, 135 W.Va. 877, 65 S.E. 2d 488 (1951). See also, **State ex rel. Daye v. McBride**, 222 W.Va. 17, 658 S.E.2d 547 (2007) (holding that "where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation). Accordingly, the Court has recently recognized:

**The plain meaning of a statute is normally controlling, except in the rare case in which literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. In such case, it is the legislative intent, rather than the strict language, that controls.**

**Worley v. Beckley Mech. Inc.** 220 W.Va. 633, 648 S.E.2d 620 (2007)

In this action, the clearest expression of the Legislature's intent can be found within the statute itself. Here the Legislature specifically declared it "the public policy of the State of West Virginia to provide all of its citizen's equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property." **West Virginia Code § 5-11-2 (Supp. 1984)**. In defining the parameters of this fundamental concept of equal opportunity, the Legislature has stated that "equal opportunity" is the "human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap" to employment, housing, and public accommodations. **Id.**

This concept of equality is so basic to our system of government, that the Legislature has declared, "The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness or handicap is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." **Id.** Therefore, every act of unlawful discrimination in employment, housing, or public accommodations is akin to an act of treason, undermining the very foundations of our democracy.

This fundamental concept of equal opportunity is also reflected in several Constitutional provisions. First, **West Virginia Constitution Art. III, § 1** states the basic principle on which our entire democratic structure is founded:

**All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their prosperity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.**

Second, **West Virginia Constitution art. III, § 3** provides, "Government is instituted for the common benefit, protection and security of the people, nation or community." Third, **West Virginia Constitution Art. III, § 10** provides, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his [174 W.Va. 149] peers." Fourth, **West Virginia Constitution Art. III, § 17** provides, "The courts of this State shall be open, and every person; for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." Finally, **West Virginia Constitution Art. III, § 20** provides, "Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles." Equal opportunity in this State is a fundamental principle which has its foundation in these constitutional provisions. The Human Rights Act breathes life into these constitutional

provisions which mandate equal opportunity, imbuing administrative procedure before the Human Rights Commission with the same constitutional aura attendant to any other procedure which can culminate in a judicial proceeding. **Allen v. State, Human Rights Com'n**, 174 W.Va. 139, 324 S.E.2d 99 (1984)

Despite the defendant, State Auto's proclamation that it and the insurance industry are immune from the fundamental core principles outlined by the United States Constitution, there is nothing in the revised version of the **Unfair Claims Practices Act** enacted in 2005 supporting such a declaration. The forceful language used by the Legislature in **West Virginia Code § 5-11-2 (Supp.1984)** mandates the eradication of unlawful discrimination. If this mandate is to be carried to fruition the provisions of the **1967 Human Rights Act** and the amendments thereto must be given the significance intended so as to provide for meaningful enforcement.

Undeniably, it is the public policy of the State of West Virginia to provide all of its citizen's equal opportunity in **housing accommodations** and/or real property and that it is a human right or a civil right of all citizens not to be discriminated against because of race or the fact that they reside in public housing. It is also the public policy of the State of West Virginia to provide all of its citizen's freedom from degradation, embarrassment and/or economic loss due to race or the fact that you reside in public housing. The discrimination of Kitrena Michael, Doris Michael and Todd Battle because of their race and/or the fact that they reside in public housing is contrary to the principles of freedom

and equality of opportunity and is destructive to a free and democratic society. West Virginia Human Rights Act, **West Virginia Code 5-11-2**.

State Auto Insurance Company, Inc. and its agents, representatives, employees are persons as defined by **Chapter 5, Article 11, and Section 9((7)(A))** of the West Virginia Code and are bound to comply with the mandates of the West Virginia Human Rights Act. State Auto Insurance Company is vested with the duty to fairly and reasonably evaluate, adjust and pay the damage claims of Kitrena Michael, Doris Michael and Todd Battle, arising out the fire loss regardless of their race or the fact that they reside in public housing and failure to do so gives rise to a violation of the West Virginia Human Rights Act.

**C. The Michaels family does not seek remedy nor relief pursuant to the West Virginia Code 33-11-1, et seq. nor have they pled a common law cause of action as third party claimants**

While the Respondents admit that West Virginia legislature “eliminated a private cause of action for third parties claiming unfair settlement practices”, the Michael family has not pled a “third party claim” under the “unfair settlement practices act” as suggested by State Auto Insurance Company. Contrary to State Auto’s argument, the **Michael Complaint** is completely void of any language which would give rise to a third party cause of action as defined by **West Virginia Code 33-11-1 et seq.** and does not seek any remedy nor relief found therein.

