

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 081596

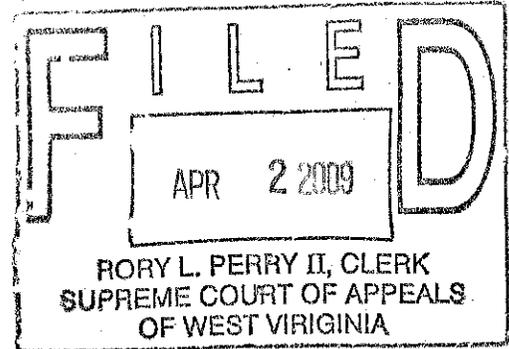
**ENTERPRISE RENT A CAR OF KENTUCKY, and
EMPIRE FIRE AND MARINE INSURANCE COMPANY,**

Appellants,

v.

WANG-YU LIN,

Appellee.



On Appeal from the Circuit Court of Kanawha County

Circuit Court Appeal No. 06-C-2372

**REPLY OF APPELLANTS, ENTERPRISE RENT A CAR OF KENTUCKY
and EMPIRE FIRE AND MARINE INSURANCE COMPANY,
TO APPELLEE BRIEF OF WANG-YU LIN**

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As stated by the Appellants in their brief, the decision of the Circuit Court of Kanawha County finding insurance coverage for Ms. Lin under the Supplemental Liability Protection (“SLP”) the Appellee purchased from Empire Fire and Marine Insurance Company (“Empire”) when he rented a vehicle from Enterprise Rent A Car Of Kentucky (“Enterprise”) should be reversed and summary judgment granted in favor of the Appellants on the basis that the SLP, as clearly and unambiguously stated in both the policy and the Rental Agreement, explicitly excludes coverage for a loss arising out of the operation of the rental vehicle by a driver who is not the Renter or an Additional Authorized Driver and for a loss arising out of bodily injury sustained by the Renter. Moreover, the SLP excludes coverage for a loss arising out of the use of the vehicle in violation of the terms and conditions of the Rental Agreement. Each of these exclusions apply here, and none are rendered inapplicable by either W.Va. Code § 17D-4-1, *et seq.*, or W.Va. Code § 33-6-31(a) because the supplemental liability coverage is over and above the statutory minimum limits of self-insured coverage on the rental vehicle, which has already been offered by Enterprise, and the SLP is optional excess rental coverage governed by a separate statute, W.Va. Code § 33-12-32.

In his brief, the Appellee responds that W.Va. Code § 33-6-31(a), the omnibus statute, applies to the SLP he purchased from Empire when he rented the vehicle from Enterprise because the SLP is a motor vehicle liability policy as defined by W.Va. Code § 17D-4-12, nothing in W.Va. Code § 33-12-32 relating to automobile rental coverage alters the requirements of the omnibus statute, and the Appellee was an insured or a custodian of the rental vehicle capable of granting permission to Ms. Lin to drive the vehicle. The Appellee further argues that the “injury to renter” exclusion of the SLP is not valid because he was not provided with a copy

of the Empire policy or a summary of coverage so as to make the exclusion conspicuous, plan and clear. These arguments are flawed in a number of respects.

First, the omnibus statute does not mandate that liability coverage be afforded to Ms. Lin under the SLP because this coverage is only in excess of or in addition to the statutory minimum self-insured limit on the rental vehicle from Enterprise, which is available to cover Ms. Lin for damages sustained by the Appellee. Prior decisions from this Court finding exclusions in automobile insurance policies inconsistent with W. Va. Code § 33-6-31 have invalidated them only up to the statutory minimum limit required by W. Va. Code § 17D-4-2 and allowed the exclusions to apply over and above that amount. Second, because the SLP is excess or additional coverage, it is not a motor vehicle liability policy as defined by W. Va. Code § 17D-4-12 and, therefore, is not required to insure any other person using the vehicle with the express or implied permission of the named insured, including Ms. Lin.

Third, an automobile rental policy issued pursuant to W. Va. Code § 33-12-32, like the SLP at issue in this case, is only required to provide liability insurance to Renters and other Authorized Drivers, not to every permissive user. Fourth, even though the Appellee was an insured under the SLP and a custodian of the rental vehicle, he was expressly prohibited by the Rental Agreement from granting permission to Ms. Lin to drive the vehicle. Lastly, the “injury to renter” exclusion of the SLP is valid even though the Appellee was not provided with a copy of the policy because he did receive a summary of coverage for the SLP on the Rental Agreement, on which this and the other exclusions were conspicuous, plan and clear. There is no dispute the Appellee not only received the Rental Agreement, but also signed it to acknowledge that he had read it.

