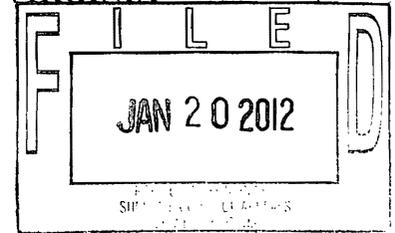


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1265



**STATE FARM FIRE &
CASUALTY COMPANY,**

Petitioner,

**Circuit Court of Jefferson County,
Civil Action No. 09-C-415**

v.

**ROBIN SKINNER PRINZ,
as Personal Representative of
the Estate of Kyle Hoffman, Jr.,**

Respondent.

RESPONDENT'S BRIEF

Stephen G. Skinner (WVSB 6725)
Skinner Law Firm
P. O. Box 487
Charles Town, WV 25414
304-725-7029/Facsimile: 304-725-4082
sskinner@skinnerfirm.com

TABLE OF CONTENTS

I.	RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF THE CASE.....	2
III.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	3
IV.	ARGUMENT.....	4
A.	This Court should review the circuit court’s ruling on the application of the Dead Man’s Statute to the facts of this case under the “abuse of discretion” standard.....	4
B.	The Circuit Court did not abuse its discretion when it barred testimony and evidence from Piper’s family.....	5
1.	The circuit court did not abuse its discretion in finding that testimony by Piper’s family members regarding his residence necessarily concerns “personal transactions” with the deceased because the testimony involved mutuality and concert of action.....	6
2.	The proffered witnesses were all interested parties within the meaning of the Dead Man’s Statute.....	9
3.	The testimony proffered was against the deceased, William Lee Piper.....	12
4.	The testimony was all excludable under Rule WVRE 403.....	14
C.	The circuit court was within its discretion in excluding certain pieces of documentary evidence under the Dead Man’s Statute.....	14
D.	The Court Correctly Disallowed Defendant’s Jury Instruction on “Household”	16
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES

<i>Allstate Ins. Co. v. Patterson</i> , 231 Va. 358 (1986).....	17
<i>Cross v. State Farm Mut. Auto Ins. Co.</i> , 182 W.Va. 320, 387 S.E.2d 556 (1989).....	5, 10
<i>Farmers Mut. Ins. Co. v. Tucker</i> , 213 W.Va. 16, 576 S.E.2d 261 (2002).....	19
<i>Hatcher v. Nationwide Mut. Ins. Co.</i> , 70 Va. Cir. 430 (Richmond 2000).....	19
<i>Hicks v. Ghaphery</i> , 212 W.VA. 327, 571 S.E. 2d 317 (2002).....	4, 12
<i>McDougal v. McCammon</i> , 193 W.Va. 229, 455 S.E.2d 788 (1995).....	4
<i>Meadows vs. Meadows</i> , 196 W.Va. 56, 468 S.E.2d 309 (1996)	4, 5, 7, 8, 13
<i>Moore v. Goode</i> , 180 W.Va. 78, 375 S.E.2d 549 (1988).....	6, 7, 9, 12
<i>Seabright v. Seabright</i> , 28 W.Va. 412 (1886).....	13
<i>State ex re. Johnson v. Tsapsis</i> , 187 W.Va. 229, 455 S.E.2d 788 (1995).....	4
<i>Phelps v. State Farm Mut. Auto. Ins, Co.</i> , 245 Va. 1, 426 S.E.2d 484 (1993).....	15, 16, 18
<i>Wilmer v. Hinkle</i> , 180 W.Va. 660, 379 S.E.2d 383 (1989).....	10

STATUTES

W. Va. Code §57-3-1.....	1, 3, 5, 10, 11
W.Va. Code §16-5-19(a).....	15
W.Va. Code §16-5-19(b)(1).....	16
W.Va. Code §16-5-19(c)(2).....	16
W.Va. Code §44-1-4.....	16

RULES

W. Va. R. App. P. 19.....3
W.Va. R. Evid. 403.....14

SECONDARY SOURCES

Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence, 74
Iowa L.Rev. 413, 415 (1989).....4
Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, (4th Ed.
2000).....13

RESPONSE TO ASSIGNMENTS OF ERROR

- A. The Circuit Court of Jefferson County properly applied the Dead Man's Statute, W.Va. Code §57-3-1, to bar the family members of William Lee Piper from testifying counter to the sworn statements of the deceased that he was a resident of his grandparents' home in Berryville, Virginia, thus triggering coverage under his grandparents' State Farm Personal Liability Umbrella Policy.
- B. The Circuit Court of Jefferson County properly applied the Dead Man's Statute when it prohibited the introduction of documentary evidence produced after Piper's death in which Piper's parents, and not an objective or disinterested party, stated that Piper was a resident of their home in Harpers Ferry, West Virginia.
- C. The Circuit Court of Jefferson County properly excluded the instruction defining the term "Household" because it misstated Virginia law.

