

No. 11-1265

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

**STATE FARM FIRE & CASUALTY
COMPANY,**

Petitioner,

v.

**ROBIN SKINNER PRINZ, the
Personal Representative of the
ESTATE OF KYLE HOFFMAN, JR.,**

Respondent.

PETITIONER'S BRIEF

E. Kay Fuller
(WV State Bar No. 5594)
MARTIN & SEIBERT, L.C.
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209
ekfuller@martinandseibert.com
Counsel for Petitioner

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....3

II. STATEMENT OF THE CASE4

III. SUMMARY OF ARGUMENT6

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION6

V. ARGUMENT7

A. Standard of review with respect to application of the Dead Man’s Statute.....7

B. The lower court erred in its application of the Dead Man’s Statute prohibiting testimony of family members concerning their personal observations of where the decedent was residing on the date of his death.....7

1. No interested parties were proffered to testify.....9

2. The proffered testimony did not concern personal transactions with the deceased.....10

3. The testimony was not proffered against the deceased.....12

C. Exclusion of documentary evidence based upon the Dead Man’s Statute was also reversible error.....14

D. The Circuit Court of Jefferson County erred when it failed to properly instruct the jury on the definition of the term “household” as utilized in the State Farm policy issued to Paul Massanopoli per Virginia law.....15

VI. CONCLUSION17

TABLE OF AUTHORITIES

W.VA. CASES:

<i>Bd. of Educ. v. Harvey</i> , 70 W.Va. 480, 74 S.E. 507 (1912).....	12
<i>Grillis v. Monongahela Power Co.</i> , 176 W.Va. 662, 346 S.E. 2d 812 (1986).....	7
<i>In re Fox's Estate</i> , 131 W.Va. 429, 48S.E.2d 1 (1948).....	9
<i>Lee v. Saliga</i> , 179 W.Va. 762, 373 S.E.2d 345 (1988).....	15
<i>McDouglas v. McCammon</i> , 193 W.Va. 229, 455 S.E.2d 788 (1995).....	7
<i>Meadows v. Meadows</i> , 196 W.Va. 56, 468 S.E.2d 309 (1996).....	<i>passim</i>
<i>Michael v Sabado</i> , 192 W.Va. 585, 453 S.E.2d 419 (1994).....	7
<i>Sayre v. Whetherholt</i> , 88 W.Va. 542, 107 S.E. 293 (1921).....	7

VA. CASES

<i>Allstate v. Patterson</i> , 231 Va. 358, 344 S.E.2d 890 (1986).....	15
<i>State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.</i> , 43 Va. Cir. 419, 1997 WL 1070431 7 (Va. Cir. Ct6. 1997).....	15
<i>State Farm Mut. Auto. Ins. Co. v. Bowles</i> , No. 6:09-cv-44 (W.D.Va. 2011).....	16
<i>State Farm Mut. Auto. Ins. Co. v. Jones</i> , 238 Va. 467, 383 S.E.2d 734 (1989).....	16
<i>State Farm Mut. Auto. Ins. Co. v. Smith</i> , 142 S.E.2d 562 (1965).....	16
<i>USAA Cas. Ins. Co. v. Hensley</i> , 251 Va. 177, 465 S.E.2d 791 (1996).....	15

STATUTES AND RULES:

W.Va. Code §16-5-19.....	14
W.Va. Code §44-1-4.....	14
W.Va. Code § 57-3-1.....	<i>passim</i>
Rule 10, W.Va. Revised Rules of Appellate Procedure . . .	3

COMES NOW the Petitioner, State Farm Fire & Casualty Company (hereinafter "State Farm"), by and through its counsel E. Kay Fuller and Martin and Seibert, L.C., pursuant to Rule 10 of the West Virginia Revised Rules of Appellate Procedure and presents its brief respectfully requesting the May 23, 2011, June 13, 2011, and August 4, 2011 Orders of the Circuit Court of Jefferson County be reversed and a new trial granted due to reversible error committed pre-trial and at trial which prohibited full presentation of all necessary factual evidence for the jury's consideration.

