

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31754

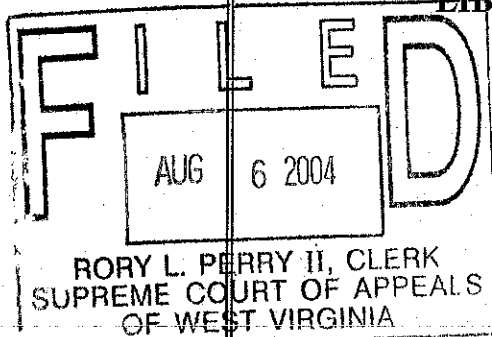
**GARRETT M. HICKS, a Minor, By and Through Donna J. Saus,
His Mother, Guardian and Next of Friend, and DONNA J. SAUS,
Individually, and on behalf of all others similarly situated, Plaintiffs Below,
Respondents**

vs.

**TODD A. JONES, CRISWELL ELECTRIC MOTOR SERVICE, INC., a
Division of Mull Machine Company, a West Virginia corporation, MULL
MACHINE COMPANY, a West Virginia corporation, and LIBERTY
MUTUAL FIRE INSURANCE COMPANY, a foreign corporation,
Defendants Below,**

**LIBERTY MUTUAL FIRE INSURANCE COMPANY,
a foreign corporation, Petitioner**

Honorable Ronald E. Wilson, Judge
Circuit Court of Ohio County
Civil Action No. 98-C-245W



REPLY BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF MATERIAL FACTS	1
III.	DISCUSSION OF LAW	
A.	THE STANDARD OF REVIEW	2
B.	SETTLING OR OFFERING TO SETTLE A THIRD-PARTY LOST WAGE CLAIM FOR NET WAGES DOES NOT CONSTITUTE A PER SE VIOLATION OF THE UNFAIR TRADE PRACTICES ACT	3
C.	TO IMPOSE LIABILITY ON LIBERTY MUTUAL FOR VIOLATING THE UNFAIR TRADE PRACTICES ACT BASED SOLELY UPON ATTEMPTING TO SETTLE MR. HICKS' CLAIM FOR NET WAGES WOULD VIOLATE THE DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION AND WEST VIRGINIA CONSTITUTION	15
IV.	CONCLUSION	17

TABLE OF AUTHORITIES

CASES

<i>Adkins v. Foster</i> , 187 W. Va. 730, 421 S.E.2d 271 (1992)	9
<i>Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc.</i> , 186 W. Va. 583, 413 S.E.2d 404 (1991)	7
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995)	3
<i>Clegg v. Butler</i> , 424 Mass. 413, 676 N.E.2d 1134 (1997)	10, 11
<i>Crum v. Ward</i> , 146 W. Va. 421, 122 S.E.2d 18 (1961)	3, 4, 5, 6
<i>Dodrill v. Nationwide Mut. Ins. Co.</i> , 201 W. Va. 1, 491 S.E.2d 1 (1996)	10
<i>Farmer v. Knight</i> , 207 W. Va. 716, 536 S.E.2d 140 (2000)	6
<i>Galloway v. Cinello</i> , 188 W. Va. 266, 423 S.E.2d 875 (1992)	4
<i>Gribben v. Kirk</i> , 195 W. Va. 488, 466 S.E.2d 147 (1995)	7-8
<i>Hensley v. W. Va. Dept. of Health and Human Resources</i> , 203 W. Va. 456, 508 S.E.2d 616 (1998)	7
<i>Hollen v. Hathaway Electric, Inc.</i> , 213 W. Va. 667, 584 S.E.2d 523 (2003)	2
<i>In re Williams</i> , 213 W. Va. 780, 584 S.E.2d 922 (2003)	4

<i>Kessel v. Leavitt</i> , 204 W. Va. 95, 511 S.E.2d 720 (1998)	6-7
<i>Lawyer Disciplinary Bd. v. Morton</i> , 212 W. Va. 165, 569 S.E.2d 412 (2002)	4
<i>Marsch v. American Electric Power Co.</i> , 207 W. Va. 174, 530 S.E.2d 173 (1999)	6
<i>Moore v. CNA Insurance Co.</i> , No. 31637 (W. Va. June 30, 2004)	2
<i>Norfolk & Western Ry. Co. v. Liepelt</i> , 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980)	5
<i>Oltersdorf v. Chesapeake & Ohio R.R. Co.</i> , 83 Ill. App. 3d 457, 38 Ill. Dec. 896, 404 N.E.2d 320 (1980)	5
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994)	2
<i>Spangler v. North Star Drilling Co.</i> , 552 So. 2d 673 (La. Ct. App. 1989)	5
<i>Van Holt v. National Railroad Passenger Corp.</i> , 283 Ill. App. 3d 62, 669 N.E.2d 1288, 218 Ill. Dec. 762 (1996)	4-5
<i>Webb v. Chesapeake & O. Ry. Co.</i> , 105 W. Va. 555, 144 S.E. 100 (1928)	6

STATUTES

W. Va. Code § 33-11-4(9)(f)	1, 4, 10, 11
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SECONDARY SOURCES

5C Michie's Jur. <i>Damages</i> § 7, § 18, § 25, § 42, § 43 (1998)	7
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I. INTRODUCTION

This is the reply brief of the Appellant, Liberty Mutual Fire Insurance Company [hereinafter "Liberty Mutual"], in support of its appeal from an order of the Circuit Court of Ohio County, concluding, as a matter of law, that Liberty Mutual violated the Unfair Trade Practices Act, W. Va. Code § 33-11-4(9)(f), by settling a third-party lost wage claim for net wages even though no statute, regulation, nor decision of this Court prohibits *settlement* of a third-party lost wages claim for net wages. At issue is whether claimants are entitled, as a matter of law, to a windfall by obtaining a settlement of gross wages when, had the accident never occurred, federal income taxes would have been paid. The Appellees, Garrett M. Hicks and Donna J. Saus, take the position that settling or offering to settle for net wages, under any circumstances, constitutes a *per se* violation of the Unfair Trade Practices Act. Liberty Mutual takes the position that settling or offering to settle for net wages does not constitute a *per se* violation of the Unfair Trade Practices Act.

II. STATEMENT OF FACTS

The Appellees' meandering statement of facts is long on hyperbole,¹ but the *relevant* facts are not in dispute. The Appellee, Garrett M. Hicks, was injured by a Liberty Mutual insured. He made a property damage claim and a personal injury claim.

¹A perfect example is the Appellees' complaint that Liberty Mutual *lied* about "withholding" taxes from Mr. Hicks' initial lost wages payment. The facts are that (1) the original check stub issued by Liberty Mutual to Mr. Hicks listed the amount of withheld taxes as zero, Lathrop Aff. at ¶ 12; (2) the letter sent by Liberty Mutual to Mr. Hicks' mother explaining its calculation of his lost wages claim stated that the 20% had been "deducted," not "withheld," *id* at ¶ 9; and (3) no Form 1099, W-2, or other tax document was issued or required, *id.* at ¶ 11.