**A. THE EMPIRE SLP IS NOT INCONSISTENT WITH THE
WEST VIRGINIA OMNIBUS STATUTE.**

The West Virginia omnibus statute, W.Va. Code § 33-6-31(a), does not require that the Empire SLP afford liability insurance coverage to Ms. Lin for the injuries sustained by the Appellee. To analyze the issues raised in this appeal, it is necessary to read the omnibus statute in *pari materia* with the other relevant statutes, W.Va. Code § 17D-4-2, § 17D-4-12, and because the SLP is an automobile rental policy, W.Va. Code §33-12-32. *See State ex rel. Cline v. Frye*, 672 S.E.2d 303, 309 (W. Va. 2008) (citing Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975) (holding that statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent)). Although the Appellee elects to disregard the controlling language of these statutes, and the case law discussing the same, they are nonetheless applicable here.

**1. The Terms Of The SLP Are Not Inconsistent With The
West Virginia Motor Vehicle Financial Responsibility Law.**

The Appellee does not address the specific language of W.Va. Code § 17D-4-1, *et seq.*, the motor vehicle financial responsibility law, in summarily concluding that the SLP issued by Empire is a motor vehicle liability policy because that is the purpose for which it was issued and it cannot reasonably be construed as covering any other risk. *See Appellee Brief*, pg. 5. As set forth in the Appellants Brief, W.Va. Code § 17D-4-12 (g) provides that any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy, and such excess or additional coverage is not be subject to the provisions of Chapter 17D. With respect to a policy which grants such excess or additional coverage, the term “motor vehicle liability

policy” applies only to that part of the coverage which is required by Section 12. Because the SLP grants coverage in excess of or in addition to the mandatory minimum limits of \$20,000 per person and \$40,000 per accident, it is not a “motor vehicle liability policy” for the purpose of this statute and is not subject to the other requirements of the statute.

One such requirement is found at W.Va. Code § 17D-4-12 (b)(2), which mandates that a policy insure the person named therein and any other person, as an insured, using any vehicle with the express or implied permission of the named insured against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of the vehicle. In the present case, even though Ms. Lin had permission from the Appellee to drive the rental vehicle, coverage was properly excluded under the SLP for “loss arising out of the operation of the Vehicle by any driver who is not a Renter or Additional Authorized Driver” and for “loss arising out of the use of the vehicle when such use is otherwise in violation of the terms and conditions of the Rental Agreement.” Because the SLP is not a motor vehicle liability policy, it may exclude coverage for persons other than the Renter and Additional Authorized Driver, even if they have the express or implied permission of the insured. Accordingly, the terms of the SLP are not inconsistent with the West Virginia motor vehicle financial responsibility law and should be enforced. *See Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W.Va. 293, 452 S.E.2d 384, 390 (1994) pursuant to W.Va. Code § 17D-4-12(g), coverage in excess of or in addition to the minimum requirements is not subject to the provisions of Chapter 17D, Article 4, as to such excess coverage, so that a Kentucky automobile policy that excluded coverage for “bodily injury to the insured” applied over the \$20,000 minimum limit).

The Appellee contends that Enterprise has not established that it is qualified in West Virginia to self insure to satisfy the requirements of Chapter 17D, and that it has not provided

any proof of compliance. The Appellee raises this question about the self-insured status of Enterprise for the first time on appeal. According to the Appellee, questions not decided on the trial court level should not be considered on appeal. *See* Appellee Brief, pg. 7-8 (citing *Whitlow v. Board of Education*, 190 W.Va. 225, 226 (1993)). Nonetheless, Enterprise Rent A Car Of Kentucky d/b/a Enterprise Rent A Car Company of West Virginia qualified as a self insurer under the West Virginia Safety Responsibility Act and was assigned a Certificate of Self Insurance, Number S. I. # 1028 by the Self Insurance Coordinator of the State of West Virginia Division of Motor Vehicles.¹ A copy of the Certificate is attached hereto as Exhibit "A."

The Appellee also argues that Enterprise now conveniently claims after the accident that it is self-insured. This is not accurate, as the Rental Agreement, which the Appellee received and signed prior to the accident, states under Paragraph 7, entitled Responsibility to Third Parties, that "Owner complies with applicable motor vehicle financial responsibility laws as a state certified self-insurer, bondholder, or cash depositor." The Appellants also asserted in Enterprise Rent A Car Company of Kentucky and Empire Fire and Marine Insurance Company's Cross Motion for Summary Judgment that Enterprise provides financial responsibility protection on its vehicles in an amount equal to the requirements of W.Va. Code § 17D-4-2 through a program of self-insurance and conceded that the \$20,000 of financial responsibility protection is available to Ms. Lin and has been offered to Mr. Lin. *See* Cross Motion, pg. 2. Thus, the Appellants have previously and consistently asserted that Enterprise is self-insured, including in the Circuit Court.