STATEMENT OF THE CASE

On October 28, 2007, seventeen-year-old Kyle Hoffman, Jr. ("Hoffman") was killed in a devastating car wreck caused by William Lee Piper ("Piper"). Hoffman was a passenger in the car when Piper attempted to pass another vehicle, lost control, crossed the centerline, and collided with an oncoming minivan. Piper died immediately. Hoffman was airlifted to a hospital in Fairfax, Virginia, but died of multiple blunt force injuries the next day. Five months after Hoffman's death, his only child, Bailey, was born.

Plaintiff filed this wrongful death action on behalf of the Estate of Kyle Hoffman, Jr. on October 27, 2009. Count I of the Complaint is a wrongful death claim against the Estate of William Lee Piper. Count IV is an insurance coverage claim against State Farm Fire and Casualty Company (“State Farm”). On July 22, 2010, by agreement, this case was bifurcated into two parts for trial: a declaratory judgment action of insurance coverage by Defendant State Farm and a tort action on the underlying wrongful death claim.

The declaratory judgment coverage action in this case turned on the question of whether or not Will Piper was a resident of his grandparents’ home in Berryville, Virginia at the time of his death. If so, this would trigger coverage under a State Farm Personal Liability Umbrella Policy (“umbrella policy”). Defendant State Farm asserted that Piper lived with his parents, Julie and David Piper, in Harpers Ferry, West Virginia. Defendant State Farm lost the declaratory judgment action in a jury trial on June 2, 2011, when the jury agreed that Piper lived with his grandparents and found in favor of coverage.

At trial, the jury considered the following evidence:

- A. Piper’s valid Virginia driver’s license listed his grandparents’ address – 1320 Chilly Hollow Road, Berryville, Virginia – as his residence;¹
- B. Just three weeks before the crash, Piper titled and registered his 1991 Honda CRX, the vehicle he was driving at the time of the crash, listing his residence and the place the vehicle was garaged as 1320 Chilly Hollow Road, Berryville, Virginia. The application for registration was dated October 4, 2007;²
- C. On his application for automobile insurance to GEICO – just weeks before the crash – Piper listed his address as his grandparents’ home in Berryville, Virginia.

¹ App. 151 – 153.

² App. 156 – 157.

On October 16, 2007, GEICO issued Piper an automobile insurance policy at this address;³

- D. On October 18, 2007 – just nine days before the crash, under penalty of perjury – Piper listed his grandparents’ address in Berryville, Virginia as his address on the following documents: Federal W-4 form, Form Va-4, Federal Employment Eligibility Form, and West Virginia Certificate of Non Residence;⁴
- E. Piper’s official transcript indicates that from August 26, 2002 through his graduation on June 4, 2006, Piper was enrolled at Clarke County High School in Virginia,⁵ and his parents and grandparents agreed to a joint custody agreement indicating that Piper would live with his grandparents specifically for that purpose.⁶

To attempt to counter this evidence, Defendant State Farm sought to introduce affidavits and testimony by Julie Piper, Piper’s mother, and Paul Massanopoli, Piper’s grandfather, and two other members of Piper’s immediate family. They additionally sought to introduce tax returns filed by Piper’s parents that listed Piper as their dependent, Piper’s death certificate, Letters of Administration creating his estate, and his obituary. The trial court excluded all of this evidence as being barred by West Virginia’s Dead Man’s Statute, §57-3-1, as irrelevant, or hearsay. State Farm produced six other non-family witnesses to support their position.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent requests oral argument under West Virginia Rule of Appellate Procedure 19, as the case involves the application of settled law to the unique facts presented. Additionally, Respondent requests that the Court issue a written decision.

³ App. 158 - 160.

⁴ App. 161 – 164.

⁵ App. 166.

⁶ App. 167 – 168.

