IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35127

**DORIS MICHAEL AND
TODD BATTLE, BY HIS NEXT FRIEND, DORIS MICHAEL, AND
KITRENA MICHAEL,
Plaintiffs,**

V.

**APPALACHIAN HEATING, LLC, AND
STATE AUTO INSURANCE COMPANY,
Defendants.**

**Certified Question from the Circuit Court of Kanawha County
Honorable Tod J. Kaufman, Judge
Civil Action No. 07-C-2616**

CERTIFIED QUESTION ANSWERED

**Submitted: March 2, 2010
Filed: June 11, 2010**

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE BENJAMIN and JUSTICE WORKMAN disqualified.

JUDGE RONALD E. WILSON and SENIOR STATUS JUDGE HERMAN G. CANADY, sitting by temporary assignment.

JUSTICE KETCHUM dissents and reserves the right to file a dissenting opinion.

JUSTICE MCHUGH concurs in part, and dissents in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus point 1, *Gallapoo v. Wal-Mart Stores, Inc*., 197 W. Va. 172, 475 S.E.2d 172 (1996).

2. "When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1, *et seq*. and *W. Va. Code*, 58-5-2 [(1998)], the statute relating to certified questions from a circuit court of this State to this Court." Syllabus point 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

3. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

4. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the

courts not to construe but to apply the statute." Syllabus point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

5. W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act establishes three distinct causes of action. More specifically, pursuant to W. Va. Code § 5-11-9(7)(A), unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions, it is an unlawful discriminatory practice for any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to: (1) engage in any form of threats or reprisal, or; (2) engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss, or (3) aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in W. Va. Code § 5-11-9.

6. The term "person" is defined by the Human Rights Act, in W. Va. Code § 5-11-3(a) (1998) (Repl. Vol. 2006), as "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Therefore, an

insurance company is included within the meaning of the term "person" as used in W. Va. Code § 5-11-9(7) (1998) (2006).

7. W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act, prohibits unlawful discrimination by a tortfeasor's insurer in the settlement of a property damage claim when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status.

8. The prohibition of a third-party law suit against an insurer under W. Va. Code § 33-11-4a(a) (2005) (Repl. Vol. 2006), does not preclude a third-party cause of action against an insurer under W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act.

Davis, Chief Justice:

This matter comes before this Court upon a request from the Circuit Court of Kanawha County to answer a certified question asking whether the West Virginia Human Rights Act, W. Va. Code § 5-11-1, *et seq*., prohibits discrimination by a tortfeasor's insurer in the settlement of a property damage claim. We conclude that the Human Rights Act does prohibit such discrimination.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts underlying the instant action originated from the alleged negligence of Appalachian Heating, LLC (hereinafter referred to as "Appalachian Heating"). Appalachian Heating was hired by the Charleston-Kanawha County Housing Authority to repair and/or replace climate control units in South Park Village, a public housing development located in Charleston, West Virginia. The plaintiffs in this action are Doris Michael; her minor son, Todd Battle; and her adult daughter, Kitrena Michael (hereinafter collectively referred to as "the Plaintiffs"). The Plaintiffs, who are African American, resided together in an apartment located in South Park Village. On November 21, 2006, the apartment in which the Plaintiffs resided caught fire, allegedly due to negligence on the part of Appalachian Heating, causing a total loss of the Plaintiffs' personal property and rendering

the apartment temporarily uninhabitable.[1] State Auto Insurance Co. (hereinafter referred to as "State Auto"), a defendant in this action, provided liability insurance coverage to Appalachian Heating.

Following the fire, State Auto settled the Plaintiffs' claims. In their brief to this Court, the Plaintiffs submit that "with the exception of one small stipend of $2,500.00 paid in December of 2006, Doris Michael was not provided with a penny to put her life back together." According to Kitrena Michael's amended complaint, State Auto placed "no value on the general damages associated with the total loss."[2] According to the amended complaint

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[1]The Plaintiffs allege that they were displaced from their home for a period of approximately 113 days. For the week immediately following the fire, the Plaintiffs stayed with friends. Thereafter, they were provided another, apparently smaller and less desirable, apartment within South Park Village, where they resided until they were able to move back into their former apartment.

