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Torts

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TORTS

I.\nWRONGFUL \nBIRTH,\nWRONGFUL \nLIFE, \nAND\nWRONGFUL \nPREGNANCY \nCAUSES OF ACTION


Courts have used several terms to describe causes of action involving a physician's negligence that results in unplanned pregnancies or birth. In James G. v. Caserta, the West Virginia Supreme Court of Appeals examined for the first time issues underlying these concepts.

The court began by defining a wrongful pregnancy as one where the failed sterilization procedure has resulted in the birth of a healthy child. A wrongful birth applies to those cases where the child is born with a birth defect. Claims for a wrongful birth are asserted by the handicapped child's parents, whereas, claims for wrongful life are asserted by the handicapped child against the mother's attending physician. James G. was a consolidation of two cases with interrelated issues dealing with the rights of parents and their children to recover damages against health care providers.

In the first case, the plaintiffs, husband and wife, decided not to have any more children; therefore, the wife underwent a tubal ligation. Subsequently, the wife became pregnant and delivered a healthy child. The plaintiffs then brought an action to recover damages from the alleged negligently performed tubal ligation. In exploring the wrongful pregnancy issue, the court noted that the liability theory used in these cases is that the physician was negligent in performing the sterilization procedure and as a consequence the parents conceived a child for whom they had not planned. The physician's negligence is a breach of the duty owed to the parents. After applying a traditional tort analysis, the court followed the majority of jurisdictions and concluded there is a cause of action for a wrongful pregnancy.

The court next addressed what type of damages are recoverable in a wrongful pregnancy action. Applying general rules governing damages, the court found the following damages to be recoverable:

(1) any medical and hospital expenses incurred as a result of a physician's negligence, including the cost of the initial unsuccessful sterilization operation, prenatal care,

2 Id. at 872.
3 Id. at 875.
4 Id.
5 Id. at 879.
6 Id. at 874.
7 Id.
8 Id. at 875.
9 Id. at 876.
10 Id.
11 Id.
childbirth, postnatal care, and a second sterilization operation, if obtained; (2) the physical and mental pain suffered by the wife as a result of the pregnancy and subsequent childbirth and as a result of undergoing two sterilization operations; and (3) recovery for the loss of consortium and loss of wages.  

These damages are recoverable in the majority of jurisdictions.  

The plaintiffs also sought recovery for the anticipated costs of rearing and educating their healthy child. The courts that have addressed this issue have generally held that these expenses cannot be recovered either because the award would be too speculative or would violate public policy. In addressing this claim, the court applied the rule established in Jordan v. Bero. The test is as follows:

To form a legal basis for recovery of future permanent consequences of the negligent infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury; contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery.

Finding the damages of child rearing expenses too speculative, the court held they cannot be recovered in a wrongful pregnancy action.

The second case addressed by the court involved genetic counseling. The issue before the court was one of first impression, addressing whether a child who is born with a birth defect has a cause of action against the mother’s attending physician. In this case, the parents claimed that the physician failed to perform an amniocentesis test on the wife, which would have revealed the birth defects of their child. Applying the traditional tort analysis, the court noted the following:

One of the underlying premises in this area of the law is that the birth defect is not curable while the child is in the fetal stage. Consequently, the physician is not being charged with failure to cure the birth defect, but rather with the failure to give the parents information about it so that an informed choice could be made.