ARGUMENT

- A. **This Court should review the circuit court's ruling on the application of the Dead Man's Statute to the facts of this case under the "abuse of discretion" standard.**

This Court should review this case under the abuse of discretion standard. As the Court has stated,

The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. As the drafters of the rules appear to recognize, evidentiary and procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case. *See generally* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 Iowa L.Rev. 413, 415 (1989). Thus, absent a few exceptions, this Court will review all aspects of the circuit court's determinations under an abuse of discretion standard. *See State ex re. Johnson v. Tsapsis*, 187 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995).

McDougal v. McCammon, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995). This Court has specifically held this standard of review appropriate in cases involving application of the Dead Man's Statute. The Court reviews "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 or review is *de novo*." *Meadows v. Meadows*, 196 W.Va. 56, 59, 468 S.E.2d 309, 312 (1996) (citations omitted); *see also Hicks v. Ghaphery*, 212 W.Va. 327, 337, 571 S.E.2d 317, 327 (2002).

In the instant appeal, the issue is not whether the circuit court misinterpreted the Dead Man's Statute, but whether it appropriately applied the statute to the facts unique to this case. Consequently, this Court should review the circuit court's decision under the abuse of discretion standard.

B. The Circuit Court did not abuse its discretion when it barred testimony and evidence from Piper's immediate family.

West Virginia's Dead Man's Statute, W.Va. Code §57-3-1 states in part

No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person . . .

The underlying rationale for the statute "is that a survivor's lips should be sealed because the lips of the decedent are sealed." *See Meadows*, 196 W.Va. at 60, 468 S.E.2d at 313 (quoting *Cross v. State Farm Mut. Auto Ins. Co.*, 182 W.Va. 320, 325-26, 387 S.E.2d 556, 561 (1989)).

The central issue in this declaratory judgment action was whether Piper was a resident of his grandparents' home in Berryville, Virginia at the time of his death so as to trigger coverage under his grandparents' State Farm umbrella policy. Before the court were multiple documents, signed and sworn by Piper immediately prior to his death, showing that Piper's residence was, in fact, his grandparents' home. One of these documents, the application for Virginia vehicle title and registration, was even signed by Defendant Julie Piper as power of attorney for William Lee Piper. Still, at trial, Defendant State Farm sought to introduce testimony and evidence by Julie Piper, Piper's grandfather, and other family members that Piper was **not** a resident of his grandparents' home and lived instead in Harpers Ferry, West Virginia. The circuit court excluded this evidence as violative of West Virginia's Dead Man's Statute.

Interpreting the Dead Man's Statute, this Court has articulated the following test:

(1) A witness' testimony is excluded if it relates to a personal transaction or communication with the deceased . . . and

(2) The witness is either a party to the suit or a person interested in its event or is a person through or under whom such party or interested person derives any interest or title by assignment, and

(3) the testimony offered must be against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such [deceased] person . . .

Moore v. Goode, 180 W.Va, 78, 90, 375 S.E.2d 549, 561 (1988).

Applying this test, the circuit court correctly excluded the testimony of Defendant Julie Piper, Paul Massanopoli, and other family members of Piper. The 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.⁷

Thus, under the facts of this case, the exclusion of testimony regarding his residence by Piper's immediate family members was not an abuse of discretion. It was a reasonable and rational application of the factors announced by this Court in *Moore v. Goode* to the facts of the instant case.

- 1. The circuit court did not abuse its discretion in finding that testimony by Piper's family members regarding his residence necessarily concerns "personal transactions" with the deceased because the testimony involved mutuality and concert of action.**

The first consideration in assessing testimony under the Dead Man's Statute requires a court to determine whether or not the proffered testimony concerns a personal transaction or communication with the deceased. *Moore*, 180 W.Va. at 90, 375 S.E.2d at

⁷ App. 219

561. Assessing the proffered testimony, the circuit court found that “[s]uch testimony by interested parties such as William Lee Piper’s family members would relate to a course of conduct,”⁸ and therefore qualified as a “personal transaction.” The circumstances of where somebody lives—whether they pay rent, whether they have chores, where they park—are all personal transactions. And here, all of the conduct relates to transactions with family members—and whether he lived at his grandparents or his parents’ home.

