

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court No. 35763

THOMAS D. LOUDIN and ALICE M. LOUDIN,

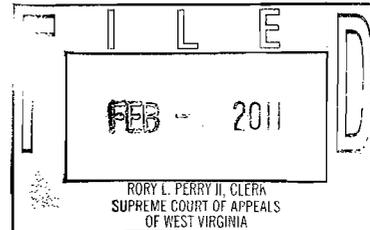
Plaintiffs/Appellants,

v.

**NATIONAL LIABILITY & FIRE INSURANCE
COMPANY, JACK SERGENT, D.L. THOMPSON,
and CONSOLIDATED CLAIM SERVICES, INC.**

Defendants/Appellees.

**Civil Action No. 08-C-100
Circuit Court of Upshur County
(Honorable Thomas Keadle)**



APPELLANT'S BRIEF

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INTRODUCTION

The Plaintiffs are Thomas D. Loudin and Alice M. Loudin, residents of Upshur County, West Virginia. The Defendants are National Liability & Fire Insurance Company, Jack Sergent, D.L. Thompson, and Consolidated Claim Services, Inc. Defendant William Loudin is no longer a named defendant in the case because the underlying portion of the Plaintiffs' lawsuit has been settled. The present claim is against the remaining Defendants in regards to the manner in which they handled the Plaintiffs' liability claim against William Loudin. The Plaintiffs' alleged claims for common law bad faith, breach of insurance contract, breach of the implied duty of good faith and fair dealing, alleged violations of the UTPA, and the tort of outrage.

The Defendants filed a motion for Summary Judgment in regards to the allegations. A hearing was held on the motion in Upshur County Circuit Court on May 5, 2010, before the Honorable Judge Thomas H. Keadle. At that time, Judge Keadle granted the Defendants' motion for Summary Judgment and dismissed the case. Judge Keadle determined that that the Plaintiffs had no legal right to sue the Defendants in regards to common law bad faith, breach of the insurance contract, breach of the implied duty of good faith and fair dealing, or for violations under the UTPA because the plaintiffs were third party claimants. Judge Keadle also dismissed the Plaintiffs' remaining claim for tort or outrage because he stated the defendants' conduct could not reasonably be regarded as so extreme and outrageous as to constitute the tort of outrage. It should be noted that the tort of outrage claim was not part of the original motion for Summary Judgment and was simply added to the final order.

The Plaintiffs assert that the Defendants are not entitled to Summary Judgment in this matter. The West Virginia Supreme Court of Appeals has never addressed the

question of whether a named insured under a liability policy bringing a liability claim against a non named insured under that same liability insurance policy, is a first party claimant or a third party claimant.

It is the Plaintiffs' assertion that they are first party claimants in regards to their claims against the Defendants. The Plaintiffs also contend the Defendants' motion for Summary Judgment was granted prematurely because the parties were engaged in the discovery process. Therefore, the Trial Court's order granting the Defendants motion for Summary Judgment should be reversed.

STATEMENT OF THE CASE

The incident that commenced this litigation occurred on September 4, 2006. On that day, Appellant Thomas Loudin sustained serious and permanent injuries as a result of an automobile accident involving his 1993 International truck. Appellant Loudin asserted that William Loudin was responsible for the accident and the injuries he sustained.

Appellant Loudin's International truck was insured through Appellee National Liability and Fire Insurance Company ("National"). After the accident, Appellant Loudin made two claims under the policy. The first was an Auto Medical Payments claim. That claim was later settled on October 12, 2006 in the amount of \$5,000.00.

Appellant Loudin's second claim was a liability insurance claim against William Loudin. Appellee Consolidated Claim Service, Inc. ("Consolidated") was hired by Jon Deacon, an employee of Appellee National, to investigate the claim. Appellee Consolidated assigned the case to Appellee Jack Sergent. Appellee D.L. Thompson later assumed the role of Jon Deacon in December 2007.