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12 Id. at 877.
14 James G., 332 S.E.2d at 876.
15 Id. at 877.
17 James G., 332 S.E.2d at 878 (citing Jordan, 158 W. Va. at 29, 210 S.E.2d at 622).
18 Id. at 878.
19 Id.
20 Id. at 879.
21 Id.
22 Id.
This duty to inform does not extend to the unborn child as it is the parents’ decision to risk conception or terminate pregnancy.\(^{23}\)

Based on this analysis, the court concluded a claim for wrongful life does not exist in the absence of any statute giving rise to such a cause of action.\(^ {24}\)

Unlike its rejection of a wrongful life claim, the West Virginia Supreme Court of Appeals recognized a cause of action for wrongful birth actions.\(^ {25}\) In this situation, the negligence is based on a duty to furnish reasonable medical care and to advise the parents of the possibility of birth defects. Breach of this duty can be demonstrated.\(^ {26}\) In this type of action, the parents may recover the extraordinary costs for rearing a child with birth defects, not only during his minority, but also after the child reaches majority if the child is unable to support himself because of physical or emotional disabilities.\(^ {27}\)

II. *Mandolidis*-Type Actions


Under the West Virginia Code, damages recoverable in a *Mandolidis*-type suit are limited to “excess” damages above those provided by workers’ compensation.\(^ {28}\) The statute is silent as to how these damages are implemented at trial.\(^ {29}\) In *Mooney v. Eastern Associated Coal Corp.*,\(^ {30}\) the West Virginia Supreme Court of Appeals addressed for the first time how to mechanically implement excess damages awarded to a plaintiff under the deliberate intent provisions of the West Virginia Code. The court stated that matters which could be proved with reasonable certainty by accepted scientific evidence or expert testimony may be considered in computing the value of a compensation award for purposes of establishing the basic amount from which excess damages may be calculated under West Virginia Code section 23-4-2.\(^ {31}\) Finally, the court noted, when damages in a wrongful death action involve both pecuniary and non-pecuniary losses, the general rule is that damages

\(^{23}\) Id. at 881.

\(^{24}\) Id.

\(^{25}\) Id. at 882.

\(^{26}\) Id.

\(^{27}\) Id. at 882-83.


\(^{29}\) Mooney, 326 S.E.2d at 430. W. Va. Code § 23-4-2 (1985) provides in pertinent part:

If injury or death result to any employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this chapter, and shall also have a cause of action against the employer as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter. (emphasis added).

\(^{30}\) Mooney, 326 S.E.2d 427.

\(^{31}\) Id. at 43.
for pecuniary loss should be calculated at present value and damages for non-
pecuniary loss should not.\textsuperscript{32}

In \textit{Mooney}, Roger Dale Mooney was an employee of the defendant, Eastern
Associated Coal Corporation.\textsuperscript{33} On February 2, 1977, Mr. Mooney died as a result
of injuries he had sustained in a roof fall two days earlier. His wife and daughter
were awarded workers' compensation benefits. Subsequently, Mrs. Mooney filed
suit against Eastern for both compensatory and punitive damages under the
deliberate intent provisions of West Virginia Code section 23-4-2. In her civil suit,
Mrs. Mooney alleged that Eastern's conduct was willful, wanton, and reckless in
that they directed her husband to work on premises they knew were extremely
dangerous and violated federal and safety standards.\textsuperscript{34}

In order to recover in a \textit{Mandolidis}-type action, the plaintiff must prove that
the employer's misconduct was intentional or of a willful, wanton, and reckless
character;\textsuperscript{35} that the employee had knowledge and appreciation of the high degree
of risk of physical harm;\textsuperscript{36} and finally, the employer's action must be the prox-
imate cause of the injury.\textsuperscript{37} During the trial, the jury was not allowed to hear
evidence about the worker's compensation benefits. They returned a verdict against
Eastern, awarding Mrs. Mooney $350,000 compensatory damages and the dece-
dent's daughter $500,000 compensatory damages. Following the verdict, the trial
judge offset the jury award by the value of the workers' compensation benefits
the two were entitled to receive. On appeal, Eastern contended that there was ins-
sufficient evidence to support an award under the deliberate intent provisions because
there was evidence that Eastern had taken measures to correct the hazardous con-
ditions. Mrs. Mooney argued that the trial court erred when it reduced the jury
verdict by the value of the workers' compensation benefits she and her daughter
were entitled to receive.\textsuperscript{38}