The circuit court’s finding is consistent with precedent. In *Meadows*, 196 W.Va. 56, 468 S.E.2d 309 (1996), this Court construed the statutory term “personal transaction” “as requiring something in the nature of a negotiation or a course of conduct or a mutuality of responsibility.” 196 W.Va. at 63, 468 S.E.2d at 316. Consequently, the Court held that the Plaintiff’s unilateral observations and opinions of a decedent’s mental state were admissible evidence in an action challenging a last will and testament, as such observations did not possess the requisite mutuality to establish a personal transaction. 196 W.Va. at 62, 468 S.E.2d at 315. There is no evidence that the plaintiff in *Meadows* ever had a conversation with the decedent about his mental state, she simply observed his behavior and formed opinions based on that behavior.

Here, the circuit court did not abuse its discretion in finding that the proffered testimony regarding Piper’s residence concerned “personal transactions” with the proffered witnesses. What Defendant claims are observations of Piper’s behavior were, on the contrary, personal transactions of a course of conduct. At the time of his death, Piper was a twenty-year old man. He had reached the age of majority and had the right to make decisions about where he would reside. This decision necessarily required that

⁸ App. 219.

Piper engage in “something in the nature of a negotiation or a course of conduct or a mutuality of responsibility” with his grandparents, whose home address he held out as his own, and his parents, who now claim that he lived with them in West Virginia. *See Meadows*, 196 W.Va. at 63, 468 S.E. 2d at 316.

Moreover, Ms. Piper and Mr. Massanopoli engaged in a consistent course of conduct with Piper when they systematically claimed that he lived with his grandparents for purposes of school registration, employment applications, transactions with the Virginia Department of Motor Vehicles (“DMV”), and Piper’s automobile insurance carrier. These transactions possessed the element of mutuality, as all three parties, Piper, Mrs. Piper, and Mr. Massanopoli consistently represented Will’s residence as Berryville, Virginia. In fact, Ms. Piper was the signatory on Piper’s application for Virginia title for his automobile⁹, and Mr. Massanopoli testified at deposition that he specifically allowed Piper to use his address with the DMV.¹⁰

In situations like the one presented in this case, “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.” *Meadows*, 196 W.Va. at 60, 468 S.E.2d at 313 (citations omitted). The Petitioner claims “nobody knew better where William Piper lived than his family.”¹¹ In fact, someone did know better, William Piper himself, and he represented, under penalty of perjury, that he lived at his grandparents’ address in Berryville. The Petitioner’s position directly contradicts the words of William Piper. After stating that she had raised her son to be an

⁹ App. 156 – 157.

¹⁰ App. 174 – 175.

¹¹ Petitioner’s Brief, p13

honest person and to tell the truth,¹² Mrs. Piper testified multiple times that her son had lied under oath about his place of residence.¹³

Q. Okay. Well, let me ask you was he telling the truth when he filled out his address?

A. No.

Q. So he was lying?

A. He wasn't telling the truth.¹⁴

Mrs. Piper now claims that she lied when she registered his car for him under power of attorney.¹⁵ Will Piper cannot now give his own version of facts in this case, nor can he defend himself against his own mother's claims that he lied under oath.

This family, led by Mrs. Piper and Will Piper, made clear, until after his death, that Piper lived with his grandparents in Berryville, Virginia. It is where he sent to school, where he had his driver's license and where he represented to the world where he lived. Now that it would advantage them, they are recasting the course of conduct without a shred of objective evidence. This consistent course of conduct and mutual representation satisfies the first part of the three-part test for application of the Dead Man's Statute.

2. The proffered witnesses were all interested parties within the meaning of the Dead Man's Statute.

The second element required for application of the Dead Man's Statute is that the proffered witness be "either a party to the suit or a person interested in its event." *Moore*, 180 W.Va. at 90, 375 S.E.2d at 561. Each of the proffered witnesses was an interested party, and each stood to benefit from the outcome of the declaratory judgment action. As Administratrix of the Estate of William Piper, and as a beneficiary of Will's estate, Ms.

¹² Official Trial Transcript (Second Day), 15.

¹³ *Id.* at 16-22.

¹⁴ *Id.* at 18,61-20.

¹⁵ *Id.* at 19-20.

Piper is a party to this suit and thus falls into the category of witnesses whose testimony may be excluded by W.Va. Code §57-3-1. Moreover, Piper's immediate family members, including his brother and sister-in-law, are also beneficiaries of the Estate of William Piper and have a present and vested interest in any action involving the estate. *See Cross*, 182 W.Va. at 325, 387 S.E.2d at 561.