[2]To the contrary, an exhibit contained in the record in this case titled "PROPERTY DAMAGE RELEASE," which was executed by plaintiff Kitrena Michael on August 30, 2007, states that she received $3,545.15 in settlement of her claims against Appalachian Heating. In consideration for this payment, Kitrena Michael executed a release discharging Appalachian Heating

> from any and all property damage claims which [Kitrena Michael] may now have or which may hereafter accrue on account of or in any way arise out of or result from any known or unknown, foreseen or unforeseen property damage and the consequences thereof related to or arising out of the fire which occurred on or about November 21, 2006 . . . .

State Auto asserts that Kitrena Michael was represented by counsel in negotiating this settlement.

filed by Doris Michael and Todd Battle, State Auto "placed a total value of Two Thousand Five Hundred Dollars ($2,500.00) on Doris Michael and Todd Battle's general damages associated with the total loss outlined herein."[3]

Thereafter, on December 6, 2007, the plaintiffs commenced the instant action by filing two separate complaints. One complaint was filed by Kitrena Michael,[4] and another was filed by Doris Michael and Todd Battle.[5] Both complaints alleged, *inter alia*,[6] that State

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[3]Contrary to this assertion, an exhibit contained in the record in this case titled "PROPERTY DAMAGE RELEASE," which was executed by plaintiff Doris Michael on September 12, 2007, states that she received $19,449.56 in settlement of her claims against Appalachian Heating. In consideration for this payment, Doris Michael executed a release discharging Appalachian Heating

> from any and all property damage claims which [Doris Michael] may now have or which may hereafter accrue on account of or in any way arise out of or result from any known or unknown, foreseen or unforeseen property damage and the consequences thereof related to or arising out of the fire which occurred on or about November 21, 2006 . . . .

State Auto asserts that Doris Michael was represented by counsel in negotiating this settlement.

[4]This action was styled *Katrina Michael v. Appalachian Heating, LLC, and State Auto Insurance Company*, and was designated as civil action no. 07-C-2616.

[5]This action was styled *Doris Michael and Todd Battle, by His Next Friend, Doris Michael v. Appalachian Heating, LLC, and State Auto Insurance Company*, and was designated as civil action no. 07-C-2617.

[6]No issues involving the Plaintiffs' claims against Appalachian Heating are involved in this certified question action.

Auto had violated the West Virginia Human Rights Act in settling their claims. Specifically, both complaints set out nearly identical allegations as follows:

> 32. That [State Auto] by and through its agents, employees and representatives . . . failed to properly, fairly and reasonably evaluate, process and adjust the plaintiff[s'] fire loss claims because of the plaintiff[s'] race and the fact that they resides [sic] in public housing.
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> 33. That [State Auto], by and through its agents, employees and representatives . . . wrongfully denied the plaintiffs . . . fair and reasonable compensation for the loss and damages arising out of the fire loss [they] sustained on November 21, 2006 because of plaintiffs' race and the fact that they reside in public housing.
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> 34. That [State Auto], through its agents, employees and representatives . . . committed the act of inferring and informing the [plaintiffs] that the loss of [their] personal property and the commensurate damages arising there from [sic] virtually had no value because of [their] race and the fact that [they] resided in public housing.
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> 35. That the express purpose and spirit of the West Virginia Act was clearly violated by the defendant, [State Auto,] and its agents, employees and representatives when it participated directly in excluding the plaintiffs from and/or refusing to extend to the plaintiffs the same opportunity and consideration when evaluating the plaintiffs' fire loss claims it extends to those persons not of African American descendent and those who do not reside in public housing.
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> 36. That the express purpose of the West Virginia Act was clearly violated by the defendant, [State Auto,] and its agents, employees and representatives when it acted as previously described herein and in such a way as to degrade the plaintiffs, to embarrass the plaintiffs and to

