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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

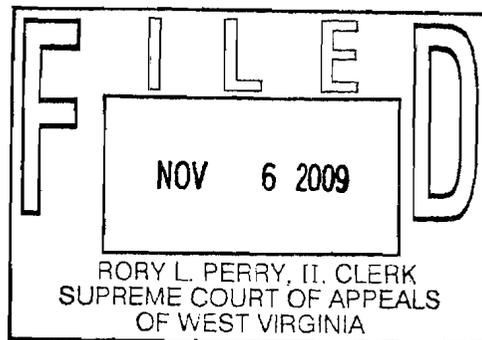
No. 35127

**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.

**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

**REPLY BRIEF OF THE PETITIONER,
STATE AUTO INSURANCE COMPANY**

Submitted by:
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MEMORANDUM

At the outset of this lawsuit, it must be remembered by this Court throughout the reading of all of the arguments of all of the parties that State Auto did not insure the Plaintiffs or their property at any time whatsoever. State Auto insured an alleged tortfeasor which caused a fire at the Plaintiffs' home. Also, State Auto unequivocally, completely, and vehemently denies that it engaged in any sort of discrimination based upon the Plaintiffs' African American descent, or their residing in public housing and finds such practices as repugnant as do the Plaintiffs. However, even if all of the allegations in the Plaintiffs' Complaint are taken as true, the Plaintiffs still have failed to state a claim upon which relief can be granted against State Auto.

I. The West Virginia Human Rights Act applies to discrimination in the areas of employment, places of public accommodations, and housing, and does not apply to alleged discrimination in adjustment of third-party insurance claim.

The Plaintiffs go to great lengths to mold their bad faith lawsuit against State Auto into a discrimination case pursuant to the West Virginia Human Rights Act. However, even if the Plaintiffs' claim is not barred by the exclusive remedy found in West Virginia Code § 33-11-4a which bars third-party bad faith actions for unfair claims settlement practices, the Plaintiffs' have still failed to state a claim upon which relief can be granted.

The Plaintiffs' own argument forecloses this lawsuit. When the Plaintiffs argue "the Legislature has declared it 'the public policy of the State of West Virginia to provide all citizens with equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in sale, purchase, lease, rental and financing of housing accommodations, or real property.' West Virginia Code § 5-11-2 (Supp. 1984)."

Plaintiffs' Brief at 3. Therefore, the inquiry can end here, State Auto is not the Plaintiffs' employer, a place of public accommodations, nor did it sell, purchase, lease, rent or finance any real property related to the Plaintiffs. Further the Plaintiffs' argument that

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 purported conclusion of the fire loss claim.

(Plaintiffs' Brief at 13) (emphasis added) is equally devastating to their claim as the West Virginia Human Rights Act does not cover actions for "consideration when evaluating loss and damages" and "treat[ment] with utter disrespect...including the purported conclusion of the fire loss claim."

Further, the Plaintiffs' extensive citation of the Constitution is equally unavailing as the constitution does not provide a cause of action in area of insurance adjusting.

State Auto does not contend that it is immune from the West Virginia Human Rights Act or the Constitutional mandates against discrimination. For instance, if State Auto employed the Plaintiffs and discriminated against them, then State Auto could be sued pursuant to the West Virginia Human Rights Act. If State Auto owned a mall, a hotel, a restaurant, or any other place of public accommodation, and discriminated against the Plaintiffs, then they could be sued under the West Virginia Human Rights Act. If State Auto sold, leased, rented, financed, or purchased any real property to or from the Plaintiffs and discriminated against them, then State Auto could be sued under the West Virginia Human Rights Act. However, absolutely nothing in the West Virginia

Human Rights Act allows for a lawsuit against a third-party insurance company for alleged discrimination in adjusting a claim.

The Plaintiffs' representation to this Court that Doris Michael and Todd Battle were only offered \$2,500.00 for their "general damages" is misleading. The Plaintiffs have been represented by counsel throughout this entire ordeal. In fact, the Plaintiffs' lawyer negotiated a property settlement with State Auto on behalf of all of the Plaintiffs and Doris Michael and Todd Battle were paid \$19,446.56 and Kitrena Michael was paid \$3,545.15. Obviously, State Auto adjusted the claim for the Plaintiffs' property to the Plaintiffs' satisfaction as this amount was unquestionably accepted and releases were signed which were prepared by Plaintiffs' counsel, on the property damages. The only remaining issue, and the reason this lawsuit is before this Court, is that the Plaintiffs believe they were offered too little money for their alleged "inconvenience and aggravation." State Auto has not offered an amount to Kitrena Michael for "inconvenience and aggravation." Again, the adjustment of this claim has nothing to do with the Plaintiffs' employment, a place of public accommodations, or the sale, purchase, lease, rental and financing of any real property to or from the Plaintiffs.