As a named insured and the holder of the State Farm umbrella policy at issue in this case, Mr. Massanopoli is a "person interested in the event" under the statute, and his connection with this litigation far exceeds that of a simple fact witness. As the named insured, Mr. Massanopoli stands to see a significant change in his policy premium and thus has "an interest to be affected by the result of the suit or by the force of the adjudication." *Wilmer v. Hinkle*, 180 W.Va. 660, 664, 379 S.E.2d 383, 387 (1989). This interest is "present, certain, and vested, not remote uncertain, or contingent." *Cross*, 182 W.Va. at 325, 387 S.E.2d at 561. By virtue of their individual interests in the outcome of this suit, both Ms. Piper and Mr. Massanopoli qualify as witnesses whose testimony should be excluded under West Virginia's Dead Man's Statute.

Additionally, Ms. Piper has unequivocally revealed her interest – and that of her father and other family members – in statements made to GEICO employees during that insurance company's investigation of the fatal collision. Mrs. Piper originally told GEICO's adjusters that Piper lived at "his grandmother's house."¹⁶ However, upon learning that GEICO might look to Piper's grandparents' insurance policies for additional coverage, Mrs. Piper changed her story. In deposition testimony, GEICO adjuster Vickie Rouse reported the following testimony:

¹⁶ App. 134

I told [Mrs. Piper] that, if indeed her son did live at the grandmother's home, then we need to look possibly at the coverages there, if he was living there with her at that time,

And she said that she would check into it and get back with me. But she did tell me that she did not want the mother's policy to be involved because her mother had - - was having health issues and everything.

And I remember telling her, well, we're not going to do anything to her mom, per say [sic], we would just look at the policy. It doesn't mean that her mother was at fault for anything.

I tried to explain to her we were just looking for insurance coverage, not to put any kind of stress of blame on her mother's policy kind of thing, you know.

We just wanted to – because of the seriousness of the accident and the coverages that we had, I was just wanting to see if we had other coverage out there anywhere that could pay.

But she didn't want to give me the information.¹⁷

After being told that her parents' insurance policy might be implicated, Mrs. Piper “completely changed her thoughts about everything. Then she said, no, he didn't live with her mom.”¹⁸

In other words, it was extremely important to both the Pipers and the Massanopolis that the State Farm policy at issue in this declaratory judgment action not be implicated or triggered by the underlying wrongful death claim. The desire not to trigger that policy renders Piper's family members' precisely the sort of interested parties referred to by W.Va. Code §57-3-1, parties whose testimony might be suspect in light of the deceased's inability to speak for himself in any way save through the documents executed by him prior to his death. It is not the fact of their familial relationship standing alone that makes the proffered witnesses interested parties. Rather, it is the concerted

¹⁷ App. 252 – 253.

¹⁸ App. 254.

family interest in insuring that Piper’s grandparents’ State Farm insurance policy is not triggered in this case. In light of the ample evidence that Piper’s family members had a present and certain interest in a finding that State Farm coverage under the Massanopoli umbrella policy did not exist, the circuit court did not abuse its discretion when it held that they were interested parties within the meaning of the Dead Man’s Statute.

3. The testimony proffered was against the Estate of William Lee Piper.

The final element of analysis for applicability of the Dead Man’s Statute is that the testimony offered be “against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such [deceased] person . . .” *Moore*, 180 W.Va, at 90, 375 S.E.2d at 561. State Farm argues that the proffered testimony was offered against it as Defendant in the declaratory judgment portion of this bifurcated action – not against the deceased or any of his survivors. Before the circuit court, counsel for the Respondent argued that, as a potential beneficiary of the State Farm policy, the Estate of William Piper satisfied this third requirement. The circuit court agreed with this argument, finding it in keeping with precedent established in *Hicks v. Ghaphery*, 212 W.Va. 327, 571 S.E.2d 317 (2002).¹⁹

In fact, the testimony proffered was against the Estate. First, Piper specifically stated during his lifetime – in multiple sworn documents – that his residence was at his grandparents’ home in Berryville, Virginia.²⁰ Second, the testimony of the proffered witnesses would be to the detriment of the Piper estate, which incurs substantial risk should the State Farm coverage be found not to apply. Risk to the statutory beneficiaries is a natural corollary of risk to the Estate.

¹⁹ Official Transcript of Proceedings (Pre-trial Hearing), 22.