> cause the plaintiffs economic loss as set forth in 5-11-9(A) [sic] of the West Virginia Code.[7]

(Footnote added). State Auto filed a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure in each case, based upon State Auto's contention that the Plaintiffs are barred from bringing their Human Rights Act case by a provision of the West Virginia Unfair Trade Practices Act (hereinafter referred to as "the UTPA") that provides the only method for bringing a third-party action against an insurance company based upon its settlement practices. *See* W. Va. Code § 33-11-4a (2005) (Repl. Vol. 2006). The actions were then consolidated by order of the circuit court entered on May 22, 2008.[8] By order entered December 1, 2008, the circuit court denied State Auto's motions to dismiss. After the denial, State Auto orally moved that a question be certified to this court pursuant to

[7]This reference should have been to W. Va. Code § 5-11-9(7)(A) (1998) (Repl. Vol. 2006).

[8]The actions were consolidated under civil action no. 07-C-2616.

W. Va. Code § 58-5-2 (1998) (Repl. Vol. 2005).[9] The circuit court granted the motion, and by agreed order entered April 23, 2009, the circuit court certified the following question:

> *May a plaintiff present a cause of action against a tortfeasor's insurance carrier pursuant to the West Virginia Human Rights Act, West Virginia Code § 5-11-9*[*(7)*]*(A), when it is alleged that a tortfeasors' insurance carrier discriminated against the plaintiffs because they are African-American and reside in public housing?*
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> *Circuit Court: Yes*.

By order entered September 3, 2009, this Court accepted the certified question for review

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[9]W. Va. Code § 58-5-2 (1998) (Repl. Vol. 2005) states:

> Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the Supreme Court of Appeals.

II.

STANDARD OF REVIEW

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996). *Accord* Syl. pt. 1, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009); Syl. pt. 1, *Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc.*, 220 W. Va. 39, 640 S.E.2d 102 (2006). Accordingly, we give plenary consideration to the legal issues that must be resolved to answer the question herein certified.

III.

DISCUSSION

Before we address the substantive issues rased in this certified question, we note that

> [w]hen a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1, *et seq*. and *W. Va. Code*, 58-5-2 [(1998)], the statute relating to certified questions from a circuit court of this State to this Court.

Syl. pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993). *See also* W. Va. Code § 51-1A-4 (1996) (Repl. Vol. 2008) ("The Supreme Court of Appeals of West Virginia may reformulate a question certified to it."). In order to clarify the instant certified question and

to fully address the relevant law, we exercise our authority to reformulate the question as follows:

> Does the West Virginia Human Rights Act prohibit discrimination by a tortfeasor's insurer in the settlement of a property damage claim asserted by a member of a protected class under the Act?

Summarizing the parties' arguments relating to the manner in which we should answer the certified question, we note that State Auto argues that the Plaintiffs' sole exclusive remedy for the conduct alleged against it is an administrative complaint with the Insurance Commissioner pursuant to the UTPA.[10]

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[10]State Auto refers specifically to W. Va. Code § 33-11-4a(a) (2005) (Repl. Vol. 2006), which states:

> *A third-party claimant may not bring a private cause of action or any other action* against any person *for an unfair claims settlement practice. A third-party claimant's sole remedy* against a person *for an unfair claims settlement practice* or the bad faith settlement of a claim *is the filing of an administrative complaint* with the commissioner in accordance with subsection (b) of this section. A third-party claimant may not include allegations of unfair claims settlement practices in any underlying litigation against an insured.

(Emphasis added). The term "third-party claimant" is defined as "any individual, corporation, association, partnership or any other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract for the claim in question." W. Va. Code § 33-11-4a(j)(1).