I. ASSIGNMENTS OF ERROR

A. The Circuit Court of Jefferson County erred in its application of the Dead Man's Statute and incorrectly ruled that family members of William Lee Piper could not testify as to their personal observations of where the decedent was residing on the date of his death, the key issue that was tried in the declaratory judgment action filed by the Respondent against State Farm. Specifically, the Circuit Court erred in its findings that the family members were interested parties and would be testifying about personal transactions with the decedent.

B. The Circuit Court of Jefferson County erred in its application of the Dead Man's Statute when it also precluded the introduction of documentary evidence on the same grounds.

C. The Circuit Court of Jefferson County erred when it failed to properly instruct the jury on the definition of the term "household" as utilized in the State

Farm policy issued to Paul Massanopoli per Virginia law where the subject policy was issued.

Each of these grounds of error were denied again in post-trial motions by the Circuit Court on August 4, 2011. App. 224.

II. STATEMENT OF THE CASE

William Lee Piper was killed on October 28, 2007, in a motor vehicle accident which occurred in Jefferson County, West Virginia. Also killed was his friend and neighbor, Kyle Hoffman, Jr. Thereafter, the Estate of Kyle Hoffman, Jr. filed suit against the Estate of William Lee Piper. The Hoffman Estate also filed a declaratory judgment action against State Farm attempting to obtain insurance proceeds under an umbrella policy State Farm issued in Virginia to Paul Massanopoli, William Piper's grandfather.

Mr. Massanopoli is a resident of Berryville, Virginia. The only other person residing in his household on October 28, 2007, was his wife Patricia. (see Affidavit of Paul Massanopoli, proffered as evidence but refused admittance by the Circuit Court. App. 67-69.

William Lee Piper resided with his parents Julie Piper and David Piper in Harpers Ferry, Jefferson County, West Virginia, (see Affidavit of Julie Piper, proffered as evidence but refused admittance by the Circuit Court. App. 64-66.

William Lee Piper used his grandfather's address in Berryville, Virginia, to obtain a Virginia driver's license, an automobile liability insurance policy through GEICO, and listed the address on certain employment documents at Briggs Animal Shelter. App. 151, 159, 161.

Other documents identify the address of William Piper as Harpers Ferry, West Virginia such as his parents' tax returns where William Lee Piper is listed as a dependent, App. 74-77; his death certificate, App. 78; Letters of Administration creating his estate in West Virginia, App. 79; and his obituary App. 52. Moreover, Kyle Hoffman, Sr. executed an affidavit admitting that William Lee Piper resided with his parents in Harpers Ferry, West Virginia. App. 50-51. More compelling, the testimony of Julie Piper, William Massanopoli, David Paul Piper and Sara Piper – all of which was precluded at trial – testified in proffers outside the presence of the jury that William Lee Piper resided with his parents in Harpers Ferry on the date of his death. Trial transcript pp. 10-28, 29-36, 72-76 and 76-78, respectively.

Based upon limited documentary information, the Hoffman Estate presumed William Lee Piper was a resident of his grandfather's household in Berryville, Virginia and filed a declaratory judgment action against State Farm. The sole issue to be resolved in the declaratory judgment action was where William Piper resided on October 28, 2007. However, the trial court precluded testimony from those with first hand knowledge of this fact. App. 218.

Because the jury did not have complete information in its deliberations, the jury found that William Lee Piper resided with his grandfather in Berryville, Virginia, on the date of his death. The Court also provided an inappropriate definition of "household" when instructing the jury rather than the definition as used in the State Farm policy at issue. The jury, therefore, had no chance of rendering a fair verdict since it was deprived of hearing all pertinent evidence and

was deprived full and fair instruction by the Circuit Court. The Circuit Court likewise refused to reconsider these rulings and issue a new trial when ruling on post-trial motions. App. 1. Therefore, the Petitioner moves that the Orders of May 23, 2011, June 13, 2011 and August 4, 2011, be reversed, that the jury verdict be vacated and a new trial awarded with instruction to the Circuit Court upon remand to permit full introduction of evidence on the residency issue and proper instruction on the term "household."