²⁰ App. 151 – 153, 156 – 157, 158 – 160, 161 – 164, 166, 167 – 168.

Importantly, there is no requirement that the party against whom testimony is proffered be on the opposite side of the lawsuit from the witness or the party proffering the witness.

The word “against” does not mean on opposite sides of the lawsuit, but it means those with opposing interests. Therefore, the witness could be, for example, the executor who happens to be on the same side of the lawsuit nominally as plaintiff or as defendant but who has antagonistic interest with the estate.

Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, (4th Ed. 2000) (citing *Seabright v. Seabright*, 28 W.Va. 412 (1886)).

The instant case presents a situation where the interests of the administratrix and beneficiaries of the Estate of William Piper are strangely divided. The interest in preserving and protecting the estate conflicts with their interest in protecting the policy of the insureds, Piper’s grandparents. This divided interest speaks directly to the policy underlying the Dead Man’s Statute. As this Court stated in *Meadows*

[t]he 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)”

Meadows, 196 W.Va. at 60, 468 S.E.2d at 313 (citations omitted). There is record evidence of Piper’s family’s motivation for concealing material facts. They did not want to trigger Mr. Massanopoli’s State Farm umbrella policy.²¹

Given the complexities of the relationships and facts presented by this case, the circuit court did not abuse its discretion in holding that the proffered testimony was

²¹ App. 254.

“against the deceased or personal representative of the deceased.”²² This Court should not overturn the circuit court’s holding that the Dead Man’s Statute applies to bar the testimony of Mrs. Piper, Mr. Massanopoli, and Piper’s other immediate family members regarding Piper’s place of residence.

4. The testimony was all excludable Rule WVRE 403.

If the testimony does not meet the test for exclusion under the Dead Man Statute, it is all properly excludable under Rule 403 of the West Virginia Rules of Evidence as being unfairly prejudicial, confusing and misleading. Given the fact that William Piper stated his intent as to his residence just weeks prior to his death, any testimony contradicting Piper would be unfairly prejudicial given his clearly stated intent and that there is no means to cross-exam Piper. Given that his Administrator, his own Mother, testified that he was not telling the truth and that she herself had lied, this evidence is extremely misleading and confusing when the question a jury must determine is the intent of a dead person.

C. The circuit court was within its discretion in excluding certain pieces of documentary evidence under the Dead Man’s Statute.

At trial, Petitioner attempted to have admitted as evidence the letters of administration establishing the Estate of William Piper,²³ Piper’s death certificate,²⁴ and his obituary.²⁵ Respondent’s counsel objected to the introduction of these documents on the grounds that the information regarding Piper’s residence contained in these

²² Official Transcript of Proceedings (Pre-trial Hearing), 22-23.

²³ App. 79.

²⁴ App. 78

²⁵ App. 52.

documents was provided by Piper's immediate family members and was therefore barred by the Dead Man's Statute.²⁶ The documents were also hearsay and irrelevant.²⁷

The primary question before a court on the issue of residency in an insurance case is the *intent* of the party for whom coverage is sought. *Phelps v. State Farm Mutual Automobile Insurance Co.*, 245 Va. 1, 426 S.E.2d 484 (1993). The letters of administration, Death Certificate, and obituary that Defendant sought to introduce were created after the accident occurred and were created without any knowledge by the deceased. None of the documents were helpful in determining what Piper's intent was as to his place of residency. In the instant case, the weight of the evidence shows that Piper declared multiple times under oath and penalty of perjury that his residence was 1320 Chilly Hollow Road, Berryville, Virginia. Evidence to the contrary created by Piper's parents after the fact has little probative value in the face of the deceased's own sworn statements. The circuit court was within its discretion to exclude this evidence.

The address information contained in the letters of administration and death certificate was provided to Jefferson County officials by Piper's family. It was not obtained independently or objectively, and its inclusion in official county documents does not carry any imprimatur of veracity. This is especially true of Piper's obituary, which is not an "official" document at all and is clearly hearsay.

The Death Certificate had little probative value because by law, it was created in West Virginia because that is where Piper *was pronounced dead*. W.Va. Code §16-5-19(a) states "[a] certificate of death for each death which occurs in this state shall be filed" This statute further provides

²⁶ Official Transcript of Proceedings (Pre-trial Hearing), 78-81, 87-88.

²⁷ Official Trial Transcript (First Day) 80, 87.

