No. 35286

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANISSA WHITE,

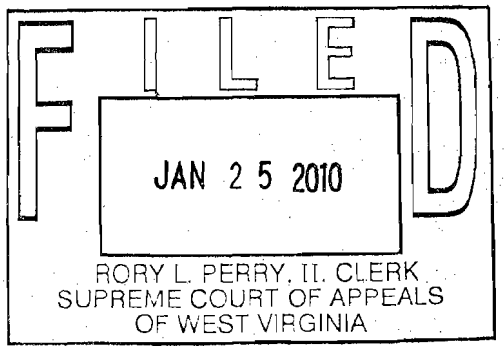
Appellant,

v. **Civil Action No.: 07-C-82**

RG CROWN MORTGAGE/RG CROWN BANK,
now known as FIFTH THIRD BANK;

Appellee.

APPELLATE BRIEF



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Comes now the Appellant, Anissa White, by counsel, Paul M. Stroebel, and presents the following brief in support of her appeal.

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

On January 12, 2007, Appellant filed a Civil Action in the Circuit of Kanawha County, West Virginia, against the R&G Crown Mortgage Corporation and R-G Crown Bank FSB, subsequently known as Fifth Third Bank. Fifth Third was substituted as the party Appellee/Defendant in the place of RG Crown during the discovery process, as successor to RG Crown Bank. In her Complaint, Appellant claims that Appellee Fifth Third was negligent and/or reckless when it failed to properly monitor the building progress of her new home. Appellant also alleges that Appellee was negligent and/or reckless when it forwarded notices of draw payments to the wrong address, thereby depriving Appellant of the knowledge that monies were being paid to the contractor. Appellant had entered into a construction loan agreement that was subsequently purchased and administered by Fifth Third or its predecessors. Appellant also claims that Fifth Third breached the terms of the construction loan agreement.

A hearing was held on January 27, 2009 and on February 4, 2009, Judge Stucky entered an Order granting Appellee's motion for summary judgment.

II. STATEMENT OF FACTS AND BACKGROUND

Appellant asserted claims against Appellee, Fifth Third Bank, (formerly known as R&G Crown Mortgage Corporation and R-G Crown Bank) for negligence, reckless conduct, and breach of contract. Appellant has asserted through her complaint and deposition testimony that Fifth Third Bank was negligent and/or reckless as well as in breach of contract when its agents failed to properly administer the construction draw payments to Appellant's builder. The conduct constituting Appellee's negligent and/or reckless acts and breach of contract are as follows:

1. Disbursing monies for line items that were not completed or did not exist.
2. Failure to carry out proper inspections prior to disbursing funds to the Appellee contractor and/or failure to report and follow the result of the inspections;
3. Disbursing monies to the contractor after Appellee Fifth Third/R-G Crown specifically stated that it would not disburse any more funds;
4. Failure to inspect the building project and disburse funds in accordance with its own loan documents;
5. Negligently forwarding draw request confirmations to the wrong address; and
6. Failure to discover that the builder was forging Anissa White's signature on draw requests.

Appellant entered into a construction loan agreement on January 28, 2005 with ABN AMRO Mortgage Group/AAMG Construction Lending Center. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 6. [1] The loan was subsequently sold to RG Crown Mortgage/RG Crown Bank FSB and sold again to Fifth Third Bank. At the time Appellant signed the loan agreement, Appellant also received a Construction Loan Disbursement Information Sheet, a Disbursement Processing

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[1] The loan had been originated by Allied Home Mortgage Capital Corporation.

Guide - Quick Reference and a Disbursement Processing Guide - Questions and Answers. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibits 5 and 7. These documents were prepared by Appellee and set forth specific terms that Appellant relied upon. These documents establish the following duties that Appellee failed to meet:

1) That work supporting the draw is completed or in place prior to disbursements being made. Exhibit 5;

2) That the lender would confirm the draw requests (with the borrower) and verify the progress. Exhibit 7; and

3) That the borrower must approve each draw request even if Appellant designated the builder to act as her agent. Exhibit 7.