After reviewing the trial transcript, the supreme court concluded that reasonable
minds could differ about whether the evidence warranted a finding of deliberate
intent to produce injury or death. The trial transcript included evidence that the
roof in the section of the mine where Mr. Mooney was killed was in an extremely
hazardous condition, that there had been numerous roof falls in the accident area
before and after Mr. Mooney's fall on January 31, 1977, and that the defendant
had received numerous citations for federal mine safety standard violations in that
section of the mine. Based on the evidence, the issue was properly submitted to
the jury.\textsuperscript{39}

\textsuperscript{32} Id.
\textsuperscript{33} Id. at 429.
\textsuperscript{34} Id.
\textsuperscript{35} Id. (citing Cline v. Joy Mfg. Co., 310 S.E.2d 835 (W. Va. 1983)).
\textsuperscript{36} Id. at 429.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
The court then addressed how damages in excess of the workers' compensation award should be implemented at trial. The court stated that implicit in the language of West Virginia Code section 23-4-2, is the requirement that the factfinder know what the compensation award will be. In other words, evidence of the value of the compensation benefits must be submitted to the jury with instructions that any verdict for the plaintiff shall include damages in excess of the benefits.\footnote{Id. at 430.}

Next the court noted that in compensation cases involving awards of death benefits, the jury must determine future damages.\footnote{Id.} To do this, the jury can use information that can be proved with reasonable certainty by accepted scientific evidence and expert testimony, such as reliable mortality tables.\footnote{Id. at 431.} Additionally, the court noted there was evidence that the Workers' Compensation Commission establishes a "reserve fund figure" that represents the Commissioner's estimate of the total value of an award of dependents' death benefits. If such a figure exists and it is calculated with reasonable certainty, the court felt this was the best proof of compensation benefits for purposes of calculating excess damages under West Virginia Code section 23-4-2.\footnote{Id.}

Finally, the court stated that the lower court erred in reducing the entire verdict to its present value. The majority of jurisdictions, including West Virginia, follow the general rule that an award for pecuniary damages, such as loss of income, should be reduced to present value; however, non-pecuniary damages, such as mental anguish, should not.\footnote{Id.}

Justice Miller, dissenting, felt that as a matter of law the plaintiffs had failed to show intentional or willful and wanton conduct on the part of the employer.\footnote{Id. at 432.} Since this is the standard that must be met under the West Virginia Code,\footnote{W. VA. Code § 23-4-2 (1985).} a directed verdict should have been granted for the defendant.\footnote{Mooney, 326 S.E.2d at 433.} In contrasting this case with \textit{Mandolidis},\footnote{Under Mandolidis v. Elkins Industries, Inc., 246 S.E.2d 907 (W. Va. 1978), it is essential, in order for an injured employee to recover, that the employer's misconduct must be of an intentional or willful, wanton and reckless character, that the employer must have knowledge and appreciation of the high degree of risk of physical harm to another created by such misconduct, and, of course, that the employer's action must be the proximate cause of the injury.} he concluded that Eastern was not acting in a willful or intentional manner to injure its employees.\footnote{Mooney, 326 S.E.2d at 429 (quoting Cline, 310 S.E.2d 835 (1983)).}

Next, Justice Miller believed the better procedure to follow in a \textit{Mandolidis}-
type suit, would be to have a bifurcated trial. In the first part of the trial, liability and damages would be decided. In the second part of the trial, the jury would determine the workers’ compensation benefits offset to be received by the plaintiff.50 Even though the lower court followed Justice Miller’s recommended procedure, he felt the trial court made two errors.51 First, the trial judge should not have apportioned the workers’ compensation benefits between the two plaintiffs.52 Secondly, when he calculated the total amount of receivable death benefits offset based on the widow’s life expectancy he should not have applied this offset to the combined damage awards of the widow and the daughter.53

The Mooney decision makes it clear that when an action is brought under the deliberate intent provisions of the former Workers’ Compensation Act, evidence of the value of compensation benefits must be submitted to the jury with instructions that any verdict for the plaintiff shall include damages in excess of the benefits.54

III. INSURANCE


In Davis v. Robertson,55 The West Virginia Supreme Court of Appeals was called upon to determine whether or not a plaintiff may bring a direct action against an insurance company without first obtaining a judgment against the insured.