¹ By way of explanation, Enterprise Rent A Car of Kentucky filed the original application for self-insurance and was approved under Certificate # 1028. It also previously filed for a d/b/a with the name Enterprise Rent A Car Company of West Virginia in 1997. Upon renewal of the Enterprise Rent A Car of Kentucky self-insurance filing in 2003, the State requested that the entity name on the Certificate be changed to the d/b/a of Enterprise Rent A Car Company of West Virginia. Enterprise Rent A Car Company of West Virginia is not set up as a separate subsidiary and is part of Enterprise Rent A Car of Kentucky, which covers both states geographically.

Further, the Appellants do not argue that because Enterprise is self-insured, it is permitted to circumvent the requirements of the West Virginia omnibus statute. Rather, the Appellants contend that because the Empire SLP provides coverage in excess of or in addition to the minimum limits of coverage, which Enterprise provides through a program of self-insurance, it is not required pursuant to W.Va. Code § 17D-4-12 (g) to provide liability coverage to every person using the rental vehicle with the express or implied permission of the Appellee. Empire may properly exclude persons other than the Renter and Additional Authorized Drivers from coverage under the SLP.

The requirements of the motor vehicle financial responsibility law mirror those of the omnibus statute, W.Va. Code § 33-6-31(a), which likewise provides that any policy covering liability arising from the ownership, maintenance or use of a motor contain a provision insuring the named insured and any other person responsible for the use of the motor vehicle with the consent, expressed or implied, of the named insured or his or her spouse against liability for death or bodily injury sustained or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured by such person. West Virginia cases interpreting policy exclusions in the context of the omnibus statute are entirely consistent with the argument made by Appellants in this case.

Even though the Court has invalidated exclusions in policies which bar coverage for persons using the vehicle with the permission of the insured, it has done so only up to the statutory minimum limit of coverage. *See Jones v. Motorists Mut. Ins. Co.*, 177 W.Va. 763, 356 S.E.2d 634, 636 (1987) (“named driver” exclusion in motor vehicle liability insurance policy is of no force or effect up to limits of financial responsibility required by W.Va. Code § 17D-4-2 because insurer could not issue valid policy that excluded from coverage for third-party liability

purposes any driver using vehicle with insured's permission; however, above mandatory limits, exclusion is valid under W.Va. Code §33-6-31(a)); *Dairyland Ins. Co. v. East*, 188 W.Va. 581, 425 S.E.2d 257, 261 (1992) ("named insured" exclusion endorsement is valid above statutorily imposed minimum amounts of coverage, and insured who was passenger in her own vehicle was not "guest passenger" within provision of W.Va. Code § 33-6-29); *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568, 574 (1990) ("intentional tort" exclusion in motor vehicle liability insurance policy is precluded under motor vehicle safety responsibility law, up to minimum amount of insurance coverage required, but exclusion will operate as to any amount above statutory limit because there is clear expression by Legislature that more restrictive statutory conditions imposed under financial responsibility law are not applicable to any excess insurance coverage provided in policy); and *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533, 539-40 (1997) "owned but not insured" exclusion that precludes recovery of statutorily mandated limits of uninsured motorist coverage required by W.Va. Code § 17D-4-2 and § 33-6-31(b) is void and ineffective; however, exclusion is valid and enforceable above mandatory limits of such coverage). Over and above the minimum limit of coverage, these exclusions are valid. Under both West Virginia statutes relied upon by Appellee, liability coverage cannot be excluded for permissive users, except when that coverage is excess of or in addition to the mandatory limits, which is the precise situation presented by this appeal.

**2. Appellants Have Not Waived Any Argument That
The SLP Is Governed By W.Va. Code § 33-12-32**

The Appellee argues that the Appellants raised for the first time in their Petition for Appeal whether W.Va. Code § 33-12-32 represents a departure from the omnibus statute and does not require coverage for any permissive user. The Appellants, however, are not changing their legal theory or asserting a new argument on appeal. The Appellants are still relying upon

the exclusions in the SLP for “loss arising out of the operation of the Vehicle by any driver who is not a Renter or AAD” and for “loss arising out of the use of the vehicle when such use is otherwise in violation of the terms and conditions of the Rental Agreement” and are still contending that these exclusions are not inconsistent with West Virginia statutory or common law. The Appellants examine W.Va. Code § 33-12-32 to illustrate why these exclusions are permissible and, therefore, why the Circuit Court erred in granting summary judgment in favor of the Appellee, finding coverage under the Empire SLP for an unauthorized driver of the Enterprise rental vehicle.