State Auto's position is not a narrow reading of the West Virginia Human Rights Act, but a true reading of the West Virginia Human Rights Act. It is true that the plain meaning of a statute must be given full force and effect, which is what State Auto would ask this Court to do. *State v. Williams*, 196 W.Va. 639, 474 S.E.2d 569 (1996). State Auto respectfully requests that this honorable Court apply "the plain meaning" of the West Virginia Human Rights Act to this Action and not distort and morph it into a

standard for insurance claims adjustment when the Legislature has already clearly established a scheme for insurance claims adjustment.

There is simply no valid claim that the Plaintiffs can bring against State Auto in this matter. The Plaintiffs contention that State Auto has violated the West Virginia Human Rights Act because it allegedly “did not give [the Plaintiffs’] fire loss claim the same opportunity or 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” and therefore, State Auto “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” (Plaintiffs’ Brief at 16) is simply inaccurate for two reasons. First, people who reside in public housing are not a protected class, and second, mere allegations of discrimination are not sufficient to state a cause of action under the West Virginia Human Rights Act. The discrimination must be related to the protected person’s place of employment, housing or public accommodation. “Consideration and evaluation” of an insurance claim falls under none of these categories.

The mere happening of a fire at the Plaintiffs’ home does not place this loss within the West Virginia Human Rights Act. The Act clearly contemplates “sale, purchase, lease, rental and financing of housing accommodations, or real property,” and none of these words can be construed to apply to adjusting and insurance claim which happens to be related to a property damage loss. For example, a landlord may not refuse to rent or lease, or charge higher rent for, an apartment to a member of a protected class based upon discriminatory reasons. A bank may not refuse to loan money to, or change the terms for, a member of a protected class based upon discriminatory reasons. A

person or entity may not refuse to sell or buy a piece of property to or from a member of a protected class for discriminatory reasons. None of these things has anything to do with adjusting an insurance claim. Construing the statute in the manner advanced by the Plaintiffs would allow any damage which befalls a person's home to be sued upon pursuant to the West Virginia Human Rights Act. This is simply not consistent with the letter or spirit of the Act.

II. The Unfair Trade Practices Act controls the Plaintiffs' lawsuit.

Despite the fact that the Plaintiffs contend that they do not seek relief pursuant to the Unfair Claims Practices Act, simply calling a claim "discrimination," does not mean that the claim does not fall under this act. The West Virginia Human Rights Act is not a "catch all" through which all members of a protected class may bring actions against any entity or person simply because they are members of that protected class. Throughout their brief, the Plaintiffs have alleged that State Auto "discriminated" against them in the "consideration and evaluation of their claim." Their claim is based upon their feeling that State Auto offered them less money than they feel deserved for "aggravation and inconvenience." This is clearly a claim based upon *insurance adjusting* and not one under the West Virginia Human Rights Act. And the West Virginia Unfair Claims Practices Act and the regulations arising out of that that Act clearly apply to insurance adjusting and would cover any grievances the Plaintiffs may have against State Auto.

The West Virginia Legislature eliminated private causes of action for third parties claiming unfair settlement practices 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.

Even if West Virginia Code § 33-11-4(7) deals with premiums, the West Virginia Unfair Trade Practices Act and the Regulations which were promulgated pursuant to that Act still apply to the claims of the Plaintiffs.

West Virginia Code § 33-11-4(9) deals with adjusting of insurance claims providing that an insurance company has committed bad faith for

(f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

The West Virginia Legislature and the West Virginia Insurance Commission provides standards and guidelines to all insurers to be considered when adjusting an insurance claim. 114 CSR 14 provides that “[n]o insurer may attempt to settle a claim by making a settlement offer that is *unreasonably low*.” This section goes on to state that “[t]he Commissioner shall consider any evidence offered regarding the following factors in determining whether a settlement offer is unreasonably low:

1. The extent to which the insurer considered evidence submitted by the claimant to support the value of the claim;
2. The extent to which the insurer considered legal authority or evidence made known to it or reasonably available;
3. The extent to which the insurer considered the advice of its claims adjuster as to the amount of damages;

4. The extent to which the insurer considered the opinions of independent experts;
5. The procedures used by the insurer in determining the dollar amount of property damage;
6. The extent to which the insurer considered the probable liability of the insured and the likely jury verdict or other final determination of the matter; and
7. Any other credible evidence presented to the Commissioner that demonstrates that the final amount offered in settlement of the claim by the insurer is or is not below the amount that a reasonable person would have offered in settlement of the claim after taking into consideration the relevant facts and circumstances at the time the offer was made.