Specifically, the opening paragraph of the **Michaels' Complaint** states as follows:

*That the plaintiffs, Doris Michael and Todd Battle, institute these proceedings and invokes the jurisdiction of this Court to obtain legal and/or equitable relief as the Court deems appropriate, including general and punitive damages, as well as an award of reasonable attorney fees and costs all arising from defendant, State Auto Insurance Company's discrimination against the plaintiffs, Kitrena Michael, Doris Michael and Todd Battle in violation of the "West Virginia Human Rights Act"(hereinafter W.Va. Human Rights Act), Chapter 5, Article 11, et seq., West Virginia Code.*

The numbered paragraphs that follow thereafter unequivocally set forth fact after fact after fact that outline the discriminatory conduct of State Auto and its agents and representatives. The Michaels' claims have been plainly and succinctly pled as an unequivocal race and public housing discrimination case and neither the United States Constitution, West Virginia Constitution, common law, case law nor statutory law **give insurance companies immunity** as it relates to race discrimination and public housing discrimination. Finally, the averments set forth in the Michaels complaint must be considered true for purposes of considering a motion to dismiss i.e. that State Auto Insurance Company did engage in discriminatory acts based on race and residence public housing in the handling of the Michaels' fire loss claim. **West Virginia Canine College, Inc. v. Rexroad**, 191 W.Va. 209, 444 S.E.2d 566 (1994). State Auto Insurance Company has not and did not deny the averments set forth in the Michaels' complaint but filed a Motion to Dismiss merely stating that the "plaintiffs' fails to state a claim upon which relief can be granted."

Contrary to State Auto's argument that the Michaels' family is "attempting to use the West Virginia Human Rights Act as a 'backdoor' method of bringing a third party bad faith claim", this Court will note that the respondents' complaint is completely void of any facts or theories claiming a violation of the **Unfair Claims Practices Act**. In fact, instead of using a "backdoor method" as described by State Auto Insurance, the respondents are walking through the front door provided by the **West Virginia Human Rights Act** and are seeking protection against those persons who violate it and particularly those persons who admittedly violate it – and say there is nothing you can do about it!

Although State Auto Insurance Company is not now permitted to deny the averments set forth in the Michaels complaint, i.e. it did engage in discriminatory acts based on race and residence public housing in the handling of the Michaels' fire loss claim, State Auto argues that an unfair settlement practice could include "discrimination" and specifically points to **West Virginia Code 33-11-4(7) (a) and (b)**. State Auto points to acts set forth under **Subsection (7) of the Unfair Trade Practices Act** which prohibits in pertinent part

- “(a) 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 there under, 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 there for. This paragraph shall not apply as to any premium or premium rate in effect pursuant to article twenty of this chapter.

Clearly, the language set forth in **West Virginia Code 33-11-4(7)(a)(b)(c)** does not remotely address the discriminatory acts prohibited under the West Virginia Human Rights Act but instead address the setting of premium rates for different types of insurance. In the instant case, the Respondents' claims do not involve allegations of discriminatory insurance rates for people in the "same class" with "equal expectation of life" differently. Instead, the Respondents' cause of action centers around pure, unadulterated race and public housing discrimination, i.e. the type of discrimination that is destructive to a free and democratic society and the type of discrimination that is strictly prohibited by well established law. West Virginia Human Rights Act, **West Virginia Code 5-11-2**.

#### **D. CONCLUSION**

It is the public policy of the United States of America and the great State of West Virginia to provide equal opportunity" and it is the "human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap" to employment, housing, and public accommodations. West Virginia Human Rights Act, **West Virginia Code 5-11-2**. Furthermore, it is well established that public policy prohibits any person from engaging in any form of threats or reprisal, or to engage or 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 as defined by the West Virginia Humans Rights Act. **West Virginia Code 5-11-9(7)(A)**.

The cardinal rule of statutory construction and interpretation is to give effect to the intention of the Legislature. **Anderson v. State Workers Comp. Comm'r**, 174 W.Va. 312, 305 S.E.2d 268 (1983). The Legislative intent found in the West Virginia Human Rights Act could not be ascertained with more certainty. i.e. State Auto Insurance Company cannot engage in discriminatory acts based on race and residence in public housing in the handling a fire loss claim. When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts and in such case it is the duty of the courts not to construe but to apply the statute. **State v. Gen. Daniel Morgan post No. 548, Veterans of Foreign Wars**, 144 W.Va. 137, 107 S.E.2d 354 (1959).

**REQUEST FOR RELIEF**

For all the foregoing reasons, this Court should answer the Certified Question presented in the Affirmative effectively holding that a plaintiff may present a cause of action against a tortfeasor's insurance carrier pursuant to the West Virginia Human Rights Act, West Virginia Code 5-11-9(a), when it is alleged that a tortfeasor's insurance carrier discriminated against the plaintiffs because they are African American and reside in public housing.