The property damage claim was settled to his satisfaction. The personal injury claim, other than the component claim for lost wages, was settled to his satisfaction. The only claim in dispute was his claim for lost wages.

Mr. Hicks suffered a loss of wages. Liberty Mutual initially offered to settle Mr. Hick's lost wages claim for net wages, i.e., reduced by 20 percent for federal income tax. [See Exhibit A]. Liberty Mutual promptly paid this amount to Mr. Hicks. Once Liberty Mutual received documentation supporting Mr. Hicks' claim that he was not subject to federal income tax, it paid the additional 20 percent. [See Exhibit B]. Thus, Mr. Hicks received 100 percent of the wages he would have received had he never been injured. Despite this, the Appellees claim violation of the Unfair Trade Practices Act and are seeking to certify a class action seeking damages on behalf of all those whom Liberty Mutual has settled or offered to settle for net wages.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

In Syllabus Point 1 of *Moore v. CNA Insurance Co.*, No. 31637 (W. Va. June 30, 2004), this Court recently reiterated, "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)." See also Syl. pt. 2, *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 584 S.E.2d 523 (2003) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard

of review.’ Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).”). As this is an appeal from an order of partial summary judgment in a case involving interpretation of the Unfair Trade Practices Act, there is no dispute between the parties that the appropriate standard of review is *de novo*. This Court must decide whether settling or offering to settle for net wages constitutes a *per se* violation of the Unfair Trade Practices Act.

B. SETTling OR OFFERING TO SETTLE A THIRD-PARTY LOST WAGE CLAIM FOR NET WAGES DOES NOT CONSTITUTE A *PER SE* VIOLATION OF THE UNFAIR TRADE PRACTICES ACT.

Surprisingly, now, on appeal, the Appellees are claiming that they are not advocating a *per se* rule. [Brief of the Appellees at 24]. Of course, their position in the trial court was to the contrary. They argued that (1) *Crum v. Ward*, 146 W. Va. 421, 122 S.E.2d 18 (1961), dictates that lost wage claims can be settled solely for gross wages and (2) settling or offering to settle for anything less than gross wages constitutes a violation of the Unfair Trade Practices Act. *See* Reply in Support of Plaintiffs’ Motion for Partial Summary Judgment at 4 (“The no-deduction-for-taxes rule is the final piece of plaintiff’s [sic] motion. Under that rule of West Virginia law, the only reasonable value of a lost wage claim in a liability clear personal injury case is the gross amount of wage loss. Thus, Liberty’s ‘general business practice’ . . . violates the Act’s prescription [sic] that an insurance company must make a ‘fair and equitable’ offer when liability is reasonably clear.”). The trial court agreed with this argument, holding that “an insurance

company's offering or settling for net wages in a case is a prohibited practice under the Unfair Claims Practices Act [W.Va. Code § 33-11-4(9)(f)] because the reasonable value of the claim under West Virginia law is gross wages." [Order at 4-6]. This is plainly a *per se* rule, i.e., any settlement or attempt to settle for anything less than gross wages constitutes a violation of the Unfair Trade Practices Act.²

Even in their brief to this Court, their argument in support of the trial court's ruling is predicated entirely upon the Appellees' assertion that, when "liability is reasonably clear," West Virginia law "unequivocally mandates that gross wages be paid in personal injury cases. *Crum v. Ward*, 146 W. Va. 421, 443, 122 S.E.2d 18, 31 (1961)." [Brief of the Appellees at 2]. Of course, this Court's decision in *Crum*, which was relied upon by the trial court to hold otherwise, did not adopt a *per se* prohibition against reducing a lost wage claim to take federal tax implications into account. Rather, it simply held that a trial court does not abuse its discretion in denying a defense motion to instruct the jury on such federal tax implications.³

²See *In re Williams*, 213 W. Va. 780, 785, 584 S.E.2d 922, 927 (2003) ("We decline to follow the per se rule of Tavenner . . . which automatically voids a deed of trust because the trustee has acted as its notary.") (quoting *Galloway v. Cinello*, 188 W. Va. 266, 270, 423 S.E.2d 875, 879 (1992); *O'Dell v. Miller*, 211 W. Va. 285, 290, 565 S.E.2d 407, 412 (2002) ("While no per se rule bars the sitting of prospective jurors who are patients of a doctor who is a party to the litigation . . ."); *Lawyer Disciplinary Bd. v. Morton*, 212 W. Va. 165, 170, 569 S.E.2d 412, 417 (2002) ("The court in *Kemp* appears to have adopted a per se rule that prohibits attorneys from receiving a contingent fee for medical payments recovered on behalf of a client.")).

³Many other courts, including the Supreme Court of the United States, have reached a different conclusion. In *Van Holt v. National Railroad Passenger Corp.*, 283 Ill. App. 3d 62, 72, 669 N.E.2d 1288, 1296-97, 218 Ill. Dec. 762, 770 (1996), a state court FELA action, the Illinois appellate court noted:

The *Crum* decision does not require an insurance company, as advocated by the Appellees and accepted by the trial court, when settling a lost wage claim, to pay gross

Defendants argue that they should have been permitted to introduce evidence of taxes to be withheld from plaintiff's future earnings.

Prior to closing argument, defendants moved in limine that damages for lost wages be limited to plaintiff's net wages, not her gross wages. The circuit court ruled that the evidence concerning wage loss would be gross earnings.

* * *

The circuit court's ruling deprived defendants of a fair trial on the damages issues. The measure of damages in FELA cases are federal in character, even where, as in the present case, plaintiff joins her federal and common law action in one lawsuit. .

In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980), the United States Supreme Court held that it was error to exclude evidence offered to show the effect of income taxes on plaintiff's estimated future earnings in an FELA case. The Court stated: "It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss * * *." *Liepelt*, 444 U.S. at 493-94, 100 S. Ct. at 757, 62 L. Ed.2 d at 693-94. See also *Oltersdorf v. Chesapeake & Ohio R.R. Co.*, 83 Ill. App. 3d 457, 464, 38 Ill. Dec. 896, 404 N.E.2d 320 (1980).

In this case, Amtrak, the sole defendant in the FELA claim, should have been allowed to show the effect of income taxes on plaintiff's estimated future earnings.

The circuit court erred in barring this evidence, and Amtrak is entitled to a new trial on the issue of damages with respect to the FELA claim.

See also *Spangler v. North Star Drilling Co.*, 552 So. 2d 673 (La. Ct. App. 1989)(net wages was the proper measure of damages in state court suit under Jones Act). Respectfully, it is absurd to suggest that Liberty Mutual should be held liable under the Unfair Trade Practices Act for settling or offering to settle for net wages when such measure of damages has been adopted by the United States Supreme Court in FELA cases or Jones Act cases which can also be filed in state court.

wages and only gross wages. The *Crum* decision involved jury instructions in a tort action, not an insurance claim under the Unfair Trade Practices Act.

The Appellees conveniently ignore a number of decisions by this Court, cited in the Appellant's initial brief, which are inconsistent with their argument that settling or offering to settle a lost wages claim for net wages constitutes a violation of the Unfair Trade Practices Act.