III. SUMMARY OF ARGUMENT

The sole issue at trial was where William Lee Piper resided on the date of his death. The trial court precluded a full and fair trial of the issue when it precluded family members, including the named insured whose policy was at issue, from testifying on the key factual issue after incorrectly analyzing the Dead Man's Statute and precluded introduction of documentary evidence demonstrating William Lee Piper resided in West Virginia on the same grounds. The error was further compounded when the trial court improperly instructed the jury on the term "household," a key term in the State Farm policy for the question presented.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case involves assignments of error in the application of settled law such that considerations set forth in Rule 19 apply. The Petitioner requests oral argument.

V. ARGUMENT

A. Standard of review with respect to application of the Dead Man's Statute.

This Court has held:

[i]n reviewing a circuit court's application of the Dead Man's Statute, we utilize a bifurcated process. First, we review a circuit court's fact finding for clear error and give due deference to the circuit court's application of the statute to the facts applying an abuse of discretion standard. *McDougal v. McCammon*, 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995); *Michael v. Sabado*, 192 W. Va. 585, 595, 453 S.E.2d 419, 429 (1994); *Grillis v. Monongahela Power Co.*, 176 W. Va. 662, 666-67, 346 S.E.2d 812, 817 (1986). To the extent the exclusion of the evidence was based either upon a legal precept or an interpretation of a statute, our review is plenary. In other words, we review a circuit court's ruling on the admissibility of testimony under an abuse of discretion standard, but to the extent a circuit court's ruling turns on an interpretation, meaning, or scope of the statute or a rule of evidence our review is *de novo*. *Gentry v. Magnum* (citations omitted).

Meadows v. Meadows, 196 W.Va. 56, 468 S.E.2d 309 (1996).

B. The lower court erred in its application of the Dead Man's Statute prohibiting testimony of family members concerning their personal observations of where the decedent was residing on the date of his death.

West Virginia Code § 57-3-1, the Dead Man's Statute, prohibits parties to any action, as well as persons interested in the event, from testifying about transactions with the decedent. The Statute is to be strictly construed and limited to its narrowest application. *Meadows, supra*. Moreover, the Statute does not preclude the testimony of any witness that does not clearly come within its terms. *Sayre v. Whetherholt*, 88 W.Va. 542, 107 S.E. 293 (1921). None of those

factors are present when considering the proffered testimony of family members on their observations.

This case hinged on whether William Piper was a resident of Berryville, Virginia, or Harpers Ferry, West Virginia at the time of his death. Indeed, the sole question posed to the jury was the same. App. 222. Prior to trial, the Circuit Court erroneously granted Plaintiff's Motion *In Limine* on this central issue and precluded family members, including the named insured, from providing this factual testimony. App. 218. The lower court reasoned that "testimony by William Lee Piper's mother, grandfather, or other family members regarding his place of residence is barred under [W.Va. Code § 57-3-1]" because it (1) relates to personal transactions with the deceased, (2) would be offered by interested parties, and (3) would be against the deceased's personal representative, heirs at law, and/or other beneficiaries." App. 219.

In explaining its ruling, the trial court held:

[I]n the instant case, any testimony regarding where William Lee Piper lived and his motivations or intent in signing these legal documents to the effect that he lived with his grandfather would necessarily involve testimony regarding personal transactions with the deceased. Such testimony by interested parties such as William Lee Piper's family members would relate to a course of conduct offered to prove the truth of the matter asserted and would therefore be barred by the Dead Man's statute.

App. 219. Such a finding is inapposite with both controlling interpretation of the statute and the narrow scope under which it is applicable.

1. No interested parties were proffered to testify.

It is black-letter law that the Dead Man's Statute operates to preclude an interested party from testifying against the interest of the decedent. Interest is defined in the Dead Man's Statute as either interested in the event thereof or deriving any interest or title by assignment or otherwise. W.Va. Code § 57-3-1. State Farm sought to introduce testimony of Paul Massanopoli, the State Farm insured whose policy was at issue; Julie Piper, the mother of decedent William Piper, as well as other family members who had personal knowledge through their observations of William Piper. The testimony of those individuals was flatly prohibited, despite the fact that none of them met the definition of an interested party.