Davis, arose from an automobile collision on in Wayne, West Virginia.56 The plaintiff, a passenger in the car driven by her husband, defendant Jack Davis, was injured when their car collided with a vehicle driven by Robert J. Robertson. Mrs. Davis filed suit against both drivers.57 Mr. Davis was represented by counsel provided by his insurance carrier, State Farm Mutual Automobile Insurance Co. (State Farm), and Mr. Robertson, an uninsured motorist, represented himself.58 Prior to trial, Mr. Robertson learned that if he did not continue to appear and defend himself, State Farm would pursue a subrogation claim against him for any amount it was required to pay the plaintiff because of his negligence.59 When the plaintiff’s counsel

50 Id. at 433.
51 Id.
52 Id. at 433-34.
53 Id. at 434.
54 Id. at 430.
56 Id. at 820.
57 Id.
58 Id. at 820-21.
59 Id. at 821.
learned of this, he filed a motion to join State Farm as a real party in interest. The trial court denied this motion and certified this issue to the West Virginia Supreme Court of Appeals.\textsuperscript{60}

The first question addressed was whether a liability insurer of a defendant in a civil action is a real party in interest and an indispensable party in the action and includable as a defendant in that action.\textsuperscript{61} The court, in answering this question, followed its longstanding rule and the majority position that, prior to a judgment against the insured, an injured plaintiff cannot join the defendant's insurance company in a suit for damages arising from a motor vehicle accident.\textsuperscript{62} The insurer cannot be joined as a defendant with an insured unless a right of joinder is conferred by statute or by the terms of the policy itself.\textsuperscript{63} Because the West Virginia statute does not expressly authorize a direct action of joinder, the insurer could not be joined with the insured.\textsuperscript{64} The reasoning behind this rule is to avoid the unnecessary mention of insurance coverage at trial because of its possible prejudicial effect on a jury's verdict.\textsuperscript{65}

The second certified question focused on whether the West Virginia Uninsured Motorist Statute\textsuperscript{66} permits a plaintiff to bring a direct action against his or her own carrier which provided the uninsured motorist coverage.\textsuperscript{67} This statute specifically sets out procedures for suing uninsured motorists, whether they are known\textsuperscript{68}.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.} at 820.


\textsuperscript{63} \textit{Davis}, 332 S.E.2d at 822.

\textsuperscript{64} \textit{Id.} at 823.

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{W. VA. CODE} § 33-6-31(b) (1982).

\textsuperscript{67} \textit{Id.} 332 S.E.2d at 824.

\textsuperscript{68} \textit{W. VA. CODE} § 33-6-31(d) provides:

\textit{Any} insured intending to rely on the coverage required by subsection (b) of this section shall, if any action be instituted against the owner or operator of an uninsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were a named party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured motor vehicle or in its own name.

Nothing in this subsection shall prevent such owner or operator from employing.
or unknown. The court determined that the statute does not authorize a direct action against the insurance company that provides the uninsured motorist coverage until a judgment has been obtained against the uninsured motorist. In reaching this decision, the court quoted the Virginia case of O'Brien v. Government Employees Insurance Co. In that case, the court stated that the existence of John Doe procedures, which were designed to simulate a suit against a known motorist, indicated that the legislature wanted this procedure to be part of the recovery mechanism. John Doe procedures avoid possible prejudgment on the liability issue by preventing the jury from being informed of the existence of insurance. The West Virginia Supreme Court of Appeals, in dismissing the case, concluded that this analysis was equally applicable to the language in the West Virginia Uninsured Motorist Statute.