Appellant also filled out a "Notice of Borrower's Address for Billing During Construction" that specified that all bills and correspondence regarding the loan be sent to Appellant at 817 Seventh Avenue, St. Albans, WV 25777. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 3. Appellee's knowledge of Appellant's mailing address is significant because Appellee failed to forward notification of draw requests or disbursements to the address provided. This prevented Appellant from having knowledge of the disbursements made to the contractor by the Appellee lender.

Construction began in the Spring of 2005. On or about July 18, 2005, Appellant was asked by the builder to meet and sign some documents in a mutually convenient parking lot. The documents included a Disbursement Hold Harmless Agreement that required notarization. Appellant testified in deposition that she did not recall reading the document and that she never appeared before a notary. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 2, pp. 57-58. Appellant also testified that she signed her first and only Project Status & Construction Draw Request on this date.[2] Appellant testified that all subsequent draw requests contained Appellant's forged signature. See

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[2] This was the first draw request submitted. It resulted in a payment of $48,375.00 to the builder.

Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 1, pp 40-41 and Fifth Third Bank's Motion for Summary Judgment Exhibit 30, pp. 63 and 73.

As the project continued, Appellee Fifth Third received copies of subsequent draw request documents with the forged signature of Appellant. See Fifth Third Bank's Memorandum in Support of Motion for Summary Judgment Exhibits 11, 12, 16, 17, 25. A cursory review of the signatures shows that they are not similar to Anissa White's signature as set forth on any of the initial loan documents.

Notice of the draw requests and any payments made pursuant to these requests were to be forwarded to Appellant. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 7. On page 2 of the Disbursement Processing Guide, it states:

Q. How will I know if my Draw Request has been approved?

A. When your draw request is received, we will confirm your request and order an inspection to verify the progress of construction on your home. The inspection will be performed within 48 to 72 hours from the time we receive your draw request. Your Servicer will contact you regarding the inspection results and the approved draw amount, if the amount differs from original request.

Most importantly, Appellee argued in its Motion for Summary Judgment that it repeatedly sent Draw Request Confirmation Letters to the Appellant. See Fifth Third's Memorandum in Support of Motion for Summary Judgment Exhibits 14, 18, 21, 26. An examination of the Notices reveals that they were sent to the wrong address. The "Draw Request Confirmations" were sent to the building site and not to Appellant's current home as set forth in the Notice of Borrowers Address for Billing during Construction. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 3. Appellant never received notice of confirmation as promised in Appellee's Disbursement Processing Guide. The building site had no mailbox and Appellant was not receiving her mail at this location. Appellee Fifth Third had Appellant's mailing address but at no time did Appellee send the notification documents to the address where Appellant actually resided. If the mail was forwarded to the construction

site, that mail would have been received by Appellee Steven White and not Appellant. On the one occasion Appellee refused to pay a draw, because the work complete did not support the requested amount, Appellee failed to inform the Appellant. See Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 21.

The final loan disbursement took place after Appellant had conversations with Appellee's agents and instructed them not to forward anymore loan proceeds to Mr. White unless the work was completed. Appellee, Fifth Third agreed that no further disbursements would be made at that time. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 3, p. 187. Despite these assurances, Appellee disbursed an additional $32,650.00 on January 5, 2006 for work that had not yet been completed.

As a result of the last disbursement, ninety percent (90%) of the loan proceeds had been distributed to the builder but the home was approximately fifty percent (50%) complete. Appellee's own Lender Inspection Report, dated 12/29/05 does not budget any amounts to be disbursed for gutters and downspouts, exterior stairs or for garage doors. See Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 27. Despite showing no amounts to be disbursed for these line items, Appellee disbursed $3,000 for the gutters, $2,000 for the exterior stairs and $5,000 for the garage doors. See Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 28.[3] On September 21, 2005, the bank disbursed $4,915 for driveways and walkways.[4] See Appellee Fifth Third Bank's Motion for

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[3]Exhibit 28 also designates $5,000.00 as payable for the septic system but no septic system was ever installed.