114 CSR 14-6.1. It is unquestionable that the Plaintiffs are making a claim against State Auto for making an allegedly “unreasonably low offer” to the Plaintiffs. The Legislature and the Insurance Commission have addressed this completely providing guidelines and standards which an insurance company must abide by in order to fairly adjust a claim.

Simply declaring that State Auto made this “unreasonably low” offer based upon alleged “discrimination” does not change the fact that this is based upon adjusting of an insurance claim and does not fall under the West Virginia Human Rights Act. If the Plaintiffs’ claim stands every single woman, person of advanced age, minority, disabled person, person with HIV or Aids, and, according to the Plaintiffs, people who reside in public housing, would be able to bring a third-party claim against an insurance company outside of the parameters of law which was clearly implemented to regulate insurance companies and their practices.

The insurance industry is a unique industry and the adjusting of insurance claims is closely regulated by the West Virginia Legislature and the West Virginia Insurance Commission.

However, even if this Court finds that West Virginia Code § 33-11-4a does not bar this claim, the Plaintiffs' claim still fails because does not state a claim under the West Virginia Human Rights Act as discussed extensively in Section I, *supra*.

CONCLUSION

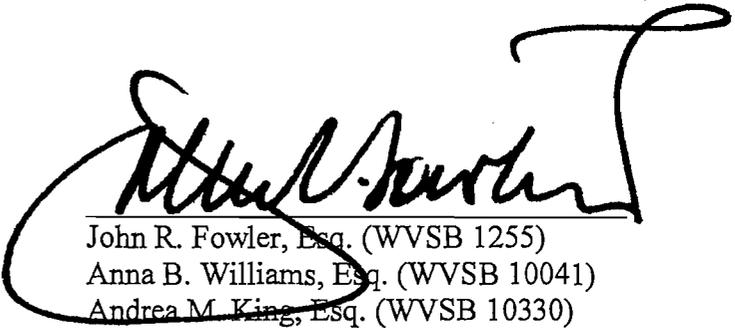
The Plaintiffs' claim is barred by West Virginia Code § 33-11-4a which bars third-party bad faith claims. This is undoubtedly a claim for unfair claims settlement practices.

However, even if the Plaintiffs' case is not barred by West Virginia Code § 33-11-4a, the Plaintiffs have failed to state a claim upon which relief can be granted.

State Auto finds discrimination as revolting and damaging as do the Plaintiffs. However, no matter how disgusting discrimination is, there is no place for insurance adjusting in the West Virginia Human Rights Act. That leap simply cannot be made and would materially alter the West Virginia Human Rights Act beyond its letter and intention.

The Plaintiffs have failed to state a claim upon which relief can be granted as they have not pled, and will never be able to plead, a case showing any alleged acts of discrimination on the part of State Auto dealing with the Plaintiffs' employment, sale, purchase, lease, rental and financing of housing accommodations, or real property, or a place of public accommodation. The West Virginia Human Rights Act simply does not cover insurance adjusting. Further, the Plaintiffs have failed to state a claim upon which

relief can be granted as this is, in reality, a third-party bad faith claim which is barred by
West Virginia Code § 33-11-4a.



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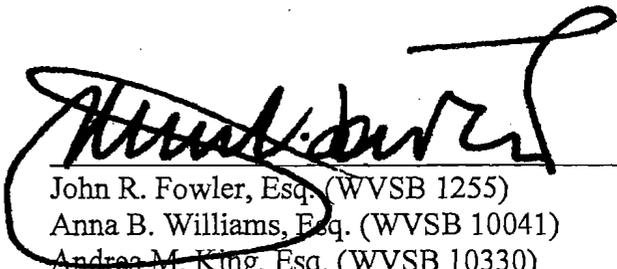
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CERTIFICATE OF SERVICE

The undersigned counsel for State Auto Insurance Company does hereby certify that the foregoing "Reply Brief of the Petitioner, State Auto Insurance Company" 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 5th day of November, 2009.


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