The above mentioned liability claim did not settle and the Appellants filed a lawsuit against William Loudin for personal injuries and Appellee National and others for the manner in which they handled claim. The Circuit Court of Upshur County bifurcated and stayed the Appellants claims against Appellee National until a final order was issued in the personal injury lawsuit filed against William Loudin. In September 2009, Appellants' case against William Loudin was settled by Appellee National. Subsequently, Appellants proceeded with their claims against the Appellees.

The Appellants filed claims against the Appellees for common law bad faith, breach of the insurance contract, breach of the implied covenant of good faith and fair dealing, violations of the West Virginia Unfair Trade Practices Act, and the tort of outrage.

The allegations against the Appellees stem from their conduct in handling the liability claim against William Loudin. Appellants' claim was first denied in January 2008. Appellant Loudin advised the Appellees that his claim was a covered loss under his insurance policy with Appellee National. Appellant made it known to the Appellees that his damages exceeded their offers of settlement. However, the same was to no success as Appellants' claim and the investigation of the same was unreasonably delayed.

Appellant had every right to file such a lawsuit against the Appellees. The Appellants were unduly delayed and misled throughout the claim process. The Appellants were caused to suffer anguish and undue expenses in legal and court costs. The Appellants must be recognized as first party claimants and their allegations against the Appellees deserve to be heard.

**ASSIGNMENT OF ERROR NUMBER ONE-THE TRIAL COURT ABUSED ITS
DISCRETION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

A. Standard of Review

The court reviews a trial court's decision regarding a motion for summary judgment de novo. Syl. Pt. 1, Painter v. Peavy, 451 S.E. 2d 755 (W.Va. 1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 2, Logan Bank & Trust v. Letter Shop, Inc., 437 S.E.2d 271 (W.Va. 1993) ; Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York, 133 S.E. 2d 770 (W.Va. 1963).

"If a moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided by Rule 56 (f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, Williams v. Precision Coil, Inc., 459 S.E. 2d 329 (W.Va. 1995).

The Supreme Court of Appeals of West Virginia has held that " a court considering a motion for summary judgment "must grant the nonmoving party the benefit of inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are just functions, not those of a judge[.]'" Id.

B. Argument

The entry of the Defendants' motion for Summary Judgment was premature as the parties are engaged in the discovery process

In Williams v. Precision Coil, Inc., the Supreme Court of Appeals of West Virginia stated that "subject to the conditions of Rule 56(g), we believe a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion. Furthermore, in Board of Education of the County of Ohio v. Van Buren and Firestone Architects, 267 S.E. 2d 440 (W.Va. 1980), the Court held that granting summary judgment before discovery is completed must be viewed as precipitous.

In the present case, Appellants have actively been engaged in the discovery process. Appellants have been requesting depositions of essential witnesses since October 19, 2009. (Exhibit 1, Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment). However, Appellants have been met with complete resistance from Appellees in regards to the same. (Exhibits 2-16, Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment). Appellants sought to depose essential corporate designees and witnesses. The testimony of these individuals is essential to the matters in controversy. There are several questions of fact regarding Appellants' claims that include but are not limited to:

(1) at what point did Appellees claim Appellant Loudin lost his rights as a first insured,

(2) why is Appellant Loudin listed throughout the claims file and journal as the insured if Appellees contend they were treating William Loudin as their insured,

(3) whether Appellant Loudin was notified that Appellees intended to remove him from his position as a named first party insured and deprive him of the duties he was owed in said position,

(4) what portions of the insurance contract Appellees believe support their contention that Appellant is not entitled to the duty of good faith and fair dealing,

(5) what portions of the insurance contract Appellees believe support their contention that Appellant cannot assume the position of an injured party and simultaneously be a first party to which common law and statutory duties are owed.

Clearly there are issues which the Appellees need to address via depositions. Appellants had been diligently attempting to schedule and take these depositions for in excess of six months, prior to the Court granting Appellees' motion for Summary Judgment. It is contrary to well established law in West Virginia for the Court to render a decision in this matter without allowing Appellants to take the requested depositions. Appellants' counsel provided an affidavit to the trial court pursuant to R. 56 (f).