[4]All photos and estimates showing the status of completion are not part of the underlying record because Appellee never disputed the level of completion or the amount it would currently take to complete the construction. However, the photographs included in the December 29, 2005 Lender Inspection Report shows that there is no driveway, walkways, garage doors, or exterior steps. See Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 27.

Summary Judgment Exhibit 15. The Lender Inspection Report prepared on September 21, 2005 displays that $0.00 dollars were to be disbursed for driveways and walkways. See Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 13. The preceding examples are just a sample of improper disbursements Appellant anticipated proving at trial. Funds were routinely disbursed for work not in place and not completed. This is demonstrated by Appellee's own disbursement documents.

III. ASSIGNMENTS OF ERROR

1. The Court erred by ruling that Appellant could not recover under a theory of negligence. See Order granting Summary Judgment, Conclusions of Law paragraphs 1-13.

2. The Court erred in granting Appellee's Motion For Summary Judgment on the grounds that Appellant's complaint did not plead a "special relationship" between the bank and Appellant. Id. at paragraphs 14-23.

3. The Court erred by holding that no facts existed to support a special relationship as discussed in Glascock v. City National Bank, Syl. Pt. 6, 213 W.Va. 61 (2002). Id.

4. The Court erred by ruling that there were no material issues of fact at issue under Appellant's breach of contract theory.

IV. POINTS AND AUTHORITIES RELIED UPON

Case Law:

Glascock v. City National Bank, Syl. Pt. 6, 213 W.Va. 61 (2002)

Sewell v. Gregory, 179 W.Va. 585, 371 S.E. 2d 82 (1988)

Jochum v. Waste Management of West Virginia, Inc., Syl. Pt. 6, 34264 (W.Va. 579-2009)

V. LEGAL ARGUMENTS

A. THE COURT ERRED BY RULING THAT APPELLANT COULD NOT RECOVER UNDER A THEORY OF NEGLIGENCE.

The West Virginia Supreme Court of Appeals has held that:

> Where a lender making a construction loan to a borrower creates a special relationship with the borrower by maintaining oversight of, or intervening in, the construction process, that relationship brings with it a duty to disclose any information that would be critical to the integrity of the construction project.

Glascock v. City National Bank, Syl. Pt. 6, 213 W.Va. 61 (2002)

In Glascock, a case similar to the one before this Court, Appellee attempted to avoid liability for failing to disclose important information that had been discovered during the construction process. Appellee City National Bank attempted to avoid this responsibility by arguing that the inspections were for the sole benefit of the bank, the same argument made by Appellees herein. Oddly enough, Appellee failed to inform the Circuit Court of the Glascock decision in the underlying action despite their knowledge that it is controlling law for the case before this Court.

In Glascock, this Court explained its rationale for determining when a lender has a duty by stating that:

> The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Syl. Pt. 4 of Glascock, quoting Syl. Pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E. 2d 82 (1988).

In the present case, the lender required Appellant to pay for inspections for the purpose of determining the status of the construction prior to financial disbursements being made to the builder. The lender maintained oversight of the job by hiring the inspector and by disbursing the construction loan monies only after its approval. Fifth Third assumed the oversight duties when it required that Appellant use its inspector and further required that the inspector report to the bank and not to the Appellant. The Lender Inspection Reports previously discussed and cited, demonstrated the negligence of the disbursements for work not completed. As a result, the monies were disbursed prior to completion of the

home. At trial, Appellant's expert would have testified that the home was approximately 50% complete at the time the final disbursement occurred. Appellee's own expert submitted an estimate that it would cost $86,950.00 to complete the home.[5] See "Defendants White Family Properties, LLC, Stephen L. White, II, Individually, and RG Crown Mortgage/RG Crown Bank's Joint Supplemental Disclosure of Expert Witness."