State Auto contends that, under the UTPA, the Plaintiffs' sole remedy is to file an administrative complaint with the Insurance Commissioner.[11] In addition, State Auto submits that there is no common law cause of action for third-party claimants who allege discrimination by a tortfeasor's insurance company.[12] Additionally, State Auto argues that the rules of statutory construction support its interpretation of the relevant statutes. State Auto opines that, if this Court allows the instant action, it will open a flood of baseless litigation which the Legislature has already prohibited. According to State Auto, this action is simply a third-party bad faith claim disguised as a Human Rights claim.

The Plaintiffs respond that the West Virginia Human Rights Act, specifically W. Va. Code § 5-11-9(7)(A) (1998) (2006),[13] expressly prohibits discrimination based on

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[11]State Auto also argues that the West Virginia Legislature has expressly prohibited unfair discrimination by insurance companies. It should be noted, however, that the provision relied upon by State Auto, W. Va. Code § 33-11-4(7) (2002) (Repl. Vol. 2006), primarily pertains to the rates and premiums charged for insurance coverage. It does not pertain to settlement practices and, thus, is irrelevant to the instant question.

[12]In support of this argument, State Auto cites *Elmore v. State Farm Mutual Automobile Insurance Co.*, 202 W. Va. 430, 434, 504 S.E.2d 893, 897 (1998), which states

> there is simply nothing to support a common law duty of good faith and fair dealing on the part of insurance carriers toward third-party claimants. We therefore decline to expand our prior holdings regarding common law bad faith claims to allow third parties to bring an action against the insurance carrier of another.

[13]W. Va. Code § 5-11-9(7) states:

(continued...)

race or the fact that a person resides in public housing. The Plaintiffs contend that State Auto did not give their fire loss claim the same opportunity and consideration when evaluating their loss as it extends to persons who are not African American and who do not reside in public housing. Thus, the Plaintiffs argue that State Auto violated the West Virginia Human

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[13](...continued)

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:
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> . . . .
>
> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:
>
> (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;
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> (B) Willfully obstruct or prevent any person from complying with the provisions of this article, or to resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of a duty under this article; or
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> (C) Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

Rights Act and their cause of action should stand. The Plaintiffs further assert that there is nothing in the UTPA that supports granting insurance companies immunity from the Human Rights Act.

Finally, the Plaintiffs assert that they do not seek remedy or relief under the UTPA, nor have they pled a common law cause of action as third-party claimants. Because their complaint is void of any language that would give rise to a third-party cause of action, they contend that their claim is not barred by the UTPA.

The issue presently before this Court is one of first impression and requires us to consider West Virginia's Human Rights Act to ascertain whether W. Va. Code § 5-11-9(7)(A) prohibits discrimination in the settlement of a property damage claim, and whether the UTPA precludes a third-party action against an insurer brought under said statute.

At the outset of our analysis, we point out that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Nevertheless, this Court's authority to construe a statute is limited. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the

statute." Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

The particular provision of the Human Rights Act under which the plaintiffs have asserted their claims, W. Va. Code § 5-11-9(7)(A), is a plainly worded statute that clearly evidences the Legislature's intention. Thus, the statute may not be interpreted by this Court. "'Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.'" *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 729, 679 S.E.2d 323, 328 (2009) (quoting Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968)). *See also* Syl. pt. 1, *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.").

W. Va. Code § 5-11-9(7)(A), under which the plaintiffs have asserted their claims, states:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:
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> . . . .

> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:
>
> (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;

This provision utilizes the disjunctive term "or," to demonstrate that it sets out alternative means of violating the Human Rights Act. *See State v. Rummer*, 189 W. Va. 369, 377, 432 S.E.2d 39, 47 (1993) ("We have customarily stated that where the disjunctive 'or' is used, it ordinarily connotes an alternative between the two clauses it connects." (internal quotations and citations omitted)). Clearly, then, W. Va. Code § 5-11-9(7)(A) establishes three distinct causes of action under the Human Rights Act, making it an unlawful discriminatory practice "for any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:" (1) "engage in any form of threats or reprisal," or; (2) "engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss," or (3) "aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section [(W. Va. Code § 5-11-9)]." W. Va. Code § 5-11-9(7)(A).