The Appellees ignore this Court's holding in Syllabus Point 3 of *Webb v. Chesapeake & O. Ry. Co.*, 105 W. Va. 555, 144 S.E. 100 (1928), that "[i]n personal injury cases, no rule of law fixes measure of damages." If the evidence so warrants, even a jury has discretion, despite uncontested liability, to award all or none of a plaintiff's claim of lost wages.⁴ Yet, the Appellees advocate that there is only one measure of damages for lost wages, i.e., all of the gross wages claimed to have been lost by an injured party.

West Virginia's law of damages is predicated upon placing an injured party in the same position he or she would have been in the absence of injury. See *Kessel v. Leavitt*,

⁴See, e.g., *Farmer v. Knight*, 207 W. Va. 716, 536 S.E.2d 140 (2000)(evidence that passenger had not attempted to return to work for reasons unrelated to accident supported award of \$0 for past lost wages); *Marsch v. American Electric Power Co.*, 207 W. Va. 174, 530 S.E.2d 173 (1999)(jury's award of \$10,000 for past lost earnings was adequate in action by contractor's employee, even though he missed work for six months and thereafter received lower wage, working in less strenuous position, where evidence indicated that employee suffered another shoulder injury in his own home six weeks after his fall, that he did not miss any work due to shoulder pain until after his shoulder injury incurred at home, and that only decrease in salary directly attributable to fall was in conjunction with his relegation to lower paying position after fall).

204 W. Va. 95, 187, 511 S.E.2d 720, 812 (1998)(“Primarily, the aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant’s injurious conduct. In this manner, ‘[c]ompensatory damages indemnify the plaintiff for injury to property, loss of time, necessary expenses, and other actual losses. They are proportionate or equal in measure or extent to plaintiff’s injuries, or such as measure the actual loss, and are given as amends therefor.’ 5C Michie’s Jur. *Damages* § 7, at 46-47 (1998) (footnotes omitted). ‘[T]he general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been [in] if . . . the tort [had] not [been] committed.’ 5C Michie’s Jur. *Damages* § 18, at 63 (footnote omitted). Generally, in an action grounded in tort, a prevailing plaintiff may recover compensatory damages for, among other things, expenses actually incurred in repairing or redressing the injury occasioned by the defendant’s conduct and sums necessary to compensate the plaintiff for his/her injuries and his/her present and/or future physical or mental pain and suffering resulting from the defendant’s tortious behavior. *Id.* § 7, at 47; § 25, at 78-79; § 42, at 116; § 43, at 116-17, 119, 123-26.”)⁵ Bogdan Misovic, Liberty Mutual’s case manager, who

⁵See also Syl. pt. 1, *Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc.*, 186 W. Va. 583, 413 S.E.2d 404 (1991)(“Prejudgment interest, according to West Virginia Code S 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned.”)(emphasis supplied); *Hensley v. W. Va. Dept. of Health and Human Resources*, 203 W. Va. 456, 465-66, 508 S.E.2d 616, 625-26 (1998)(“although an award of back pay and an award of damages are not synonymous, the goal of both ‘is to place the prevailing parties in the same position as they would have been had they not been deprived of the sum owed them and had benefitted from full use of the money during the period of deprivation.”)(quoting *Gribben v. Kirk*,

negotiated Mr. Hicks' lost wages claim, has testified, "I just want to make your, you know claimant as a whole, not make them better prior to - after the accident or, you know, I just want to put them in the same financial position prior to the loss that's my job." Misovic Depo. at 105-06. Even, Mr. Hicks' own mother conceded that her son eventually received all of the lost wages to which he was entitled: Q. All right. Now, you eventually got all the money that you thought you were entitled to on be - on Garrett's behalf for wages that he had lost as a result of this accident; correct? A. Eventually, yes. . . . Q. All right. And you got those amounts for the lost wages before you contacted Mr. Fitzsimmons, according to your log, correct? A. Yes." Saus Depo. at 105. Settling a lost wages claim for net wages does place a claimant "in the same position as they would have been had they not been" injured. Thus, it should not form the basis for the imposition of liability under the Unfair Trade Practices Act. This principle is ignored in the Brief of the Appellees.

In the trial court, the Appellees did not dispute that West Virginia follows a "made whole" rule with respect to the award of damages in personal injury actions; rather it argued that even if the payment of gross wages constituted a windfall, such windfall was dictated by West Virginia law:

Third, Liberty argues that its "general business practice" of offering net is justified because compensatory damages are supposed to make the victim whole and paying net makes the victim whole in its opinion. This plea is nothing more

195 W. Va. 488, 501, 466 S.E.2d 147, 160 (1995)(emphasis supplied).

than the insurance company's statement that is [sic] disagrees with West Virginia's no-reduction [sic] -for taxes rule. Put differently, whether or not Liberty believes that paying net is fair and makes the victim whole, West Virginia law is to the contrary and holds that compensatory lost wage awards are not reduced for taxes in personal injury cases. Thus, Liberty's "general business practice" of offering less than the only reasonable value of a lost wage claim by deducting taxes - a deduction not permitted by law - violates the Act.

Reply in Support of Plaintiffs' Motion for Partial Summary Judgment at 6-7.

Likewise, the Appellees fail to address this Court's cases, relied upon by Liberty Mutual, in which it has approved various devices to prevent windfall recovery of damages, including, as summarized in *Adkins v. Foster*, 187 W. Va. 730, 734 n.6, 421 S.E.2d 271, 275 n.6 (1992), taking into consideration tax consequences. To adopt the Appellees' argument would be to dispense with reducing future lost wage claims to present value, which take into account the tax implications, thereby granting a substantial windfall to plaintiffs. Of course, according to the Appellees, windfall or not, West Virginia dictates gross wage settlements. Respectfully, Liberty Mutual disagrees.

The Appellees concede in their brief that there are no reported cases holding that settling for net wages constitutes bad faith and, moreover, they implicitly admit that there are both statutes and decisions under those statutes finding that settling for net wages is permissible. [Appellee's Brief at 23-24]. The Appellees complain that Liberty Mutual relies upon no cases, other than those interpreting statutes, authorizing the settlement of lost wage claims for net wages, but it is the Appellees' burden, not Liberty Mutual's, of

establishing that such settlement practice is so unconscionable as to constitute a violation of the Unfair Trade Practices Act. Respectfully, how can a practice that no court in the history of Anglo-American jurisprudence has condemned subject Liberty Mutual to liability?

In the absence of any case condemning the practice of settling for net wages, the Appellees rely on *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996), and *Clegg v. Butler*, 424 Mass. 413, 676 N.E.2d 1134 (1997), involving facts and legal issues readily distinguishable from those in this case.