Approximately ninety percent (90%) of the construction loan monies were disbursed by the lender to the Contractor. Appellee's inspector would have known that the home was not 90% complete if the inspections were properly performed. When Appellee chose not to provide this critical information to the Appellant, Appellee should have known or anticipated that the Appellant would be financially harmed. This Court has clearly stated its position that where a lender making a construction loan to a borrower creates a special relationship with the borrower by maintaining oversight of, or intervening in, the construction process, that relationship brings with it a duty to disclose any information, that would be critical to the integrity of the construction project. Appellant would have benefitted from knowing that the lender was disbursing monies for work not completed. This would have allowed Appellant to intervene in the construction process and protect her interests. Glascock clearly establishes a cause of action for negligent or reckless conduct of a lender and the Court erred by ruling that no such cause of action exists.

B. THE COURT ERRED BY RULING THAT APPELLANT WAS REQUIRED TO SPECIFICALLY PLEAD THAT A "SPECIAL RELATIONSHIP" EXISTED BETWEEN ANISSA WHITE AND APPELLEE FIFTH THIRD BANK.

In Paragraph 5 of the Order Granting Summary Judgment/Conclusions of Law, the Circuit Court concluded that Appellant was required to plead "special relationship" as a separate and distinct cause of action. Rule 8(a) of the West Virginia Rules of Civil Procedure states that:

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[5] Appellee Fifth Third and Defendant White Family Properties jointly retained this expert.

(a) Claims for relief - A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several types may be demanded. . .

In light of Rule 8(a), this Court has held that:

"[c]omplaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E. 2d 516 (1995); Accord Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E. 2d 907 (1978); John W. Lodge Distrib. Co., Inc., Texaco, Inc., 161 W.Va. 603, 245 S.E. 2d 157 (1978).

Appellant's complaint alleged negligent/reckless conduct that included Appellee's failure to properly inspect the home prior to disbursing funds and failure to determine if Appellant had signed Disbursement Authorization Forms. See Appellant's Complaint. Discovery also revealed that Appellee Fifth Third failed to forward notice of the disbursements to Appellant but negligently or recklessly forwarded them to the building site. The Honorable Judge James Stucky realized that Appellee's argument was without merit when during oral arguments he stated:

> THE COURT: Yeah, I don't think that this sets forth a special cause of action. This is - - I think the Court simply said that it was a negligent action, but what triggers the negligent action is this special - - factually, a special relationship between the bank and the lender - - lendee - - borrower.
>
> And, of course, Mr. Stroebel has alleged whether rightfully or wrongfully, that, "Hey, we fit - - our fact fit into Glascock"

See Hearing Transcript Pg. 42, lines 20-24 and Pg. 43 1-5.

Despite acknowledging this during argument, the Court inexplicably entered an Order holding that Appellant had to plead special relationship in a separate cause of action. As a result of this error, Appellant requests that this case be remanded for trial on her theory of negligent or reckless conduct.

C. THE COURT ERRED BY HOLDING THAT APPELLANT DID NOT PRESENT ANY FACTS TO SUPPORT THE EXISTENCE OF A SPECIAL RELATIONSHIP BETWEEN THE BANK AND APPELLANT.

Appellant asserted that the bank created a special relationship with Appellant as a result of the following:

1. Requiring Appellant to pay for inspections that would be conducted by the lender; See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 5.
2. Requiring that the lender choose the inspector; Id. at I.E.
3. That the lender was the sole recipient of the inspection results;
4. That disbursements were to be based on the results of the inspections; Id. and See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 6, at 1.F and 9A.
5. By representing that monies would only be disbursed for "work in place;" Id.
6. By verbally informing Appellant that no additional monies would be disbursed prior to the work being completed; See Fifth Third Bank's Motion for Summary Judgment Exhibit 30 p. 75; and
7. Requiring Appellant to allow the bank to act as her power-of-attorney for the purpose of completing the home. Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 6, at 15B(4).

Through the above conduct, the lender maintained oversight of the job by having the inspector determine the appropriateness of all draw requests. Monies were only to be disbursed after the lender approved. Appellant had no control over when or if monies would be paid. The lender assumed these duties and failed to disclose information to the Appellant that draws were being paid for work that was not complete. An additional step required Appellant to appoint the lender as her power-of-attorney. This requirement further establishes a special relationship between Appellant and the lender. The purpose of being appointed as power-of-attorney was so that lender could take whatever steps necessary to effect completion of the project.