We note that W. Va. Code § 5-11-9(7)(A) appears to be an expansion of the general policy declaration of the Human Rights Act found at W. Va. Code § 5-11-2 (1998) (Repl. Vol. 2006).[14] Importantly, however, we observe that the policy declaration does not

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[14]The "Declaration of policy" contained in the Human Rights Act states:

> It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.
>
> The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

W. Va. Code § 5-11-2 (1998) (Repl. Vol. 2006). The Declaration cites only to unlawful discrimination in (1) employment, (2) places of public accommodations, and (2) in the sale, purchase, lease, rental and financing of housing accommodations or real property. However, W. Va. Code § 5-11-9 sets out causes of action against other entities that are not expressly stated in the Declaration. Under W. Va. Code § 5-11-9(2), specific types of unlawful discrimination are prohibited by employment agencies and labor organizations; W. Va. Code § 5-11-9(3) prohibits specific types of unlawful discrimination by a labor organization; W. Va. Code § 5-11-9(4) prohibits specific types of unlawful discrimination by a labor organization, employment agency or any joint labor-management committee; W. Va. Code § 5-11-9(5) prohibits specific types of unlawful discrimination by an employment agency. (continued...)

specifically nullify the application of W. Va. Code § 5-11-9(7)(A); therefore, it is not within the province of this Court to ignore the plain language of that code section. In other words, "courts are not to eliminate through judicial interpretation words that were purposely included [in a statute] . . . ." *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996) (citations omitted). *See also* Syl. pt. 1, *Consumer Advocate Div. v. Public Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989) ("A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."). *Accord Longwell v. Board of Educ. of County of Marshall*, 213 W. Va. 486, 491, 583 S.E.2d 109, 114 (2003).

In accordance with the preceding analysis, we now hold that W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act establishes three distinct causes of action. More specifically, pursuant to W. Va. Code § 5-11-9(7)(A), unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions, it is an unlawful discriminatory practice for any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or

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[14](...continued)
Thus it is clear that in, addition to W. Va. Code § 5-11-9(7)(A), the legislature has set out provisions in several other statutes that expand the application of the Human Rights Act to entities not listed in the Declaration. In the final analysis, the Declaration is simply a broad policy statement, not a limitation on the entities that are subject to the Human Rights Act.

financial institution to: (1) engage in any form of threats or reprisal, or; (2) engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss, or (3) aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in W. Va. Code § 5-11-9.

To analyze the applicability of the foregoing holding to the circumstances presented in the instant case, we first consider whether the statute is applicable to an insurance company. The first paragraph of W. Va. Code § 5-11-9(7) sets out those to whom the following subsections, including subsection (A), apply, which is "any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution." In the context presented in this case, the insurance company is not functioning as an employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution. Thus, this section is applicable to an insurance company only if the insurance company falls within the meaning of the term "person." The term "person" is broadly defined in the Human Rights Act as "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." W. Va. Code § 5-11-3(a) (1998) (Repl. Vol. 2006). This plainly worded definition clearly includes an insurance company, as an "organization" or

"corporation," within the meaning of the term "person."[15] Accordingly, we hold that, the term "person" is defined by the Human Rights Act, in W. Va. Code § 5-11-3(a) (1998) (Repl. Vol. 2006), as "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Therefore, an insurance company is included within the meaning of the term "person" as used in W. Va. Code § 5-11-9(7) (1998) (2006).