[t]he funeral director or other person who assumes custody of the dead body shall: (1) Obtain the personal data from the next of kin . . . including the deceased person's social security number or numbers, which shall be placed in the records relating to the death and recorded on the certificate of death." The personal information on the death certificate comes directly from the deceased's next of kin.

W.Va. Code §16-5-19(b)(1). The statute then requires that the physician "completing the cause of death shall attest to its accuracy." W.Va. Code §16-5-19(c)(2). The statute does not require any official certification or due diligence of the information provided by the next of kin as Defendant suggests in its petition. Likewise, W.Va. Code §44-1-4 contains no such requirement. The circuit court did not abuse its discretion when it excluded the death certificate from evidence.

These documents were created by Piper's immediate family **after** the fact of his death. They contained information counter to sworn statements made by Piper during his lifetime, and concern personal transactions between the deceased and parties with a real and vested interest in the outcome of this litigation.

Even if the documents were excluded in error, their slight probative value renders the omission harmless. The determination of residency under the insurance policy in this case was made under Virginia law, and Virginia courts have clearly stated that evidence created by others after the fact of a decedent's death has very little probative value. *See Phelps v. State Farm Mut. Auto. Ins. Co.*, 426 S.E.2d 484 (Va. 1993).

D. The Court Correctly Disallowed Defendant's Jury Instruction on "Household"

The Court correctly rejected Defendant's Jury Instruction No. 4 because the language did not relate to the language of the State Farm umbrella policy in question, and the introduction of the Instruction would have only confused the Jury unnecessarily.

Defendant's Jury Instruction No. 4²⁸ stated, in pertinent part, that: "The term 'household' means a 'collection of persons as a single group, with one head, living together, a unit of permanent and domestic character under one roof.'" Defendant cites a litany of inapposite Virginia cases in support of this instruction. All the cases cited interpret a particular phrase generally found in automobile policies. Those policies state that insurance would be provided to "the named insured and, while residents of the same household, the spouse and relatives of either." *Allstate Ins. Co. v. Patterson*, 344 S.E.2d 890, 891 (Va. 1986). In interpreting the automobile policy language, the Courts focused on the "permanency" and "melding" of the "household" unit. Here though, the language is markedly different. Additionally, Virginia law has evolved in this area since *Patterson*.

Indeed, the instruction given by the circuit court on this issue, to which Petitioner did not object at trial, read

Intent. Whether an individual has met the residence requirements for an insurance policy is a question of fact. Determining primary residence in the context of the insurance policy requires a close examination of the facts of each individual case. The controlling factor in making such a determination of primary residence is the intent as demonstrated primarily by acts of the person whose primary residence is sought to be established. If you find by a preponderance of the evidence that the acts of William Lee Piper show his intent that his grandfather's home in Berryville, Virginia, be his primary residence, you may also find that he was covered under the State Farm policy at issue in this case.²⁹

Therefore, the circuit court's instruction was consistent with controlling law.

A close review of the policy language in this case, especially as it diverges from the language of the policies in the cases cited by Defendant, is imperative. The cases cited by Defendant were interpreting language found in auto insurance policies and not

²⁸ Defendant has failed to include its Jury Instructions in its Appendix and does not clearly specify to which instruction it is referring. Plaintiff presumes its Instruction No. 4.

²⁹ Official Trial Transcript (Second Day) 75-76.

umbrella insurance policies. In automobile policies, the focus is on protecting a member of a “household” while driving a vehicle linked to the family. Auto policies are narrow by nature. Umbrella policies, by contrast, are written to cover far more activities than driving and are intended to cover all family members (not just those with driver’s licenses or in a vehicle), and exist to provide “excess coverage” for unforeseen and often unanticipated liability.

Reviewing the particular language of this policy it is clear that the language in the policy and the relevant question for a jury relates to “the primary residence” and not the “household”. The policy defines an “insured” as “you and your relatives whose *primary residence* is your household”. It makes no sense to plug in the definition of household given by Virginia Courts because it would make the definition self-contradictory. Primary implies that you can have “secondary” residences. A literal interpretation of the Petitioner’s position would read something like “you and your relatives whose primary residence is your collection of persons as a single group, with one head, living together, a unit of permanent and domestic character under one roof.” The problem is that the Petition does not distinguish between Virginia automobile policy language and Virginia umbrella policy language.