The facts set forth above create questions of fact for a jury to decide. The Court erred in not allowing Appellant the opportunity to present her case to a jury. Where a lender making a construction loan maintains oversight of, or intervenes in the construction process, that relationship brings with it a duty to disclose any information that would be critical to the integrity of the construction project. *Glascock v. City National Bank*, Syl. Pt. 6, 213 W.Va. 61 (2002). The lender in this case created the

special relationship discussed in Glascock by maintaining oversight over the project. The Court clearly erred in granting summary judgment on this issue.

D. APPELLEE'S LOAN DOCUMENTS ARE AMBIGUOUS AND CREATED AN AFFIRMATIVE DUTY TO MAKE CONSTRUCTION LOAN DISBURSEMENTS ONLY AFTER INSPECTIONS OF THE PROPERTY HAD BEEN MADE TO DETERMINE THE STATUS OF COMPLETION AND THE COURT ERRED IN HOLDING THAT THERE WERE NO DISPUTED ISSUES OF MATERIAL FACT.

Appellees provided Appellant a document entitled "Construction Loan Disbursement Information Sheet" which clearly represented to Appellant that payments would be made to the contractor only after inspections had been performed to confirm the status of completion as well as conformity with the building with plans and specifications. Moreover, Appellant was required to pre-pay $100 per inspection. See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 5. Specifically, pertinent parts of the information sheet state as follows:

CONSTRUCTION LOAN DISBURSEMENT INFORMATION SHEET

> 1) Disbursements will be made only after inspection of the property has been made to determine the status of completion and apparent conformity to the plans and specifications. . .

Because Appellant paid for the inspections, and because Appellee affirmatively asserted that the reason for performing the inspection was to determine the status of completion, Appellant clearly had an expectation that she could rely upon the lender to only disburse funds as the construction proceeded in accordance with the terms of the loan documents. Additionally, the document entitled "*Draw Requirements*" specifically states as follows:

> 1. CONDITIONS APPLICABLE TO ALL DRAWS: Lender shall not release any draws unless...
>
> E. An inspector selected by Lender has certified that the WORK supporting the draw request is "IN PLACE"...

See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 5 p.2.

This paragraph clearly and distinctly states that an inspector selected by the Lender must certify that the work supporting the draw has been completed prior to the release of any draws. These provisions were not followed by the Appellee during the construction process. As a result, monies were paid to the builder for work that had not been completed or had not been undertaken at all. Appellant was harmed financially as a result of Appellee's failure to properly fulfill the duties and obligations that Appellee affirmatively assumed.

In addition to the previous documents set forth above, Appellant was provided with a "*Construction Loan Agreement*" that specifically states that all disbursements of the loan will be made as construction progresses for work in place only. Pertinent portions of the loan agreement state as follows:

CONSTRUCTION LOAN AGREEMENT

> 1. DEFINITIONS: In this Agreement, the following terms shall have the meanings indicted, other terms may be defined elsewhere:
>
> **F. "DRAW SCHEDULE"** means the Draw Schedule submitted by Borrower and accepted by Lender to provide guidance in the making of disbursements of funds to pay for the Project, which is attached hereto. The Draw Schedule may be modified after this date at the request of Borrower and with Lender's approval. The Draw Schedule shall only provide guidance in the expectations of the parties regarding the progress of the work and timing of payment. <u>However, disbursements will be made for "work in place only", based upon inspection</u>. . . (emphasis added)
>
> **9. <u>DRAW REQUESTS</u>**
>
> **<u>A. Work in Place.</u>** Other than the initial disbursement which may be applied to the purchase price of the Property and/or to the satisfaction of any liens against the Property, as specified in the Loan Specific Conditions and the Draw Schedule, all disbursements of the Loan will be made as the construction progresses for "WORK IN PLACE ONLY" upon written request for payment submitted by Borrower to Lender ("Draw Requests") and pursuant to the Draw Schedule. The Draw Requests shall be made in a form approved by Lender. Such Draw Requests shall be for amounts not exceeding the amount set forth in the Draw Schedule for each draw. IF THE PROGRESS OF THE WORK IN PLACE IS NOT CONSISTENT WITH THE DRAW SCHEDULE, THE LENDER SHALL DISBURSE ONLY THE AMOUNT OF FUNDS THAT IT DETERMINES IS APPROPRIATE BASED ON THE INSPECTION OF THE PROGRESS OF THE WORK. Borrower will pay the cost of the inspections. If, in Lender's