In Shamblin v. Nationwide Mutual Insurance Co., the West Virginia Supreme Court of Appeals interpreted the term "occurrence" to apply only to the resulting event for which the insured becomes liable and not to some antecedent cause(s) of the injury. The court held that when the insurance policy contains language limiting the insurer's liability as a result of one occurrence, regardless of the number

counsel of his own choice and taking any action in his own interest in connection with such proceeding.

69 W. VA. CODE § 33-6-31(e) provides in relevant part:
If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, the insured, or someone in his behalf, in order for the insured to recover under the uninsured motorist endorsement or provision, shall:
(i) Within twenty-four hours after the insured discover, and being physically able to report the occurrence of such accident, the insured, or someone in his behalf, shall report the accident to a police, peace or judicial officer, or to the commissioner of motor vehicles, unless the accident shall already have been investigated by a police officer; and
(ii) Notify the insurance company, within sixty days after such accident, that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unknown and setting forth the facts in support thereof; . . .
(iii) Upon trial establish that the motor vehicle, which caused the bodily injury or property damage, whose operator is unknown, was a 'hit and run' motor vehicle. . . If the owner or operator of any motor vehicle causing bodily injury or property damage be unknown, an action may be instituted against the unknown defendant as 'John Doe,' in the county in which the accident took place . . .; service of process may be made by delivery of a copy of the complaint and summons or other pleadings to the clerk of the court in which the action is brought, and service upon the insurance company issuing the policy shall be made and prescribed by law as though such insurance company were a party defendant. The insurance company shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

70 Davis, 332 S.E.2d at 826.
72 Id. at 339.
73 Davis, 332 S.E.2d at 826.
75 Id. at 644.
of automobiles to which the policy applies, the insured is not entitled to stack liability coverages for each vehicle for which the insured has paid a separate premium. 76

On or about January 16, 1977, Clarence Shamblin purchased an automobile liability policy from Nationwide Mutual Insurance Company (Nationwide). The policy covered several vehicles and was limited to $100,000 for each person, $300,000 for each occurrence, and $50,000 for property damage. In April 1977, three of Mr. Shamblin’s employees were driving three of the insured vehicles. 77 During their trip, the drivers communicated with each other by citizens band radios when it was clear to pass other vehicles. 78 On one occasion, another driver, allegedly one of the other employees, radioed to another employee, Owens, that it was safe for him to pass a truck. As Owens attempted to pass the truck, he collided with it and an oncoming vehicle. The driver and a passenger in the oncoming vehicle were injured and subsequently brought a civil action for their injuries. In that action, the plaintiffs were awarded $775,000 in damages and the liability was apportioned ninety percent against the defendant.

While this personal injury action was pending, Mr. Shamblin learned from Nationwide that even if it was determined that more than one of his vehicles had contributed to the accident, the policy limits for personal injury and property damage for each vehicle would not be available to him. Consequently, Mr. Shamblin commenced a declaratory judgment, asking the court to construe the insurance policy and to declare that the liability limits for each vehicle contributing to the accident were available to him. The Circuit Court of Kanawha County ruled that there was one “occurrence” within the meaning of the insurance policy; therefore, Nationwide’s liability to Mr. Shamblin were the policy limits of $100,000 per person, $300,000 for each occurrence, and $50,000 for property damage. 79

On appeal, the supreme court initially addressed the issue whether the insurance policy’s definition of “each occurrence” was ambiguous. 80 The policy defines “one occurrence” as injury or damage “arising out of continuous or repeated exposure to substantially the same general conditions.” 81 In holding the definition was not ambiguous, the court applied the test set forth in Prete v. Merchants Property Insurance Co. 82 This test for ambiguity states that “[w]henever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous.” 83

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76 Id. at 646.
77 Id. at 640.
78 Id. at 641.
79 Id.
80 Id.
81 Id. at n.3.
After reviewing a substantial amount of case law, the court concluded the definition set forth in the policy was consistent with both the legal meaning and common usage of the term occurrence. To determine whether or not there has been one or more occurrences, the relative closeness of the connection in time and space between cause and result must be analyzed. Here, the insurance policy definition was consistent with the emphasis on closeness in time and space.