Dodrill clearly involved more than just evidence of the amounts of settlement offered. With evidence of two and one-half years of negotiations, the adjuster's settlement authority of less than one-fourth of the true worth of the claim, no request for an independent medical examination at company expense to the extent that it was claimed that medical injuries had not been adequately documented, and a jury award of more than two times the insurer's last settlement offer, the Court found sufficient evidence to support a conclusion that the insurer had violated W. Va. Code § 33-11-4(9) by (1) not attempting to settle a claim in "good faith;" (2) not attempting to effectuate a "prompt" settlement; (3) not attempting to effectuate a "fair" settlement; (4) not attempting to effectuate an "equitable" settlement; and (5) not attempting to accomplish the foregoing after "liability has become clear."

Likewise, *Clegg* involved more than just the amounts of settlement offered. With similar evidence of over four years of negotiations, sufficient information to warrant a settlement offer for policy limits before the claimant filed suit, no need or attempt to obtain further medical information, and, even after the insurer eventually authorized settlement of policy limits after suit was filed, presentment of a series of structured settlements, each having a present value of less than policy limits, the trial court concluded that the insurer had violated the same provision of the Massachusetts Unfair Claims Settlement Practices act. 424 Mass. 416-417, 676 N.E.2d at 1138. The insurer offered no reasonable explanation for the unjust delay, and the claimant was forced into unnecessary litigation to obtain relief. *Id.* Neither case involved a determination of the legal propriety of a settlement of a lost wages claim for net wages.

Without any legal authority to support their position, the Appellees want this Court to hold that Liberty Mutual violated “existing West Virginia law” and W. Va. Code § 33-11-4(9)(f) based upon words put into the mouths of Liberty Mutual’s adjusters at their depositions and an email from a Liberty Mutual employee sent *after* the Hicks claim arose, *after* the claim was handled, *after* the claim was paid, and *after* the claim had given rise to litigation, merely speculating that West Virginia law may preclude net wage settlements. [Brief of the Appellees at 10].

The Appellees attempt to misdirect the Court’s attention away from the narrow legal question presented by making conclusory unsupported references to “cheating,”

“lying,” and “misrepresentations” based, in large part, upon a letter to Mr. Hick’s mother indicating that “\$302.10 WAS DEDUCTED FOR TAXES OF 20 PERCENT . . . “ and testimony of Liberty Mutual’s adjuster that he was never instructed with respect to filing 1099s for alleged tax withholdings. [Brief of the Appellee at 2, 6-8]. The Appellees argue that “the adjuster has admitted he lied on multiple occasions by indicating that the net wages were being paid because Liberty was withholding the taxes. . . . No such tax monies were withheld.” [Brief of the Appellee at 2]. Such utterly absurd rhetoric should be saved for another day. Deducting 20 percent of a gross wage claim for federal taxes is not “withholding” 20 percent for the payment of federal taxes. With rare exceptions, workers receive “net wages,” not “gross wages.” “Withholding” from a lost wages settlement, in recognition of this indisputable fact, is not deceptive.

The trial court made no finding of fraudulent conduct. It is undisputed that Liberty Mutual initially offered to settle Mr. Hick’s claim for “net wages” because it believed that a net wages settlement would have made him whole, but when it was demonstrated that he did not pay federal taxes, it paid him “gross wages” prior to any involvement of an attorney. Nor is an insurance company required, as the Appellees suggest without citing a shred of legal authority, to file 1099s to reflect the consideration of income tax consequences when adjusting a claim for lost wages. Mr. Hicks was going to pay no taxes on the lost wages component of his settlement. There would be no reason to issue a 1099.

In the same regard, the Appellees rely on a report from their own expert, Daniel L. Selby, to argue that Liberty Mutual engaged in a "scheme to cheat personal injury claimants" that was successful in 92 percent of its claims. It should be noted that Mr. Selby was never deposed and, thus, never subject to cross-examination regarding his report, because the Appellees cancelled his noticed deposition at the last minute. The 92 percent figure in the report represents files which are silent as to whether payment was net or gross, and the report expressly states that these silent files are assumed to involve net payments for purposes of the report. Quite simply, the 92 percent figure is bogus and further discovery will prove the figure to be bogus. The Selby report is also contrary to testimony by each claims handler deposed that he or she generally paid gross wages, with a few instances of net wages.⁶ In any event, the Selby report goes to damages, not

⁶Of course, Mr. Selby was not the only expert to offer an opinion in this case. Hanley C. Clark, West Virginia's former Insurance Commissioner, also offered the following opinions:

At this time I am unaware of any West Virginia law that mandates a claimant must be paid gross wages rather than net wages in the settlement of a lost wage claim. The West Virginia Insurance Department's position on this issue has as long as I can remember that a payment to the claimant in net wages was permissible. It has been the Department's long held practice to respond to any inquiry on this issue that a net wage payment by an insurance company was permissible. The Department was aware in 1997 and is aware today that companies are paying at least net wages in these cases and this action has been viewed as acceptable. In the best of my memory, this was never a controversial issue during the years I served in the position of assistant to the commissioner, deputy commissioner or insurance commissioner. The practice . . . was never challenged by . . . any attorney in the state to the best of my knowledge.

* * *

liability. As long as net payments are permissible under the Unfair Trade Practices Act, it does not matter how often Liberty Mutual paid net wages.

In this case, it cannot be said that, as a matter of law, as the trial court has done, that ultimately settling a lost wages claim within four months for the third-party's gross wages constitutes "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become clear." The settlement was prompt; there was no evidence of "bad faith;" the amount was "fair;" and, balancing the tax considerations of a past due wages claim, was "equitable." Thus, Liberty Mutual respectfully requests that this Court reverse the decision of the trial court and rule that settling or attempting to settle for net wages does not constitute a *per se* violation of the Unfair Trade Practices Act.

I believe Mr. Misovic wanted to bring Mr. Hicks back to the position he believed he was in prior to the accident. Once he was made aware of the actual take home pay of Mr. Hicks, a check was sent to Mr. Hicks.

I believe Liberty Mutual treated Mr. Hicks fairly. I am unaware of any fraudulent activity or intent on the part of Liberty Mutual. I feel the actions of Liberty Mutual fall within the acceptable procedures and actions. I believe the actions of Liberty Mutual do not violate the Unfair Claims Settlement Practices Act.

My opinions are based on my review of the pertinent facts provided thus far in this case, my analysis of the law, my education, training and twenty years experience in the West Virginia Insurance Department.

[Exhibit C at 3-4]

C. TO IMPOSE LIABILITY ON LIBERTY MUTUAL FOR VIOLATING THE UNFAIR TRADE PRACTICES ACT BASED SOLELY UPON ATTEMPTING TO SETTLE MR. HICKS' CLAIM FOR NET WAGES WOULD VIOLATE THE DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION AND WEST VIRGINIA CONSTITUTION.

In response to Liberty Mutual's due process argument, all the Appellees can muster is a *post-suit* email, which would be inadmissible as a subsequent remedial measure, by a Liberty Mutual employee indicating that "reducing a gross wage loss claim by 20% for net income . . . [p]er statute . . . is not permitted in the State of West Virginia." [Exhibit 6 to Brief of the Appellees]. Despite responsive pleadings, discovery responses, and sworn testimony to the effect that this was never the official corporate policy of Liberty Mutual, i.e., that settling or offering to settle lost wage claims in West Virginia for net wages was illegal,⁷ the Appellees persist in arguing to the contrary.