2. The Court incorrectly classified Appellants' claims against Appellees as third-party claims.

The Appellants were improperly distinguished as third-party claimants when in fact they are first-party claimants. A first party bad faith action is a claim where an insured sues his or her own insurer for failing to use good faith in settling a claim filed by the insured. State ex rel. Allstate Insurance Company v. Gaughan, 508 S.E.2d 75 (W.Va 1998) ; State ex rel. Briston, et al. v. Kaufman, 584 S.E.2d 480 (W.Va. 2003).

Additionally, WV CSR 114-14-2.3 defines "first party claimant" or "insured" as "an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the

contingency or loss covered by such policy or contract.” These cases usually arise where an insured brings an action against his or her own insurance carrier for failing to use good faith in settling a claim. The Appellants fit the “first party claimant” definition as defined by the WV CSR. Appellees asserted in their Response to Appellant’s Petition that a first party claim is a claim made under one’s policy regardless of fault. This is simply not true. Underinsured and uninsured motorist claims are clearly first party claims and such claims may not be pursued regardless of fault.

Appellant Loudin fits the definition of a first party claimant in other jurisdictions as well. A first party claim exists where an insured is seeking payment under the terms of the insurance contract between the insured and the insurance company. Dennis v. State Farm Ins. Co., 757 N.E.2d 849 (Ohio App. 2001). A first party claim can be distinguished from a third party claim as a claim where there is a contract between the insured and the insurer. Simpson v. Permanent General Insurance Co., (2003) Ohio Eight Dist. Court of Appeals, concurring opinion by Justice Karpinski.

The claims against the Insurance Appellees are first party claims by definition under the law. Appellant Thomas D. Loudin is a named insured under the applicable insurance policy. (Insurance Contract). Furthermore, Appellees have consistently referred to Appellant Loudin as the insured throughout the handling of the claim. A review of the claims file references Appellant Loudin as the insured relative to the claim at least forty-three times. (Exhibits 18-41, Plaintiffs’ Response in Opposition to Defendants’ Motion for Summary Judgment).

The majority of the references were made substantially after the resolution of the medical payments claim. In Appellees' motion for Summary Judgment, they argued that the terms have "no real bearing." To the contrary, the terms are a major indication that the Appellees understood Appellant Loudin was their insured, that their primary obligation was to him, and they owed him a duty of good faith and fair dealing.

The Appellees' own policies and procedures (Exhibit 42, Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment) require the following regarding claim files:

(1) Three years from now could a complete stranger to this file reconstruct basically what we did and understand why we did it;

(2) Would you feel comfortable sitting on the witness stand and under oath explaining to a Judge, Jury and Courtroom that included your family exactly what you meant and why you wrote it or said something?

Appellees argument is directly contrary to their own policies and procedures. The Court should not disregard numerous admissions by the Appellees that Appellant Loudin was their insured. Furthermore, the Court should not dismiss what position the Appellant held (insured) by their own claim file admissions because it just "has no bearing." The same is disingenuous. If contracts and insurance policies and procedures have no bearing and are not relevant then they are unnecessary and contract law should be abolished all together.

The Appellees made admissions that the Appellant was their insured in their own notations. The claims file makes no reference that Appellant Loudin stepped out of the

shoes of the first party insured. Furthermore, the claims file provides no reason as to why Appellant Loudin lost his status as an insured and was no longer owed the common law and statutory duties of the insurer.

Appellant Loudin, an insured under the policy at issue, filed a claim against his insurance company for failing to use good faith and pay a claim under said policy. That is the exact definition of a first party claim as set forth by the West Virginia Supreme Court in State ex rel. Allstate Insurance Company v. Gaughan and State ex rel. Brison v. Kaufman.

Appellant Loudin has provided the Court with definitions of a first party claim from the West Virginia Supreme Court of Appeals, the West Virginia Insurance Regulations as well as other jurisdictions. Appellant Loudin meets the definition of a first party claimant. Appellees contend that the Appellant must be a third party claimant because none of the Supreme Court cases referenced provide us with a definition that is on point and meets the specific circumstances of this case. That argument does not indicate that the instant case does not meet the applicable definition. Furthermore, it is another reason why this case should not have been dismissed by the Circuit Court in the first place.