None of the proffered witnesses stood to benefit from the outcome of the declaratory judgment action. Plaintiff argued that Julie Piper in her capacity as personal representative of her son's estate stood to gain, however, that argument is flawed since Ms. Piper would have testified, consistent with her affidavit, that her son resided in West Virginia, not in Virginia. Thus, taken to its logical conclusion, the testimony served to deprive the Piper Estate of additional funds from the State Farm policy upon which to pay claims of the Hoffman Estate.

A witness "who is neither a party to the litigation, nor a person interested in its outcome, nor a person from, through or under whom such party or interested person derives any interest or title, may testify regarding a personal transaction with a deceased person, notwithstanding that the witness is a near relative of a party to the proceeding." *In re Fox's Estate*, 131 W. Va. 429, 48

S.E.2d 1 (1948). While Julie Piper is the personal representative of the Piper Estate, she was proffered in her individual capacity as the mother of William Lee Piper. The fact that she was also personal representative of the Piper Estate did not impact her ability to testify about the factual question of where her son lived on the date of his death. Mrs. Piper would not derive any direct financial benefit from the outcome of the declaratory judgment action. Indeed, the only parties to the declaratory judgment action and the only parties with any pecuniary interest are the Hoffman Estate and State Farm.

Additionally, the testimony of other family members was not offered against the executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee or survivor of William Lee Piper. Therefore, under no circumstances was the prohibition of the Dead Man's Statute triggered and the testimony should have been permitted.

2. The proffered testimony did not concern personal transactions with the deceased.

The excluded testimony was proffered to demonstrate the answer to the central question of where William Lee Piper lived at the time of his death. This would have included testimony based upon first-hand knowledge as to *inter alia*, where William Piper slept, stored his personal effects, garaged his automobile, took meals and spent his time. Such testimony does not involve prohibited testimony regarding personal transactions with the deceased. In excluding this testimony, the trial court misapplied the holding of *Meadows* where this Court

held that testimony about observations is not precluded by the Dead Man's Statute.

In *Meadows*, the plaintiff challenged a testator's capacity at the time he executed his will and in so doing, sought to introduce testimony about transactions and communications with the decedent. Upon review, this Court addressed whether the Dead Man's Statute prohibits the admission of an interested party's observations and opinions regarding the mental competency and capacity of a deceased. *Id.* After examining the Statute's history and purpose, this Court substantially narrowed the scope of the statute, overruling prior case law stating:

The rule of strict construction does not permit such an extension of the Dead Man's Statute by this Court. As we construe the statute, the circuit court committed error by barring the testimony of the plaintiff as to her mental or physical observations and descriptions of the deceased which antedated and post-dated the execution of the will.

It is difficult to discern how the proposed testimony of the plaintiff in the instant case as to her observations and opinions concerning the deceased's mental condition could be construed as a "personal transaction" within the contemplation of the Dead Man's Statute exception. We think this exception should not be construed to include a narrative of observed facts.

Id., 468 S.E.2d at 315(emphasis added).

It is equally difficult to discern in the present action how the proposed testimony of the family members as to their observations as to where William Lee Piper lived could be construed as a "personal transaction" within the contemplation of the Dead Man's Statute exception.

The *Meadows* Court went on to hold that the term “personal transaction” includes a “business deal where the legal relationship of the parties is altered.” There is no “business deal” involved in a witness testifying as to where he saw William Lee Piper living. Thus, the testimony was improperly excluded as it does not fall within the purview of the Dead Man’s Statute.

While the Circuit Court correctly cited the *Meadows* decision, it ignored the instruction of *Meadows*. Just as in *Meadows*, the family members were proffered to provide observations, not transactions. Given that the proffered testimony was purely factual in nature based upon the witnesses’ first-hand knowledge, the first requisite element for application of the Dead Man’s Statute was not met. The testimony was therefore improperly excluded and the rulings based thereupon must be reversed.

3. The testimony was not proffered against the deceased.

The third element which must be met is that the testimony must be used against the deceased. This requirement was explained in *Bd. of Educ. v. Harvey*, 70 W. Va. 480, 74 S.E. 507 (1912)(emphasis added):

Though the witness is a party to the suit, and her testimony relates to a personal transaction had with a person who is deceased at the time her testimony is given, yet these circumstances alone do not disqualify her. There is still another qualification which must exist before her testimony would be rendered inadmissible, and that is that **it must be against a person who stands in a certain designated relation to the deceased person with whom the personal transaction was had.** If the testimony is not against such a person, it is clearly admissible under the broad enabling provision of this section. Before the testimony could be excluded, it would have to appear that it was evidence against "the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor" of the deceased.