⁷Indeed, attached to the Brief of the Appellee, is a portion of the deposition transcript of Terry Borchert, the Liberty Mutual supervisor responsible for training claims representatives adjusting West Virginia claims, testified as follows:

A. [I've] never hear this before. I do not believe this to be true.

Q. You don't believe what to be true?

A. What Brian Huston's memo say here says.

Q. So you believe the statements in here are untrue?

A. Incorrect, incorrect. I think they are incorrect.

Q. As to whether statute permits that?

A. Yes.

Indeed, it is ironic that the Appellees now argue that Liberty Mutual knew of the illegality of its practice when they forcefully argued below that settling for net wages was common among Liberty Mutual claims representatives. [See Exhibit D]. Do the Appellees really expect this Court to believe that Liberty Mutual claims representatives would settle claims for net wages when they knew this practice was illegal? The fact of the matter is that, on occasion, Liberty Mutual claims representatives would settle or attempt to settle for net wages because they believed that such settlements placed the claimants in the same position they would have been had they not been injured and because there is no clear prohibition in West Virginia law against such practice. Liberty Mutual's due process argument is predicated upon the language of the Unfair Trade Practices Act, which does not give any warning, let alone a fair warning, that settling or attempting to settle for net wages constitutes a violation.

* * *

A. To this, yes, I think it is contrary. I think that he made a mistake. This is a mistake, as far as I'm concerned.

Q. But what you teach is totally contrary to what he says in this memorandum?

A. It is.

Brief of the Appellee, Ex. 5, at 122-124. Frankly, it is perplexing how the Appellees can argue that Liberty Mutual officially acknowledged the illegality of the practice of settling or attempting to settle for net wages in West Virginia when the sworn testimony of someone with more authority at Liberty Mutual to the contrary is attached to their own brief.

IV. CONCLUSION

The trial court erred in denying Liberty Mutual's motion for summary judgment. Initially, the trial court erred in finding that it is a violation of West Virginia law to take into consideration federal tax consequences when adjusting a claim for lost wages. The trial court compounded this error by finding that such action violates the Unfair Trade Practices Act. Liberty Mutual's initial reduction of 20% of Hicks' lost wage claim is not a prohibited practice under the law of West Virginia. The Unfair Trade Practices Act does not clearly prohibit settling or attempting to settle lost wage claims for net wages.

WHEREFORE, Liberty Mutual respectfully requests this Court reverse the ruling of the Circuit Court of Ohio County.

LIBERTY MUTUAL FIRE
INSURANCE COMPANY

By Counsel



Ancil G. Ramey, Esq.
W. Va. State Bar ID No. 3013
Steptoe & Johnson, PLLC
P. O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8112

LIBERTY
MUTUAL.



Liberty Mutual Group
24651 Center Ridge Road Ste 400
Cleveland, OH 44145-5622
Toll Free: 1-800-582-2503
Tel: (216)835-5300
Fax: (216)871-7865

September 8, 1997

Donna Saus
44 Hickory Lane
Wheeling WV 26003

RE: Claimant: Garrett Hicks
Our Insured: Mull Machine Inc.
Our Claim number: AB870-053780-02
Date of Loss: June 27, 1997

Dear Ms. Sauas:

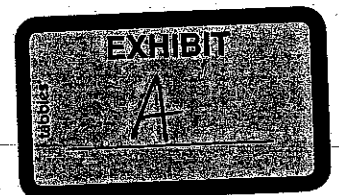
As you requested in our recent telephone conversation, the breakdown of your son's lost wage claim, based on the information you provided, is as follows:

- Hourly Rate - \$4.75
- Work Week/Day - 30 hours a week / 6 hours a day
- Daily Earnings - $\$4.75 \times 6 \text{ hours} = \28.50
- Days of Work Missed - 53
- Lost Wages - $53 \times \$28.50 = 1,510.50$

From this total, \$302.10 was deducted for tax of 20% resulting in a net total of \$1,208.40 for which your son was reimbursed.

Sincerely,

Bob N. Misovic
Case Manager



LIBERTY
MUTUAL.



Liberty Mutual Group
24651 Center Ridge Road Ste 400
Cleveland, OH 44145-5622
Toll Free: 1-800-582-2503
Tel: (216)835-5300
Fax: (216)871-7865

November 11, 1997

Donna Saus
44 Hickory Lane
Wheeling WV 26003

RE: Claimant: Garrett Hicks
Our Insured: Mull Machine Inc.
Our Claim number: AB870-053780-02
Date of Loss: June 27, 1997

Dear Ms. Saus:

The following breakdown concerning your son's additional claim for lost wages from September 12, 1997 through October 31, 1997.

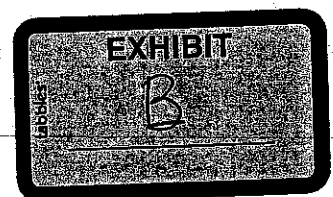
- Hourly Rate - \$5.15
- Work Week/Day - 25 hours a week / 5 hours a day
- Daily Earnings - $\$5.15 \times 5 \text{ hours} = \25.75
- Days of Work Missed - 35
- Lost Wages - $35 \times \$25.75 = 901.25$

A check for \$1,218.35 is enclosed which includes the \$901.25 in lost wages outlined above, \$302.10 for taxes that we omitted from the previous lost wage payment, and \$15.00 for your son's medical copayment.

This payment should conclude your son's lost wage claim.

Sincerely,

Bob N. Misovic
Case Manager



Hanley C. Clark
1520 Virginia Street East
Charleston, WV 25311

October 1, 2003

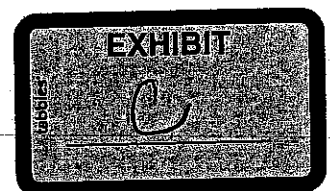
William M. Harter, ESQ
Frost Brown Todd LLC
10 W. Broad Street, Suite 1000
Columbus, Ohio 43215-3467

RE: Hicks, et al., Jones, et al.
Civil Action No. 98-C-245 W

Dear Bill:

At your request, I have reviewed the following materials relative to the above Civil action:

1. Complaint
2. Answer of Liberty Mutual Insurance Company
3. Liberty Mutual's First Set of Interrogatories and Requests to Plaintiffs
4. Plaintiffs' Answers and Responses to Liberty's First Set of Interrogatories
5. Liberty Mutual's Second Set of Interrogatories to Plaintiffs
6. Plaintiffs' Answers to Defendant Liberty Mutual Insurance Company
7. Plaintiffs' Interrogatories and Requests to Liberty (First Set)
8. Defendant liberty Mutual Insurance Company's Answers and Objections
9. Liberty Mutual's Supplemental Answers to Plaintiffs' Interrogatories and
10. Request for Production of Documents and Thing Defendant Liberty Mutual Insurance Company's Motion to Dismiss/Motion Summary Judgment
11. Plaintiff's Memorandum in Opposition to Defendant Liberty Mutual Insurance Company's Motion to Dismal/Motion for Summary Judgment and Memorandum in Support of Plaintiffs' Motion for Summary Judgment
12. Defendant Liberty Mutual's Reply in Support of its Motion to Dismiss/Motion for Summary Judgment
13. Defendant Liberty Mutual Insurance Company's Supplemental Memorandum in Support of its Motion to Dismiss/Motion for Summary Judgment
14. Defendant Liberty Mutual's Second Supplemental Memorandum in Support of its Motion to Dismiss/Motion for Summary Judgment