> opinion and discretion, all conditions required to be met under this Agreement prior to each advance have been met, on or before (3) business days after receipt of the Request and inspection report, Lender will disburse the amount requested or the amount supported by the inspection. . . (emphasis not added)

This document states that requests will not be paid if work in place is not consistent with the draw requested. The document again requires Appellant to pay the cost of inspections. These inspections were expected and intended to inure to Appellant's benefit. Appellee argues otherwise but the argument is misplaced. The Loan Agreement itself states that the purpose of inspections are to determine the status of the construction. Id. at Paragraph 13B. While Appellant agrees that the document states that the Lender will not guarantee the quality of the work, the Lender clearly assumed the responsibility for the status of the work for the purpose of disbursing construction draws.

Appellee argues that Appellant's claims are without merit because the draw requests were signed by Appellant's builder or in the alternative, that Appellant signed a disbursement hold harmless agreement. As set forth above, Appellant denies ever signing a document that she believed held the lender harmless for improper distributions. In addition, the "Disbursement Processing Guide-Questions & Answers" specifically informed Appellant that she must approve any and all draw requests. (Emphasis added) Appellant never approved of any draw request subsequent to the first draw. The guide states in pertinent part as follows:

DISBURSEMENT PROCESSING GUIDE- QUESTIONS & ANSWERS

> Q. **May I designate my builder to act as my agent in requesting my progress inspections and receiving progress payments?**
>
> A. Yes! You must execute the Disbursement Hold Harmless Agreement (Form S-12) authorizing your builder to act as your agent in requesting and receiving the construction draws on your behalf. However, you, as the Borrower, must still approve each draw request. (emphasis added)

See Response to Appellee Fifth Third Bank's Motion for Summary Judgment Exhibit 7.

The approval requirement set forth above exists even if the builder is designated as her agent. It cannot be disputed that Appellee failed to inform Appellant and obtain her approval for either the second

or third draw requests. As such, Appellee violated its duties and responsibilities pursuant to the loan agreement and Appellant was damaged as a result thereof.

At a minimum the contract is ambiguous and contradictory. In such instances, this Court has determined that summary judgment is not appropriate because issues of fact must be decided by a jury. Jochum v. Waste Management of West Virginia, Inc., Syl. Pt. 6, 34264 (W.Va. 5-19-2009).

I. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Appellant herein respectfully requests that the lower Court's order granting the Appellees' Motion For Summary Judgment be reversed and that this matter be remanded for trial by jury.

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By counsel,

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Appellees.

CERTIFICATE OF SERVICE

I, Paul M. Stroebel, hereby certify that I have on this 25th day of January, 2010, served the foregoing *"Appellate Brief"* upon the following persons by depositing true copies in the United States mail, postage prepaid, addressed to them as follows:

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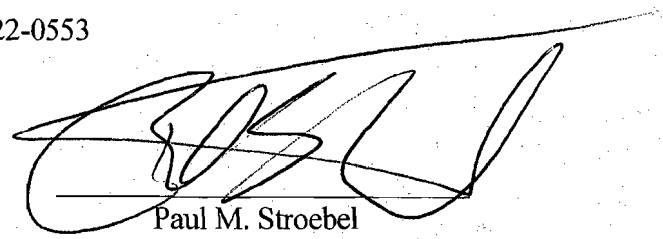

Paul M. Stroebel