This requirement, too, cannot be satisfied. The testimony would not have been against William Lee Piper or his Estate, neither of whom are parties to the declaratory judgment action where the evidence was proffered. Therefore, this third element is not met such that the Dead Man's Statute was not applicable and should not have been utilized as the basis to exclude evidence from the jury.

As this Court explained in *Meadows*:

The underlying rationale of dead man's statutes 'is that a survivor's lips should be sealed because the lips of the decedent are sealed.' In these instances, 'the decedent is unable to confront the survivor, give his or her version of the transaction or communication and expose the possible omissions, mistakes or even outright falsehoods of the survivor.' Thus, the premise of the statutes is 'that there is a very strong temptation to lie or to conceal material facts to the detriment of the decedent's representative(s).'

Here, nobody knew better where William Piper lived than his family. Since as discussed *supra*, none would derive a benefit from their testimony, nor was there any incentive to lie or conceal material facts to the detriment of the decedent's representative, the rationale behind operation of the Statute again demonstrates that the testimony was improperly excluded.

Rather, public policy dictates that all relevant evidence should be admitted in the quest for truth. *Meadows*, 468 S.E.2d at 315-316. Again lacking any foundation to exclude the evidence, the ruling of the Circuit Court must be reversed. Because the ruling also precluded full and fair presentation of evidence to the jury, the verdict is likewise flawed and must be vacated with a new trial awarded.

C. Exclusion of documentary evidence based upon the Dead Man's Statute was also reversible error.

In addition to factual testimony, State Farm also sought to introduce documents which demonstrated William Piper was a West Virginia resident on the date of his death. However, again the trial court thwarted all efforts to present full factual evidence for the jury's consideration. State Farm proffered, but the trial court refused to introduce William Lee Piper's death certificate, Letters of Administration issued in Jefferson County, West Virginia, and an obituary. These documents were also germane to the residency question and their preclusion based on the same flawed analysis of the Dead Man's Statute must be reversed. In making these rulings, the trial court also ignored the fact that at least two of the proffered documents were issued by governmental bodies who are statutorily required to conduct due diligence before the issuance thereof to determine the residency of the decedent. See W.Va. Code §44-1-4; W.Va. Code §16-5-19.

Once improperly excluded, the jury was deprived of this additional documentary evidence in its deliberations, thus mandating the verdict be vacated and a new trial awarded so that a jury might hear all pertinent evidence.

D. The Circuit Court of Jefferson County erred when it failed to properly instruct the jury on the definition of the term “household” as utilized in the State Farm policy issued to Paul Massanopoli per Virginia law.

The Circuit Court also improperly instructed the jury when it refused State Farm’s proffered instruction of the term “household” despite the fact William Lee Piper’s household was the only question on the verdict form. Specifically:

Was William Lee Piper’s primary residence, on October 28, 2007, the **household** of Paul Massanopoli in Berryville, Virginia?

App. 222 (emphasis added).

The term “household” is specifically used in the State Farm policy at issue. The policy defines “insured” individuals, in pertinent part, as:

“you and your relatives whose primary residence is your household”

App. 39. Because the policy was issued in Virginia, Virginia law applies. Syl. Pt. 2, *Lee v. Saliga*, 179 W.Va. 762, 373 S.E.2d 345 (1988).

Virginia law defines the term “household” as:

...”a collection of persons as a single group; with one head, living together, a unit of permanent and domestic character under one roof.”

A temporary sojourn or visit by a relative does not make the relative a resident of the insured’s household, because there is no melding of the family unit.”

Allstate Ins. Co. v. Patterson, 231 Va. 358, 344 S.E.2d 890 (1986); *USAA Cas. Ins. Co. v. Hensley*, 251 Va. 177, 465 S.E.2d 791 (1996); *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 43 Va. Cir. 419, 1997 WL 1070431, 7 (Va. Cir. Ct. 1997). See also, *State Farm Mut. Auto Ins. Co. v. Smith*, 142 S.E.2d 562, 566

(1965), *overruled on other grounds, State Farm Mut. Auto. Ins. Co. v. Jones*, 238 Va. 467, 383 S.E. 2d 734 (1989).