15. Plaintiffs' Response to Defendant Liberty Mutual's Second Supplemental Memorandum in Support of its Motion to Dismiss/Motion for Summary Judgment
16. Order Denying Defendant Liberty Mutual's Motion to Dismiss/Motion for Summary Judgment
17. Plaintiff's Motion to Compel the Identities of Certain Claimant's and for Leave of Court to Interview Such Persons
18. Defendant Liberty Mutual Fire Insurance Company's Response to Plaintiffs' Motion to Compel the Identities of Certain Claimants and for Leave of Court to Interview Such Persons
19. Reply in Support of Plaintiffs' Motion to Compel the Identities of Certain Claimants and for Leave of Court to Interview Such Persons
20. Surreply of Defendant Liberty Mutual Fire Insurance Company Regarding Plaintiffs' Motion to Compel the Identities of Certain Claimants and for Leave of Court to Interview Such Persons
21. Defendant Liberty Mutual's Motion to Deny Class Certification
Plaintiffs' Memorandum in Opposition to Defendant Liberty Mutual's Motion to Deny Class Certification
22. Depositions of:
 - A. Garrett M. Hicks- Claimant
 - B. Donna J. Saus- Claimant's mother
 - C. James Saus-Claimant's stepfather
 - D. Bogdan Misovic- Claim adjuster
 - E. John Lux
 - F. Brian Huston
 - G. Terry Borchert
 - H. Theresa Scott
 - I. Frank Steinbeck
 - J. Kenneth Muellaur
 - K. Joseph Lafort
23. Experts' CV's and Reports of:
 - A. James D. McQueen- Liberty Mutual expert
 - B. Robert Lathrop- Liberty mutual expert
 - C. Daniel L. Selby- Plaintiff's expert
 - D. Landers P. Bonenberger- Plaintiffs' expert
 - E. Vincent J. King- Plaintiffs' expert

Opinions:

My opinions are limited to the Hicks vs. Jones Case.

At this time I am unaware of any West Virginia law that mandates a claimant must be paid gross wages rather than net wages in the settlement of a lost wage claim. The West Virginia Insurance Department's position on this issue has as long as I can remember been that a payment to the claimant in net wages was permissible. It has been the Department's long held practice to respond to any inquiry on this issue that a net wage payment by an insurance company was permissible. The Department was aware in 1997 and is aware today that companies are paying at least net wages in these cases and this action has been viewed as acceptable. In the best of my memory, this was never a controversial issue during the years I served in the position of assistant to the commissioner, deputy commissioner or insurance commissioner. The practice of an insurance company paying net wages to a claimant rather than gross wages was never challenged by any governor of West Virginia during his administration, any member of the West Virginia Legislature or any attorney in the state to the best of my knowledge. I am even unaware of any legislative proposal or discussion that would have mandated payment of gross wages in a loss wage claim. I am unaware of any request for a hearing over the payment of at least net wages rather than gross wages either in the insurance department or the legislature. I am unaware of a large number of consumer complaints on the issue or Liberty Mutual over the years. The issue was not targeted for an examination/review within the Department. Nor was any recommendation that loss wages be paid as gross wages rather than net wages brought to my attention. If this had been viewed as a problem it would have been brought to my attention. It was the normal practice and procedure for staff members to report directly to me issues they felt needed attention, special study or legislative change. It was not unusual for me to receive recommendations from many legislators on issues they felt needed to be examined or studied. To the best of my memory this issue never surfaced.

Mr. Misovic served as an adjuster in the Hicks case. Mr. Misovic did not have to be licensed in West Virginia to adjust the Hicks claim. Out-of-state adjusters are required to become licensed in West Virginia only if the adjusting process takes place physically within the borders of the state of West Virginia.

The property damage portion of the Hicks claim was paid promptly after the accident occurred. The payment of medical bills, travel expenses and even a parking permit were paid timely and without a controversy.

Mr. Misovic originally reduced the payment to Mr. Hicks by twenty percent. Mr. Misovic paid this first wage payment without any documented proof from the claimant's employer. He trusted the statement of Mrs. Saus when she reported her son's wages. The payment was made in a very timely manner. Mr. Hicks was even paid for time that had not passed at the time of the payment. With the check, Mr. Misovic believed this was the beginning of returning the claimant to the same financial position he would have been had the accident not occurred. Without seeing a pay stub, it was natural he would believe withholding twenty percent would provide Mr. Hicks with his normal paycheck.

Mrs. Saus questioned Mr. Miscovic about the reason for the reduction in her son's paycheck on or about August 25, 1997 during a telephone conversation. He responded to Mrs. Saus' question in writing on September 8, 1997 with an explanation for the reduction. On October 20, 1997, Mrs. Saus informed Liberty Mutual that she did not agree with the reduction made in the check from Liberty Mutual. After physical evidence was presented which showed taxes were not taken out of the paycheck of Mr. Hicks, a check was issued for the loss wages and also included the reduced sum from the first payment. This was also made in a timely manner. What is so interesting in this case is that the gross pay and the net pay are exactly the same.

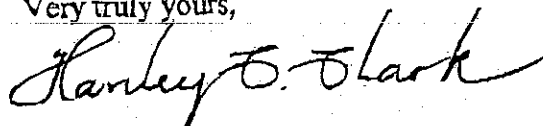
I have examined the timetable and the facts in this case. I have read the statements made by Mr. Hicks and Mrs. Saus that they did not suffer any damages from the treatment from Liberty Mutual. I have read Mr. Misovic's deposition and do not believe it was his intent to intentionally harm Mr. Hicks and/or Mrs. Saus in any way. I do not believe he was trying to fraudulently pay Mr. Hicks less than he thought was proper. I believe Mr. Misovic wanted to bring Mr. Hicks back to the position he believed he was in prior to the accident. Once he was made aware of the actual take home pay of Mr. Hicks, a check was sent to Mr. Hicks.

I believe Liberty Mutual treated Mr. Hicks fairly. I am unaware of any fraudulent activity or intent on the part of Liberty Mutual. I feel the actions of Liberty Mutual fall within acceptable procedures and actions. I believe the actions of Liberty Mutual do not violate the Unfair Claims Settlement Practices Act.

My opinions are based on my review of the pertinent facts provided thus far in this case, my analysis of the law, my education, training and twenty years experience in the West Virginia Insurance Department.

I reserve the right to change or expand my opinions on the above as additional information becomes available.