A. The cases cited by the Appellees are distinguishable

Appellees have failed to cite any law which would support their contention that the claim at issue is a third party claim. The cases relied upon by the Appellees and cited in the Order (Order, pg. 5) are distinguishable in many ways from the case at bar. See, e.g., Gillette v. Gillette, 837 N.E. 2d 1283 (Ohio App. 2005) ; Smith v. Allstate Ins.

Co., 202 F. Supp. 2d 1061 (D. Ariz. 2002) ; Sperry v. Sperry, 990 P.2d 381 (Utah 1999) ; Herrig v. Herrig, 844 P.2d 487 (Wy. 1992) ; Rumley v. Allstate Indem. Co., 924 S.W. 2d 448 (Tex. 1996) ; Wilson v. Wilson, 468 S.E. 2d 495 (N.C. 1996)

The reasoning “*a named insured under a liability policy bringing a liability claim against another insured under the same liability policy*” is a third party claimant in the above mentioned cases is because they all involve spousal relationships. The logic is when a person sues because of the negligence of his/her spouse; they are seeking benefits based on their spousal’s coverage as a named insured and not their own. The insured spouse did not seek benefits based upon the duty the insurer owed directly to him or her. In this case, Appellant Loudin is the named insured. He is seeking benefits based upon his own coverage as a named insured. William Loudin **was not a named insured and certainly was not a member of Appellant’s household or his spouse.**

Another reason the cases are distinguishable is because of the contractual relationship in this case. In the cases cited in the Order, the claimants and the insured held separate insurance policies with the same insurer. In that instance, the insurance company does not owe a duty of good faith to both the claimant and the insured as each holds a different policy. Furthermore, the issue of whether parties are first party or third party claimants usually arises in “double insured” policies. However, in this case William Loudin did not have a separate policy. Appellant Loudin was the Appellees’ insured. Hence, he would be entitled to be a first party claimant in ANY claim he brings against the insurance company because he is their NAMED insured, not anyone else.

In Dercoli v. Pennsylvania Nat. Mut. Ins. Co., 554 A.2d 906 (Pa. 1989), the Court allowed an interspousal claim against an insurance company for breach of duty of good faith and fair dealing. The court distinguished this case from other lawsuits which prohibited interspousal claims against insurance companies for bad faith because of the unjust actions of the insurance company.

In Dercoli, the insurance company failed to advise the Plaintiff as to her apparent entitlement to claim for benefits under the liability coverage of the contract and also failed to advise the Plaintiff of conflict of interests in advising or continuing to advise Plaintiff regarding her entitlement to benefits or of her possible need for independent legal counsel. The insurance company in Dercoli also failed to pay or offer to pay the Plaintiff any benefits under the liability coverage of the Contracts.

The wrongful actions of the insurance company in Dercoli parallel the conduct of Appellees National and Consolidated. Appellant Loudin was misled that his claim was being properly investigated, when in fact it was not. Similar to Dercoli, Appellant Loudin was not aware of the need to independent counsel until his claim had been unduly delayed. Appellant Loudin was misled to believe his claim was being investigated. In fact, Appellant Loudin's claim sat stagnant for months. The Appellees took no action whatsoever until after Appellant Loudin retained legal counsel. Appellees also failed to pay benefits that were rightfully owed to the Appellants.

B. Contractual Obligation and the Duty of Good Faith and Fair Dealing

The term "bad faith" is commonly used to refer to the State of West Virginia's unfair settlement practices statute. Light v. Allstate Insurance Co., 506 S.E. 2d 64

(W.Va. 1998). There is however a difference between a bad faith claim and an unfair settlement practices act claim. Id. Causes of action for statutory violations of the Unfair Trade Practices Act are separate and independent of any contractual duties owed to the insured by the insurer. Weese v. Nationwide Insurance Co., 879 F.2d 115 (4th Cir. 1989).