[15]This Court has previously rejected an attempt to limit the application of the term "person" as used in W. Va. Code § 5-11-9(7). In *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473 (1995), this Court addressed, *inter alia*, whether the term "person" included a co-worker. The circuit court had concluded that an employee could not violate the Human Rights Act based upon its reasoning that, because the definition of the term "person" found at W. Va. Code § 5-11-3(a) (1998) (Repl. Vol. 2006) does not expressly include employees, W. Va. Code § 5-11-9(7) may not be violated by employees. We rejected that narrow interpretation and concluded that "'this section does *not limit* the potential defendants to employers . . . .'" *Holstein*, 194 W. Va. at 732, 461 S.E.2d at 478 (emphasis added) (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)). The *Holstein* Court went on to hold that "[t]he term 'person,' as defined and utilized within the context of the West Virginia Human Rights Act, includes . . . employees . . . ." Syl. pt. 3, in part, *Holstein, id.*

We next look to the conduct prohibited by W. Va. Code § 5-11-9(7)(A).[16] As indicated above, one of the specific causes of action set out in W. Va. Code § 5-11-9(7)(A) prohibits a "person" from engaging in "acts or activities *of any nature*, the purpose of which is to harass, degrade, embarrass or *cause* physical harm or *economic loss* [to]" a member of a protected class, subject to certain exceptions not relevant here.[17] For purposes of the facts in the instant case, this language unambiguously proscribes specified acts of discriminatory conduct by any "person," the purpose of which is to cause economic loss to a member of a protected class. Hence, an insurer settling a property damage claim with a member of a protected class in a discriminatory manner that causes economic loss violates the act.[18]

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[16]We wish to clarify that, to be covered under the Human Rights Act, prohibited actions must be perpetrated against a member of one of the specific protected classes identified therein. Although W. Va. Code § 5-11-9(7)(A) does not expressly state that it applies only to members of a protected class, this limitation is understood because W. Va. Code § 5-11-9 expressly proscribes "unlawful *discriminatory* practices." (Emphasis added). The meaning ascribed to the term "discriminate" or "discrimination" by the Human Rights Act is "to exclude from, or fail or refuse to extend to, a person equal opportunities *because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status* and includes to separate or segregate." W. Va. Code § 5-11-3(h) (1998) (Repl. Vol. 2006) (emphasis added).

[17]The exceptions referred to are set out in the first paragraph of W. Va. Code § 5-11-9, which is quoted above with the text from W. Va. Code § 5-11-9(7)(A).

[18]We note that, in their complaint and in their arguments before this Court, the Plaintiffs have alleged that State Auto discriminated against them based upon their race and "the fact that they reside[] in public housing." As explained above, the Human Rights Act applies only to discrimination based upon "religion, color, national origin, ancestry, sex, age, blindness, disability or familial status." W. Va. Code § 5-11-3(h). *Accord* W. Va. Code § 5-11-2 ("The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to (continued...)

Based upon the foregoing analysis, we now hold that W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act, prohibits unlawful discrimination by a tortfeasor's insurer in the settlement of a property damage claim when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status.[19]

Finally, we reject State Auto's argument that, because the UTPA precludes a third-party action against an insurer, the Plaintiffs' sole remedy is to file an administrative complaint with the Insurance Commissioner pursuant to the UTPA. *See* W. Va. Code § 33-

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[18](...continued)
the principles of freedom and equality of opportunity and is destructive to a free and democratic society."). While the Plaintiffs' allegations of discriminatory actions based upon their race are most certainly within the Act, we find nothing in the Act creating a protected class based upon the fact that an individual resides in public housing.