Very truly yours,



Hanley C. Clark

Hanley C. Clark
1520 Virginia Street East
Charleston, West Virginia 25311
(304) 346-3006
(304) 346-8899
HClark2222@aol.com

Education:

Attended Hampden-Sydney College Marshall University	B.A. 1972	Majored in History Minored in Business and English
West Virginia University	M.A. 1974	Majored in History Minored in Sociology
West Virginia University	ABD	Majored in Educational Administration Minored in History

Passed 3 LOMA courses

Work Experience:

Special Assistant to Governor Governor John D. Rockefeller IV	1980-81
Assistant to the Commissioner Commissioner Richard Shaw	1981-85
Deputy Commissioner Commissioner Fred Wright	1985-88
Acting Commissioner Governor Arch Moore	1988-89
Insurance Commissioner Governor Gaston Caperton	1989-97
Insurance Commissioner Governor Cecil Underwood	1997-01
Insurance Consultant	2001-present

Additional Experience as Commissioner:

National: 1981-2001

Chairman of Personal Lines Committee
Chairman of International Committee
Chairman of Southeastern Zone
Served on Banking and Insurance Task Force
(Worked with OCC)
Served on Health Issues Task Force
Served on many committees and special projects

International: 1997-2001

Presently serve as member of Korea's International Advisory Board
Advising Korea with other international experts for revising Korea's
financial regulatory systems

International Association of Insurance Supervisors:

- Chairman (President)
- Chaired Executive Committee
- Chaired Task Force on Core Principles Methodology
- Chaired Self Assessment Task Force
- Worked with IMF and World Bank on projects
- Member of Financial Stability Forum
Created by G7 Financial Ministers
- Member of Coordination Group
- Participated in many international organizational programs
as speaker or panelist:
 - Tokyo Executive Seminar on Insurance Regulation
 - Conference on Insurance on Insurance Supervision in Latin America
 - Insurance Association of the Caribbean Annual Meeting
 - Caribbean Association of Insurance Regulators
 - International Association of Actuaries
 - International Accounting Standards Committee
 - International Organization of Securities Commission
 - IAIS Educational Seminars in:
Poland, Singapore, Peru, Argentina, Mexico, Tokyo

Represented the United States;

- US Department of Commerce (International Trade Administration)
 - Trade Mission to Central Europe (Hungary, Czech Republic and Poland)
- US State Department
 - Organization of Economic Cooperation and Development (OECD)
Speaker for US on insurance issues twice in 1997

Personal:

Married to Holly H Clark MD 3 children
Board member of WV Caring Program for Children
Member of East End Historical Review Board
Appointed by 3 mayors in town
Past President of East End Association
Soccer coach for Roosevelt Junior High (6 years)
Named by State Journal "One of 55 Good Things of West Virginia"

LITIGATION CONSULTING RATE

Initial consultation, review of materials and documents, legal research, preparation of report, consultation with counsel, preparation for deposition or trial testimony, depositions and trial testimony (including travel)

\$250.00 per hour

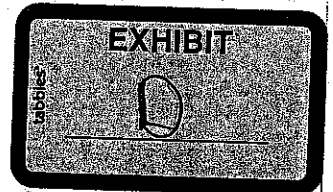
4/2/03

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

GARRETT M. HICKS, et al.,)
)
) Plaintiffs,)
)
) v.) Civil Action No. 98-C-245 W
)
TODD A. JONES, et al.,)
)
) Defendants.)

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
ON THE ISSUE OF DEFENDANT LIBERTY MUTUAL INSURANCE COMPANY'S
LIABILITY FOR VIOLATIONS OF W. VA. CODE § 33-11-4(9)

Plaintiffs Garrett Hicks and Donna Saus, on behalf of themselves and all others similarly situated, submit this memorandum of law in support of their motion, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, for entry of partial summary judgment against defendant Liberty Mutual Insurance Company ("Liberty") on the issue of Liberty's liability for violations of the West Virginia Unfair Claim Settlement Practices Act, W. Va. Code § 33-11-4(9) (the "Act").



The Act requires insurers to make a good faith attempt to reach fair and equitable settlements of claims when the

#33
a/H/03

B. There Is No Genuine Issue Of Fact That Liberty Regularly Pays Net Wages In Lost Wage Claims In Which The Liability Of Liberty's Insured Is Reasonably Clear.

To demonstrate Liberty's general business practice of paying net wages, plaintiffs rely solely on the company's admissions in the testimony of its current and former employees. During discovery, plaintiffs deposed ten such Liberty employees, all with experience adjusting personal injury claims in West Virginia, supervising adjusters working on such claims, and/or training adjusters to handle such claims. The testimony of these individuals unequivocally establishes that Liberty has paid, and continues to pay, net wages in personal injury cases where the liability of Liberty's insured is reasonably clear, even though West Virginia law clearly provides that the gross amount, without Liberty's illegal reduction, is due. (See Section I, *supra*.)

First, of the ten current and former Liberty employees deposed, seven have actually adjusted claims involving lost wages for Liberty in West Virginia, (Laforet Dep. at 8, 21, App. 021, 024; McCarthy Dep. at 15, 22-23, App. 040-41; Misovic Dep. at 98, App. 056; Muellauer Dep. at 37, 54, App. 063, 068; Reichard Dep. at 10-11, App. 073; Scott Dep. at 13-14, App. 134-35; Steinbeck Dep. at 4, App. 148), and all of

these individuals testified that they personally have paid net wages in such claims:

Joseph Laforet, a current Liberty employee, testified that he has paid net wages in bodily injury claims on behalf of Liberty. (Laforet Dep. at 3, 14, App. 020, 023.) In fact, Mr. Laforet acknowledged paying net wages in three specific West Virginia claims, including two claims that were settled after he was instructed by his Team Manager that payment of net wages was not permitted in West Virginia. (*Id.* at 51-60, 73-77, 84-90, App. 028-35.)

Terrence McCarthy, a Team Manager at Liberty since 1996, testified that he does not pay claimants their gross wages in West Virginia but makes deductions in lost wage claims to reflect the claimant's out-of-pocket loss (e.g., tax deductions and the like). (McCarthy Dep. at 3-4, 53-54, App. 039, 044-45.)

Bob Misovic, also a Liberty employee since 1996, admitted that he is the person responsible for deducting twenty percent of gross wages from the initial lost wages payment to the plaintiff in this case. (Misovic Dep. at 5, 76-77, App. 050, 052.)

Kenneth Muellauer, who worked for Liberty for approximately eight years in a variety of positions, including as a Senior Case Manager, testified that, while at Liberty, his practice was to pay the net amount of lost wages in cases where there was clear liability and the insured was responsible. (Muellauer Dep. at 5, 41, 48-49, App. 062, 064, 066.)

Bonnie Reichard, a claims adjuster who has been with Liberty for the past seven years, testified that she deducts either twenty percent or an amount equal to the claimant's actual tax withholdings in most clear liability cases for bodily injury where there is a wage loss. (Reichard Dep. at 3-4, 38-39, App. 072, 076.)