More importantly, the Petitioner gets the law wrong. Virginia jurisprudence regarding the question of residency began to change in 1993 with the *Phelps v. State Farm* case. In *Phelps*, the Court made clear that the primary determinant of residency was the **intent** of the person whose residency was in question. 426 S.E.2d at 487 (“We proceed, therefore, to inquire into the intent of [plaintiffs] with respect to [residency]....”). Since *Phelps*, Virginia courts have increasingly focused on the issue of intent as the

controlling factor in determining residency. *Hatcher v. Nationwide Mut. Ins. Co.*, 70 Va. Cir. 430, 432 (Richmond 2000) (“One's intent is a key factor to consider in making a determination...”). This is especially true in non-traditional family cases. *See, generally, Phelps*, 426 S.E.2d 484.

The old “Household” language cited by Defendant here, which states in part “*a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof,*” is archaic and not easily applicable to modern society. The traditional household of twenty years ago is often non-existent today. Households today often have two breadwinners and two decision-makers, therefore, “two heads.” And, many households are torn by divorce or a lack of marriage, and there are often two distinct “households” for one child, disallowing the “single group.” It is for this reason that Virginia courts, and West Virginia for that matter³⁰, have moved away from focusing on the concept of “household” and towards focusing on the intent of the individual to determine where the person resides.

Even if this Court were to find that the Judge wrongly excluded Jury Instruction No. 4, any resulting harm would be harmless error. The Jury was still provided Plaintiff’s Jury Instruction No. 3, which included the exact language of the policy regarding residency, as did the verdict form.

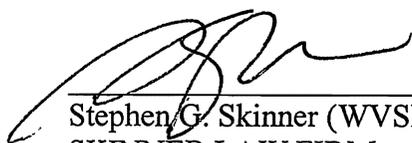
Therefore, the Court was correct to remove the instruction defining the term Household. The instruction, as written, would have only served to confuse the jury and would have mis-directed the focus from the correct question, which was where Will Piper intended to live as his “primary residence.”

³⁰ *See, Farmers Mut. Ins. Co. v. Tucker*, 213 W. Va. 16, 24, 576 S.E.2d 261, 269 (2002) (“The controlling factor is the intent, as evinced primarily by the acts, of the person whose residence is questioned.”).

CONCLUSION

Just weeks before his death, a Will Piper signs documents, under penalty of perjury, indicating that he lives at his Grandparent's home in Berryville, Virginia. When State Farm is called upon to provide coverage for the death of Kyle Hoffman – caused by Will Piper – his family challenges Piper's representation about his address and calls him a liar. The family's story cannot be challenged because Will Piper is dead. All we have left are the documents he signed which unequivocally state that Piper's address is in Berryville, Virginia, as the jury found. To add the testimony of his mother, grandfather and other interested family matters would more than confuse the case. It violates the letter and the policy of the Dead Man Statute. The Petition should be denied.

Robin Skinner Prinz
By Counsel



Stephen G. Skinner (WVSB 6725)
SKINNER LAW FIRM
P. O. Box 487
Charles Town, WV 25414
304-725-7029/Facsimile: 304-725-4082
sskinner@skinnerfirm.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 11-1265

STATE FARM FIRE &
CASUALTY COMPANY,

Petitioner,

Circuit Court of Jefferson County,
Civil Action No. 09-C-415

v.

ROBIN SKINNER PRINZ, AS PERSONAL
REPRESENTATIVE FOR THE ESTATE OF
KYLE HOFFMAN, JR.,

Respondent.

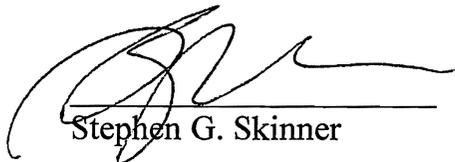
CERTIFICATE OF SERVICE

I, Stephen G. Skinner, of the Skinner Law Firm, counsel for the Petitioner, Robin Skinner Prinz, as Personal Representative of the Estate of Kyle Hoffman, Jr., certify that I served the **Respondent's Brief**, by United States Mail on the 19th day of January 2012 upon the following:

Michael Lorensen, Esquire
Bowles Rice McDavid Graff & Love LLP
P.O. Drawer 1419
Martinsburg, WV 1419

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

E. Kay Fuller, Esquire
Martin & Seibert
P.O. Box 1286
Martinsburg, WV 25402


Stephen G. Skinner