Implied in every contract in West Virginia, including insurance contracts, is the obligation and duty to act and deal in good faith. See, e.g. A&E Supply Co., v. Nationwide Mut. Fire Ins. Co., 798 F.2d 660, 676 (4th Cir. 1986). Third party claimants have no cause of action against insurer for common law claims for breach of contract, breach of implied covenants of good faith and fair dealing or breach of fiduciary duty while they have in the past had a statutory cause of action under the Unfair Trade Practices Act. See, Gallagher v. Allstate Ins. Co., 74 F. Supp.2d 652 (N.D. W.Va. 1999).

In order to meet contractual obligations to policyholders, an insurer has a duty to and an obligation to conduct a prompt and fair investigation of ANY claim made by the policyholder. Miller v. Fluharty, 500 S.E.2d 310 (W.Va. 1997). This includes liability claims, claims for medical payments coverage and any claims for underinsured motorist coverage.

Just because the Appellant and Appellees were in adversarial positions does not eliminate Appellant's position as a first party. The West Virginia Supreme Court of Appeals has recognized that all first party claims are adversarial because the insurer wishes to minimize recovery while the insured wishes to maximize it. Weese, et ux. v.

Nationwide Insurance Company, 879 F.2d 115, 118 (4th Cir. 1989) (Wherein the Court rejected Nationwide's argument that Plaintiff's uninsured motorist claim was not a first party claim.)

Appellee argues that the instant matter is a third party claim because they are treating William Loudin as their insured. This does not change the nature of the contract itself nor Appellant Loudin's position as a policy holder and therefore, his ability to make contractual related common law claims. Appellant is a party to the contract of insurance issued by Appellee National Liability and Fire Insurance, Co. Appellant is the named policy holder and the insured. Therefore, the legal contractual obligations owed the contractual parties and insurance policyholders are owed to Appellant Loudin at all times regardless of how the insurance company chooses to treat a third party and regardless of how the claim arose.

In fact, the law specifically states that insurers owe said duties to policyholders in regards to ANY claims made. None of the arguments and/or case law that the Appellees have set forth changes the contract between National Liability & Fire Insurance Company and Thomas D. Loudin, nor the legal obligations there under.

The majority of Appellant Loudin's claims are based in contract. Therefore, the insurance contract must be examined as it controls. Under West Virginia law, an insurance policy which requires construction must be construed liberally in favor of the insured. Polan v. Travelers Insurance Company, 192 S.E.2d 481 (W.Va. 1972).

Nowhere in the extensive contract does it indicate that upon a named insured making a liability claim under the contract, that he is not longer owed the common law

and/or statutory obligations of a named insured. Nor does the contract indicate that when treating another party as the "insured" that the named insured loses his rights as the same.

Section VI –DEFINITIONS, in the contract, provide the definition of an insured as follows:

"Insured" means any person or organization qualifying as an insured in the "Who Is An Insured" provision in the applicable coverage. Except with respect to the limit of insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or suit is brought.

The individual drafting the policy created a specific exclusion and qualification to when "insured" would mean something different than that set forth in the "Who Is An Insured" provision. Appellant Loudin is an insured under said provision. Had the drafter of the policy wished to make an exclusion or qualification as to the term "insured" when the named insured was an injured party, he or she would have done so in the provision.

West Virginia law clearly requires the inadequacies in contracts to be construed against the drafter. Polan v. Travelers Insurance Company, 192 S.E.2d 481 (W.Va. 1972). In this case, the contract would be construed against National Fire and Liability. Using the appellees' own definition of insured and placing it into the definition of first party claim provided under West Virginia law, Appellant Loudin's claim clearly qualifies as a first party claim.

Section V- TRUCKERS CONDITIONS, in the contract, sets forth the duties of an insured in the event of an accident, claim, suit or loss. This section requires the insured to authorize the insurer to obtain medical records or pertinent information and to submit

to a physician's examination of the insurer's choice. This provision clearly anticipates that the injured party can be the insured.