Theresa Scott, a current Liberty employee who has been adjusting bodily injury claims for the past fifteen years, testified that she paid net wages in bodily injury claims involving a lost wages component until she received a memo from her Team Manager instructing her not to do so on August 14, 1998. (Scott Dep. at 3-5, 52, App. 133, 140; see also *id.* at 69-70, App. 144-45 (identifying specific claim in which Scott paid net, rather than gross, wages).)

Frank Steinbeck, a former Liberty employee who adjusted claims out of Liberty's Charleston, West Virginia office for nearly forty years, testified that, in settling lost wage claims in bodily injury cases, he usually made a deduction from a claimant's gross wages to account for taxes. (Steinbeck Dep. at 4, 225-26, App. 148-50.)

Second, all ten of the Liberty employees who were deposed testified, in substance, that the practice at Liberty is to pay net wages most of the time. Most of these employees gave direct testimony concerning this practice:

Terry Borchert, a Liberty employee since 1982, testified that in the twenty-one years she has been associated with Liberty, lost wage claims in personal injury cases where the liability of Liberty's insured is reasonably clear have always been handled by paying net wages. (Borchert Dep. at 12-14, 102, App. 006-7, 011.)

Terrence McCarthy testified it was the practice and policy at Liberty, at least until the late 1990s, for adjusters to pay net wages. (McCarthy Dep. at 57-58, App. 045-46.)

Bob Misovic admitted that it is a "general operating requirement" at Liberty to deduct twenty percent from gross wages on lost wage claims to account for taxes. (Misovic Dep. at 7, App. 051.)

Kenneth Muellauer testified that the practice at Liberty was to pay the out-of-pocket, or net, wages. (Muellauer Dep. at 77-79, App. 069-70.)

Bonnie Reichard testified that from the time she began handling claims at Liberty, the general policy or practice was to deduct twenty percent for taxes on lost wage claims. (Reichard Dep. at 75, App. 077.)

Theresa Scott testified that she was taught by Liberty to take the net on lost wage claims. (Scott Dep. at 21-23, App. 136-37.)

Frank Steinbeck testified that, in practice, he and other Liberty adjusters would usually make a deduction in lost wage claims to account for withholding taxes. (Steinbeck Dep. at 225-26, App. 149-50.)

Virtually all of the employees, moreover, acknowledged that Liberty's goal in adjusting bodily injury claims is to make the claimant whole in terms of his or her out-of-pocket (or net) wages and that adjusters are taught to consider deducting either twenty percent or an amount equal to the claimant's actual withholdings as a means of achieving this goal. (See, e.g., Borchert Dep. at 4-5, App. 004; Huston Dep. at 13-15, 31, App. 017-18; Laforet Dep. at 27-28, App. 026; Lux Dep. at 19-20, App. 037; McCarthy Dep. at 40-42, App. 042-43; Misovic Dep. at 108, App. 057; Muellauer Dep. at 43-46, App. 065-66;

Reichard Dep. at 21-22, App. 074; Scott Dep. at 21-24, 71-73, App. 136-37, 145.)

Third, Terry Borchert, the employee responsible for training Liberty adjusters at all levels in twenty-five states,⁵ testified that, since joining Liberty's training department in 1996, she has consistently taught both new hires and intermediate and advanced adjusters to adjust lost wage claims in bodily injury cases to net wages. (Borchert Dep. at 22, 109, 111, App. 008, 012-13.) And, based on the feedback she receives from adjusters during annual instruction sessions, Ms. Borchert believes that adjusters do, in fact, follow her instruction and pay net wages in lost wage claims in which the liability of the Liberty insured is reasonably clear. (*Id.* at 110-12, App. 013.)

C. Regularly Paying Net Wages Constitutes A "General Business Practice" As A Matter Of Law.

Based on the admissions by Liberty's employees described hereinbefore, plaintiffs have more than satisfied their burden

⁵ A Liberty employee since 1982, Ms. Borchert has been a Senior Technical Training Consultant in Liberty's training department since 1996. (Borchert Dep. at 3-4, 9, 89, App. 004-5, 010.) Before that time, Ms. Borchert was employed as a claims adjuster and held numerous supervisory positions over other claims adjusters. (*Id.* at 4, 102-03, App. 004, 011.) When she joined the training department in 1996, Ms. Borchert was responsible for teaching adjusters in five states, including West Virginia. (*Id.* at 22-23, 111, App. 008, 013.) By 1999, her territory had expanded to encompass twenty-five states. (*Id.* at 111, App. 013.)

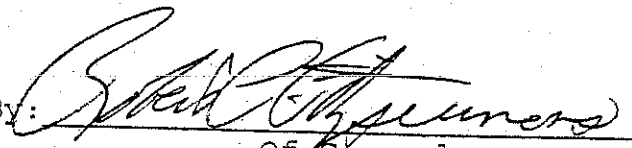
the value of their claims, Liberty is violating § 33-11-4(9)(f) as a matter of law, and partial summary judgment on liability is therefore appropriate. Such a result applies to Mr. Hicks and to all other members of the putative class. See footnote 2.

CONCLUSION

For all of the foregoing reasons, and for such other and further reasons as shall appear to the Court, plaintiffs respectfully submit that their motion for partial summary judgment should be granted.

Respectfully submitted,
GARRETT M. HICKS, et al.

By:


of Counsel

Robert P. Fitzsimmons
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Carl S. Kravitz
W.Va. State Bar No. 7361
Kristen M. Flynn
Zuckerman Spaeder, L.L.P.
Sixth Floor
1201 Connecticut Avenue
Washington, D. C. 20036
(202) 429-3301

CERTIFICATE OF SERVICE

Service of the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF DEFENDANT LIBERTY MUTUAL INSURANCE COMPANY'S LIABILITY FOR VIOLATIONS OF W. VA. CODE § 33-11-4(9) was made upon the defendant by mailing a true copy thereof by United States mail, postage prepaid, on the 4th day of September, 2003, as follows:

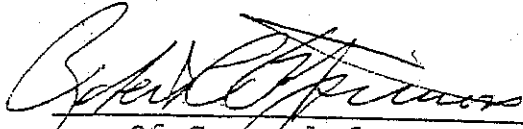
Liberty Mutual Fire Insurance Company
c/o James F. Companion, Esq.
Schrader, Byrd & Companion
Suite 500, 32 - 20th Street
Wheeling, WV 26003

and

c/o Charles S. Cassis, Esq.
Frost Brown Todd, LLC
32nd Floor
400 West Market Street
Louisville, KY 40202-3363

and

c/o William M. Harter, Esq.
Frost Brown Todd, LLC
One Columbus
10 West Broad Street
Columbus, OH 43215



Of Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 2004, I served the foregoing *Reply Brief of the Appellant* upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Robert P. Fitzsimmons, Esq.
W. Va. State Bar ID No. 1212
Russell J. Guthrie, Esq.
W. Va. State Bar ID No. 1512
FITZSIMMONS LAW OFFICES
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Wheeling, WV 26003

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Bachmann, Hess, Bachmann & Garden
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P.O. Box 351
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Michael W. McGuane, Esq.
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