The appellant also argued that these were two separate acts of negligence; therefore, there was an "occurrence" for each of the appellant's vehicles. The first alleged negligent act occurred when the employee signaled to Owens it was safe to pass. The second negligent act was passing the truck. Assuming that there were two negligent acts involving two of the insured's drivers, the court stated that at most there was concurrent negligence which was the proximate cause of one event. The term "occurrence" in a limitation of liability clause within an automobile liability insurance policy refers to the resulting event for which the insured becomes legally liable and not to antecedent causes. In this case, there may or may not have been two antecedent negligent acts but there was only one resulting occurrence.

The court stated that there was clear language in the insurance policy which precluded ambiguity arising from the purported conflict between the payment of separately computed premiums for each vehicle. The policy's separability provision assures that the policy applies to whichever automobile is involved in the accident, and it does no more. When an automobile liability insurance policy contains language limiting the insurer's liability as a result of one occurrence, "[r]egardless of the number of . . . automobiles to which this policy applies," the insured is not entitled to "stack" liability coverage for each vehicle for which the insured has paid a separate premium.

Finally, a limitation of liability clause within an automobile liability insurance

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1 Shamblin, 332 S.E.2d at 644. ("The cases have consistently construed 'occurrence' and 'accident' in liability policies to mean the event for which the insured becomes liable, and not some antecedent cause of the injury.") (quoting Champion Int'l Corp. v. Continental Cas. Co., 546 F.2d 502 (2d Cir. 1976)).
2 Shamblin, 332 S.E.2d at 643. ("[W]hen ordinary people speak of an 'accident' in the usual sense, they are referring to a single, sudden, unintentional occurrence. They normally use the word 'accident' to describe the event, no matter how many persons or things are involved.") (quoting Saint-Paul Mercury Indem. Co. v. Rutland, 225 F.2d 689, 691 (5th Cir. 1955)).
3 Id.
4 Id. at 641.
5 Id.
6 Id. at 644.
7 Id.
8 Id. at 645.
9 Id.
10 Id.
11 Id.
12 Id. at 646.
policy that limits coverage for any one occurrence, regardless of the number of covered vehicles, does not violate any applicable insurance statute or regulation. In addition, there is no judicial policy that prevents the insurer from limiting his liability and also collecting a premium for each covered vehicle because each premium is for the increased risk of an occurrence.93

IV. DEFAMATION


In *Mutafis v. Erie Insurance Exchange*,96 the West Virginia Supreme Court of Appeals found that it is maliciously critical of and derogatory to a person’s financial condition to assert that they are closely associated with the Mafia. Therefore, because the West Virginia Code97 prohibits the dissemination of false or maliciously critical statements, the code was violated.98 Similarly, the court found a violation of West Virginia Code section 33-11-4(5)99 which prohibits the insertion of false material about a person’s financial condition in a private business file or publication of such material to the public.100 Neither of these code provisions will give rise to a cause of action if any of the common law privileges of traditional libel or slander law apply. Although it appears that the code establishes absolute liability, the court held that when the Legislature created West Virginia Code sections 33-11-4(3) and (5) they intended these provisions to be interpreted with the common law defamation privileges as necessary qualifications to the statute.101