[19]It should be noted, in passing, that we are not the first court to hold that an insurance company may be liable for discriminatory actions committed in the settlement of an insurance claim. *See, e.g.*, Broomes v. Schmidt, No. CIV. A. 95-4845, 1996 WL 229369 (E.D. Pa. May 3, 1996) (mem.) (applying 42 U.S.C. § 1981, and finding racial discrimination in formation of insurance settlement contract fell within its scope); Harris v. McDonald's Corp., 901 F. Supp. 1552 (M.D. Fla. 1995) (same); Singh v. State Farm Mutual Automobile Insurance Co., 860 P.2d 1193 (Alaska 1993) (same). *See also*; Ellis v. Safety Insurance Co., 41 Mass. App. Ct. 630, 672 N.E.2d 979 (1996) (applying state law and allowing plaintiff to proceed past summary judgment stage with civil rights claim based upon an insurance settlement); Lesser v. Boston Old Colony Ins. Co., No. 9903474, 2001 WL 34038581, at *3 (Mass. Super. Ct. April 6, 2001) (finding plaintiff had "standing to maintain her claim against [insurance company] for violation of her right under G.L.c. 93, § 102 to enforce contracts to the same extent enjoyed by white male citizens."). Additionally, we note that the State of California, by regulation, has expressly prohibited discrimination by insurance companies in settling claims. *See* Cal. Admin. Code tit. 10, § 2695.7(a) (2006) ("No insurer shall discriminate in its claims settlement practices based upon the claimant's age, race, gender, income, religion, language, sexual orientation, ancestry, national origin, or physical disability, or upon the territory of the property or person insured.").

11-4(a) (eliminating private cause of action by third-party claimants).[20] The declared purpose of the UTPA is to

> regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of Congress of March ninth, one thousand nine hundred forty-five (Public Law fifteen, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

W. Va. Code § 33-11-1 (1974) (Repl. Vol. 2006). Insofar as the UTPA regulates trade practices in the business of insurance, and the Human Rights Act seeks to remedy discrimination, the "rights and remedies of the Acts are considerably different and serve to fulfill different purposes." *Messer v. Huntington Anesthesia Group, Inc.*, 218 W. Va. 4, 20, 620 S.E.2d 144, 160 (2005). The *Messer* Court addressed whether a Human Rights Act claim involving a work-related injury was barred by the exclusivity provision of the Workers' Compensation Act, and reasoned that

> [s]ince the Acts seek to remedy two separate harms, physical injury and discrimination, no conflict exists between the two Acts and it would be inconsistent with the purposes of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq*., to limit its applicability to physical-injury disabilities unrelated to work. The injury that Messer seeks to redress under the WVHRA is the indignity of the alleged discrimination against her because of her disability.

[20]See *supra* note 10 for the text of W. Va. Code § 33-11-4(a).

Id. Likewise, the UTPA and the Human Rights Act seek to remedy different harms, and no conflict exists between them. Therefore, we hold that the prohibition of a third-party law suit against an insurer under W. Va. Code § 33-11-4a(a) (2005) (Repl. Vol. 2006), does not preclude a third-party cause of action against an insurer under W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act.

The Plaintiffs' complaints, relevant portions of which have been quoted above in the fact section of this opinion, clearly demonstrate that they are not asserting their claims under the UTPA. By repeatedly alleging that, *because of their race*, State Auto treated them differently than other claimants and failed to fairly investigate and settle their property damage claims, the Plaintiffs' claims fall squarely within the Human Rights Act.[21]

IV.

CONCLUSION

After considering the certified question from the Circuit Court of Kanawha County, as reformulated, we respond as follows:

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[21]By answering the certified question in this manner, we find only that a cause of action for discrimination in the settlement of a property damage claim may be asserted. We make no determination regarding the merits of the underlying case or the effect of the releases executed by Doris and Kitrena Michael. See *supra* notes 2 and 3 for a brief recognition of the existence of, and quotations from, the releases.

> Does the West Virginia Human Rights Act prohibit discrimination by a tortfeasor's insurer in the settlement of a property damage claim asserted by a member of a protected class under the Act?
>
> Answer: Yes

Having answered the foregoing certified question, as reformulated, we remand this matter to the Circuit Court of Kanawha County for further proceedings consistent with this opinion.

Certified Question Answered.