Although Plaintiff below argued this definition is inapplicable, it was recently again upheld by the Virginia courts as the proper definition of "household." *State Farm Mut. Auto. Ins. Co. v. Bowles*, Civil Action No. 6:09-cv-44, W.D.Va., entered Aug. 12, 2011.¹ A copy is attached hereto as Exhibit A.

This definition was critical since it clearly requires a degree of permanency. Plaintiff did not offer any evidence that William Piper lived with Paul Massanopoli as part of a unit of permanent and domestic character under one roof. To the contrary, the Plaintiff merely relied upon sporadic documents where William Lee Piper utilized his grandfather's address and argued to the jury that occasional visits would suffice to create residency. Trial Transcript, p. 104. Absent instruction that occasional visits would not suffice, the jury proceeded under incorrect instruction. Without proper instruction which would demonstrate plaintiff's evidence was insufficient, there was never a chance the jury could make a proper determination of residency. Thus, the failure to provide proper instruction also amounts to reversible error mandating a new trial.

¹ The *Bowles* Court held that in determining whether an individual is a resident of the insured's household, courts in Virginia have looked to a number of factors including whether the individual intends to be a permanent resident of the household; has regular, versus erratic contacts with the household; actually stays at the residence; maintains a close, or strained relationship with other members of the household; pays rent, board, or otherwise contributes to household expenses or maintenance; keeps personal property at the residence; receives substantial mail at the residence; and maintains a room or other private space in the residence. These were items which would have been testified to by the various family members which were excluded.

VI. CONCLUSION

“Justice ordinarily will not prevail where only a part of the available evidence affords the only support for the judgment rendered.” *Meadows*, 468 S.E.2d at 316. Justice did not prevail in the present civil action because of the trial court's improper interpretation of the Dead Man's Statute which excluded proper testimony and documentary evidence from the jury's consideration. The lack of proper instruction also impaired the jury's ability to render a full and fair decision in the instant matter.

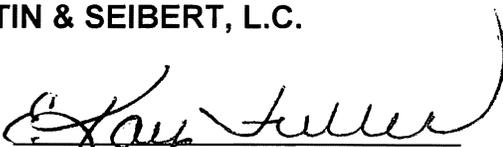
WHEREFORE, the Petitioner, State Farm Fire & Casualty Company, respectfully requests this Court reverse the pre-trial rulings of the Circuit Court of Jefferson County, vacate the verdict, grant a new trial and remand with instructions to permit introduction of all pertinent evidence and with proper instruction.

Respectfully submitted,

**STATE FARM FIRE & CASUALTY
COMPANY**
By Counsel

MARTIN & SEIBERT, L.C.

BY:



E. Kay Fuller
(WV State Bar No. 5594)
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209

CERTIFICATE OF SERVICE

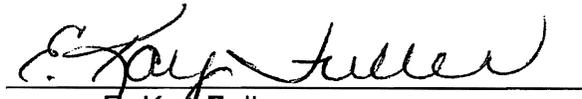
I, E. Kay Fuller, Counsel for the Petitioner, State Farm Fire & Casualty Company, hereby certify that I served a true copy of the foregoing **Petitioner's Brief** upon the following individual by United States Mail, postage prepaid, first class, on this the 5th day of Dec., 2011:

Stephen Skinner, Esquire
Skinner Law Firm
P.O. Box 487
Charles Town, WV 25414-0487

Robert Showers, Esquire
Timothy P. Bosson, Esquire
Simms Showers LLP
305 Harrison Street, S.E., 3rd Floor
Leesburg, VA 20175

Jeffrey W. Molenda, Esquire
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
P.O. Box 1970
Martinsburg, WV 25402

Michael D. Lorensen, Esquire
Bowles, Rice, McDavid, Graff & Love, LLP
P.O. Box 1419
Martinsburg, WV 25402-1419



E. Kay Fuller