During the summer of 1979, the plaintiff, Ms. Mutafis reported to her insurer,

93 *Id.*
95 W. VA. Code § 33-11-4 (Supp. 1985) provides as follows:
(3) *Defamation*—No person shall make, publish, disseminate, or circulate, directly or indirectly, or aid, abet or encourage the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any person and which is calculated to injure such person.
96 Mutafis, 328 S.E.2d at 680.
97 W. VA. Code § 33-11-4(5) provides as follows:
(5) *False statements and entries*
(a) No person shall knowingly file with any supervisory or other public official, or knowingly make, publish, disseminate, circulate or deliver to any person, or place before the public, or knowingly cause directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of a person.
(b) No person shall knowingly make any false entry of a material fact in any book report or statement of any person or knowingly omit to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.
98 Mutafis, 328 S.E.2d at 680.
99 *Id.*
Erie Insurance Exchange (Erie), that her vehicle had been stolen.\textsuperscript{102} Richard Kimble, the claims adjuster for Erie, investigated the loss. After the vehicle was stolen, it was found stripped and burned. Later, Ms. Mutafis was paid for this loss in accordance with her insurance policy.

Three weeks later, Vincent Oliverio, Ms. Mutafis's cousin, reported the theft of his vehicle to Erie. Mr. Kimble also investigated this claim; however, unlike Ms. Mutafis' claim there was a significant delay in paying Mr. Oliverio for his loss. When Mr. Oliverio questioned Mr. Kimble about the delay, he was told that Erie was investigating his involvement with the reported loss. Mr. Oliverio's vehicle was later found stripped and burned, but because Erie could not substantiate his involvement in the loss, his claim was paid.\textsuperscript{103}

Despite payment of the claim, Mr. Oliverio filed suit against Erie on the grounds that Mr. Kimble had libeled and slandered him, uttered "insulting words," and engaged in improper conduct in handling his claim. During the course of discovery, Mr. Oliverio obtained a confidential memorandum from Mr. Kimble's supervisor to Erie's Home Office Audit Department. The memo stated, "Please reference for your information to file W017415, this is a relative and associated with Mafia very heavily, although may have no connection whatever."\textsuperscript{104}

During the Oliverio trial, the memo was introduced as evidence and an article describing it appeared in the local newspaper. At the conclusion of the trial, Mr. Oliverio told Ms. Mutafis that the memorandum referred to her file.\textsuperscript{105} As a result, Ms. Mutafis filed suit against Erie asserting several theories of liability.\textsuperscript{106} At trial the jury returned a verdict for both compensatory and punitive damages based on the theory that Erie had violated West Virginia Code section 33-11-4(3) or (5).\textsuperscript{107} On appeal, the Chief Judge of the United States Circuit Court of Appeals certified three questions to the West Virginia Supreme Court of Appeals.\textsuperscript{108}

The first issue addressed by the supreme court was whether the actions of Erie, its agents, servants, or employees were in violation of West Virginia Code sections 33-11-4(3) and (5).\textsuperscript{109} The testimony at trial unequivocally demonstrated that both Kimble and his supervisor had no basis whatsoever for stating that the plaintiff was associated with the Mafia.\textsuperscript{110} As a result, there was sufficient evidence to support the jury's finding that Erie's employees placed information in the plaintiff's file they knew to be false. Moreover, the testimony

\textsuperscript{102} Id. at 677.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 678.
\textsuperscript{107} See supra notes 126-27.
\textsuperscript{108} Mutafis, 328 S.E.2d at 678.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 679.
supported the jury finding that Erie's employees acted intentionally, recklessly, and willfully in placing the memorandum in the plaintiff's file. 111

Having answered the first question affirmatively, the court went on to determine whether or not the common law defense of qualified privileges was available. 112 The court noted its decision was controlled by the reasoning in Mauck v. City of Martinsburg. 113 In that case, the court held that the common law defenses of privilege, developed in the decisional law of libel and slander, apply to the statutory cause of action for insulting words. 114 When a person publishes in good faith that in which he has an interest or duty and limits the publication of the statement to persons who have a legitimate interest in the subject matter, the writing or speech is privileged. 115 Although West Virginia Code sections 33-11-4(3) and (5) appear to establish absolute liability, the court determined it was not the intention of the Legislature to so circumscribe necessary business communication as to establish absolute liability without fault. 116 However, here there was sufficient evidence to support the jury's finding that Erie's employees placed information in the plaintiff's file which they knew to be false. As with the common law tort of defamation, there is no privilege for the intentional publication of false material. 117