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



**Cynthia M. Ranson - W.Va. State Bar ID #4983  
J. Michael Ranson - W.Va. State Bar ID #3017**  
Ranson Law Offices  
1562 Kanawha Blvd. East  
Post Office Box 3589  
Charleston, West Virginia 25336-3589  
(304)345-1990  
*Counsel for Respondents*

**No. 34745**

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

**STATE AUTO INSURANCE COMPANY,**

**Petitioner/Defendant Below,**

**v.**

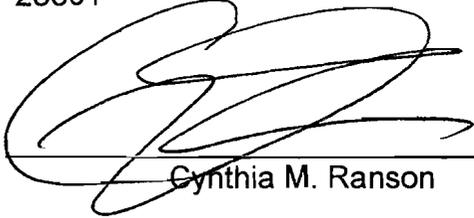
**DORIS MICHAEL and  
TODD BATTLE, by his  
Next Friend, Doris Michael and  
KITRENA MICHAEL,**

**Respondents/Plaintiffs Below.**

**CERTIFICATE OF SERVICE**

I, Cynthia M. Ranson, counsel for plaintiff, hereby certify that I have served a true and exact copy of the foregoing **DORIS MICHAEL And TODD BATTLE, By His Next Friend, Doris Michael And KITRENA MICHAEL RESPONSE BRIEF ON CERTIFIED QUESTION** on the Petitioners counsel of record via United States Mail on October 23, 2009 as follows:

**John R. Fowler, Esquire**  
500 Virginia Street, East, Suite 1190  
Charleston, WV 25301



Cynthia M. Ranson

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

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

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 07-C-2616  
JUDGE KAUFMAN  
(Consolidated w/ 07-C-2617)**

2009 APR 23 PM 3:31  
CATHY S. NEBOH, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**FILED**

**APPALACHIAN HEATING, LLC  
AND STATE AUTO INSURANCE COMPANY,**

**Defendants.**

**AGREED ORDER CERTIFYING QUESTION TO  
SUPREME COURT OF APPEALS OF WEST VIRGINIA  
PURSUANT TO WEST VIRGINIA CODE 58-5-2**

On a previous day, State Auto Insurance Company filed a motion to dismiss the Plaintiff's Complaint pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure arguing that Plaintiff's Complaint was barred by West Virginia Code § 33-11-4(a). Plaintiff responded to State Auto's Motion by stating that 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 against State Auto Insurance Company 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 based upon violation of the West Virginia Human Rights Act wherein it is

alleged that a tortfeasors' insurance carrier discriminated against the plaintiffs because they are African-American and reside in public housing.

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 as the issue deals with the sufficiency of the pleadings. Further, the Court is of the opinion that this issue is one of first impression and presents new and novel issues of law. Accordingly, the Court agrees that a certified question pursuant to West Virginia Code § 58-5-2 is appropriate.

**WHEREFORE**, it is hereby **ORDERED** that the following question, dealing with the sufficiency of a pleading pursuant to West Virginia Code § 58-5-2 be certified to the Supreme Court of Appeals of West Virginia:

*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 § 5-11-9(A), when it is alleged that a tortfeasors' insurance carrier discriminated against the plaintiffs because they are African-American and reside in public housing?*

Circuit Court: Yes.

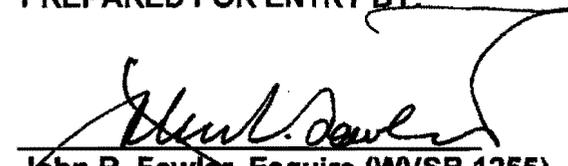
Dated this 23<sup>rd</sup> day of April 2009.

The Circuit Clerk shall send a certified copy of this order to counsel of record and transmit a copy of same to the Clerk of the W.Va. Supreme Court of Appeals. (gk)

Tod J. Kaufman  
Tod J. Kaufman Judge

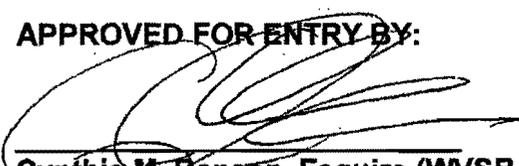
STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 23  
DAY OF April 2009.  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PREPARED FOR ENTRY BY:



**John R. Fowler, Esquire (WVSB 1255)**  
**Anna B. Williams, Esquire (WVSB 10015)**  
**Suite 4490 United Center**  
**500 Virginia Street, East**  
**Charleston, WV 25301**

APPROVED FOR ENTRY BY:



**Cynthia M. Ranson, Esquire (WVSB 4983)**  
**J. Michael Ranson, Esquire (WVSB 3017)**  
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**P.O. Box 3589**  
**Charleston, WV 25336**

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**RANSON**  
**LAW OFFICES**

P.L.L.C.

October 23, 2009

West Virginia Supreme Court of Appeals  
Rory Perry, Clerk  
1900 Kanawha Blvd. East  
Building 1, Room E-317  
Charleston, WV 25305

**Re: State Auto Insurance Company vs. Michael, et al.**  
No.: 34745

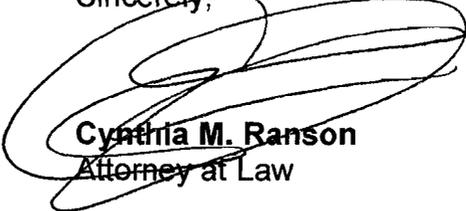
Dear Mr. Perry;

Enclosed for filing please find an original and nine (9) copies of the Respondent's Brief in the above captioned matter

Copies of the same have been provided to counsel of record.

If you have any questions please do not hesitate to call.

Sincerely,

  
**Cynthia M. Ranson**  
Attorney at Law

CMR/wsg  
CMR@Ransonlaw.com

cc. John R. Fowler, Esquire (Counsel for State Auto)

Enclosure: As described above