If the injured party still owes contractual duties, he has not stepped out of his role as an insured. The provision does not state that said requirements only apply in regards to medical payments coverage. Further, it would be contrary to general insurance practices to allege the same, as medical exams are generally not requested relative to medical payments claims. What cannot be changed is that Appellant had a contract with Appellee National. Unless the court intends to eliminate all common law duties and the duties implied in every contract, Appellant must be able to pursue a cause of action against his insurer for breach of contract and the implied covenant of good faith and fair dealing.

Appellee National is a multi-million dollar company. Teams of attorneys work to carefully draft their contracts to avoid any confusion or ambiguity. If Appellee National had intended for Appellant Loudin to be of a different legal status when filing different claims, it would be specified in the contract. Nowhere in the contract does it make any such reference. Thus, following the precedent set in Polan, the inadequacies in the contract must be construed against Appellee National.

3. The appellees' conduct could reasonably be regarded as being so extreme and outrageous as to constitute the tort of outrage.

The Appellant's claim against the Appellees for the tort of outrage was improperly dismissed. The Circuit Court of Upshur County found that the Insurance Appellees conduct in handling the Appellants liability claim against William Loudin may not be

regarded as so extreme and outrageous to constitute the tort of outrage. The Appellants disagree with the Court's contention and believe a reasonable jury could find that the conduct of the Insurance Appellees was extreme and outrageous.

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for bodily harm." The Restatement (Second) of Torts § 46(1). Tanner v. Rite Aid of West Virginia, Inc., 461 S.E.2d 149 (W.Va. 1995).

To prevail on such a claim, the Appellants must show: (1) that defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency; (2) that defendant acted with intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that actions of defendant caused plaintiff to suffer emotional distress; and (4) that emotional distress suffered by plaintiff was so severe that no reasonable person could be expected to endure it. Travis v. Alcon Laboratories, Inc., 504 S.E.2d 419 (W.Va. 1998).

Appellees National and Consolidated acted with direct indifference and disregard in handling the Appellants' claim against William Loudin. The Appellants depended on the Appellees to properly investigate and handle their claim. By entering into an insurance contract and paying premiums, one is entitled to competent service. The Appellees intentionally misled and unduly delayed the claim process. The Appellants were caused to suffer great delay, anguish and undue expenses in legal and court costs.

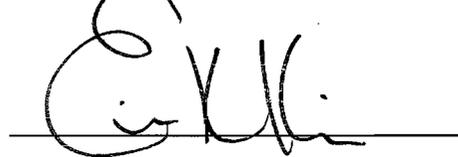
A jury is entitled to hear testimony and decide if the Appellants claim for the tort of outrage is justified. Furthermore, as previously mentioned, the discovery process has not been completed. Appellants need more time to collect information that is relevant to their claim. With only a short amount of time to conduct discovery and strengthen their case against the Appellees, the Court should have given the Appellants the benefit of the doubt. If given the opportunity, a jury could reasonably conclude the facts put forth by the Appellants satisfy the requirements of Travis. Therefore, the ruling dismissing the claim for the tort of outrage should be reversed.

CONCLUSION

Appellants assert that the Circuit Court of Upshur County erroneously granted the Appellees' motion for Summary Judgment. The Appellees' motion for Summary Judgment was improperly granted. For all the hereinbefore described reasons, the Appellants respectfully requests that this Honorable Court to reverse the decision of the circuit court in granting Appellees' motion for Summary Judgment and return this matter to the active docket in the Circuit Court of Upshur County.

Respectfully Submitted,

Thomas D. Loudin, et ux.

A handwritten signature in black ink, appearing to read 'T. Loudin', written over a horizontal line.

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CERTIFICATE BY ATTORNEY

I hereby certify, pursuant to the West Virginia Rules of Appellate Procedure, that the facts alleged are faithfully represented and that they are accurately presented to the best of my ability.


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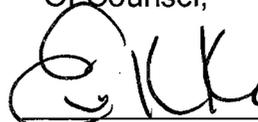
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing Appellants' Brief was served upon the Defendant by mailing a true and accurate copy via United States mail postage prepaid this 2nd day of February , 2011. to:

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