The court then addressed whether a private cause of action exists to enforce the Unfair Trade Practices Act. 118 In answering this question, the court applied the test set forth in Hurley v. Allied Chemical Corp. 119:

(1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; (4) such private cause of action must not intrude into an area delegated exclusively to the federal government. 120

Here, the test was met, and the court therefore held that there is a private cause of action for violation of West Virginia Code sections 33-11-4(3) and (5). 121

V. CAUSES OF ACTION AS THEY RELATE TO CORPSES


The West Virginia Supreme Court of Appeals has held that unlawful disinter-

111 Id.
112 Id. at 680.
114 Mutafis, 328 S.E.2d at 680 (citing W. Va. Code § 55-7-2 (1981)).
115 Mauck, 280 S.E.2d at 217.
116 Mutafis, 328 S.E.2d at 680.
117 Id. at 680-81.
118 Id. at 681.
120 Id. at 758.
121 Mutafis, 328 S.E.2d at 681.
ment of a corpse can give rise to damages.\textsuperscript{122} In \textit{Whitehair v. Highland Memory Gardens, Inc.},\textsuperscript{123} the court was presented with a question of first impression as to whether a person can recover damages for mental anguish caused by intentional, reckless, or negligent mishandling of a relative's remains when the removal itself is lawful.\textsuperscript{124}

In \textit{Whitehair}, the defendant, Highland Memory Gardens, entered into a contract with the West Virginia Department of Highways to remove and relocate bodies buried in the Old Baptist Cemetery in Buckhannon, West Virginia. The plaintiff had several relatives buried in the cemetery. In her complaint, Ms. Whitehair alleged that the defendant lost the remains of her sister and her aunt and failed to remove the remains of her cousins.\textsuperscript{125} As a result of the defendant's negligent, willful, wanton, and reckless actions, the plaintiff claimed to have suffered great mental anguish. She did not allege any pecuniary loss or physical injury.\textsuperscript{126}

The court held that even when removal of a relative's remains is lawful, a person can recover for mental anguish caused by the intentional, reckless, or negligent mishandling of the remains.\textsuperscript{127} In making its decision, the court found that there is a "quasi-property" right in the survivors to control the disposition of a loved one's remains.\textsuperscript{128} This includes the right to receive the body in the condition in which it was left, without mutilation, to have the body treated with decent respect, and to bury or otherwise dispose of the body without interference. Also included in these rights are, when possible, the survivors right to notice and reasonable opportunity to be present when bodies are moved from one resting place to another.\textsuperscript{129} Thus, the defendant's alleged failure to notify the plaintiff of the date of disinterment and to give her reasonable opportunity to be there was actionable.\textsuperscript{130} Furthermore, the alleged losing of bodies and body parts was also actionable.\textsuperscript{131}

Next, the court, in a question of first impression, held that a suit could be brought seeking damages for mental anguish, even if the disinterment was authorized.\textsuperscript{132} In reaching this conclusion, the court noted that this is an exception to the general rule that damages for mental distress cannot ordinarily be recovered for a negligent act that does not provide some physical injury. In cases involving the negligent mishandling of corpses, there is a special likelihood of genuine and


\textsuperscript{124} Id. at 440.

\textsuperscript{125} Id. at 439.

\textsuperscript{126} Id. at 440.

\textsuperscript{127} Id. at 442-43.

\textsuperscript{128} Id. at 441.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 442.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 443.
serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.133

Finally, although not an issue in this case, the court noted that the cause of action ordinarily belongs to the party with the right to the possession of the body, this usually being the spouse.134 In the event the spouse is deceased, the cause of action passes to the next of kin, in the order established by the statute governing interstate succession.135

The case was reversed and remanded to the Circuit Court of Upshur County.136

Jill L. Miles