Importantly, it was the Appellee who raised the automobile rental coverage statute in summary judgment briefing in the Circuit Court, contending that “[a]ll individuals who sell rental insurance policies are to be licensed or supervised by a person licensed by the West Virginia Insurance Commissioner. See *W.Va. Code* § 33-12-32,” and that “[i]t is also a statutory requirement that Empire’s agents . . . be given a training program of instruction with respect to the sale of supplemental liability policies such as the one sold to the plaintiff. *W.Va. Code* § 33-12-32.” See Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment, pg. 2. The Circuit Court also cites this statute in the March 19, 2008 Order Granting Summary Judgment, stating that “the Court does not overlook the fact that . . . the person who was entrusted to sell the insurance policy had not been given a program of instruction with respect to the sale of liability policy as required by W. Va. Code § 33-12-32 . . .” See Order, pg. 5. The Appellee cannot rely on certain provisions of the automobile rental coverage statute that appear to support his claim while disregarding others that do not. It is not manifestly unfair for the Appellants to now cite those other provisions. To the extent the Court deems the reliance on

W.Va. Code § 33-12-32 to raise a new issue, it is sufficiently developed to be decided on appeal. *Whitlow v. Bd. of Educ. of Kanawha Cty.*, 190 W.Va. 223, 227, 438 S.E.2d 15, 19 (1993).

The Appellants do not argue that W.Va. Code § 33-12-32 invalidates the omnibus statute. Rather, the Appellant argue that the SLP is outside the scope of W.Va. Code § 33-6-31(a), not only because it is an excess policy, but also because it is an automobile rental policy. The Appellants are simply reading the omnibus statute together with the motor vehicle financial responsibility law and the automobile rental coverage statute to assure recognition and implementation of legislative intent for the type of policy at issue in this case.

Because the SLP policy was issued by Empire incidental to the rental of the Enterprise vehicle, it is governed by W.Va. Code § 33-12-32, which not only authorizes the Insurance Commissioner is to issue limited licenses for the sale of automobile rental coverage and outlines the licensing requirements for rental company counter agents, but also identifies the type of rental coverage that may be sold and how it differs from other standard automobile liability insurance. Specifically, W.Va. Code § 33-12-32(h)(4)(B) provides that the limited licensee may offer or sell, in connection with and incidental to the rental of vehicles, whether at the rental office or by pre-selection of coverage in a master, corporate, group rental or individual agreements, liability insurance (which may include uninsured and underinsured motorist coverage whether offered separately or in combination with other liability insurance) that provides coverage, as applicable, to renters and other authorized drivers of rental vehicles for liability arising from the operations of the rental vehicle.

This particular section is significant because the liability insurance offered incidental to the rental of vehicles only needs to provide coverage for “renters” and “other authorized drivers” of rental vehicles. It does not require coverage for unauthorized drivers who may have the

permission of the renter. The Empire policy comports with this statute by affording the supplemental liability protection to the "Renter" and "Additional Authorized Drivers." As set forth above, Ms. Lin was neither the Renter nor an AAD of the Enterprise vehicle. If the statute had intended to require liability coverage for persons using the vehicle with the express or implied permission of the insureds, it could have incorporated the same language found in W.Va. Code § 17D-4-12 (b)(2) or W.Va. Code § 33-6-31(a) as set forth above. However, it does not.

The Appellee states in his brief that the counter agent at Enterprise, David Smyer, was not licensed to sell insurance policies by the West Virginia Insurance Commissioner. However, the statute did not require Mr. Smyer himself to be licensed. W.Va. Code § 33-12-32 (g) provides as follows:

Any limited license issued under this section shall also authorize any other employee working for the same employer at the same location as the limited licensee to act individually, on behalf and under the supervision of the limited licensee with respect to the kinds of coverage authorized in this section. In order to sell insurance products under this section, at least one employee who has obtained a limited license must be present at each location where insurance is sold. All other employees working at that location may offer or sell insurance consistent with this section without obtaining a limited license. However, the limited licensee shall directly supervise and be responsible for the actions of all other employees at that location related to the offer or sale of insurance as authorized by this section. . .

The deposition testimony of David Smyer and Jason Tardiff, both of which were cited in part by the Appellee, was that Mr. Smyer was working under the supervision of a limited licensee, Amber Aloi.² Additional portions of their transcripts are attached as Exhibits "B" and "C" respectively. Accordingly, the sale of the SLP was in compliance with the requirements of the automobile rental coverage statute.

² Ms. Aloi is licensed by the West Virginia Office of the Insurance Commissioner for resident motor vehicle rental insurance. Her license, # 443932, has been active since May 24, 2005.

3. The Appellee Was Expressly Prohibited By The Rental Agreement From Granting Permission To Ms. Lin To Drive The Vehicle.

Relying upon the omnibus statute, the Appellee claims that he was an insured or custodian of the rental vehicle, capable of granting permission to Ms. Lin to drive the vehicle. As set forth above, however, the SLP is a supplemental liability policy issued incidental to the rental of a vehicle and, therefore, is outside the scope of the omnibus statute. Even if the SLP were required by W.Va. Code § 33-6-31(a) to cover permissive users in certain instances, this is not such a case. Although there are no decisions directly on point, the opinions from this Court addressing whether a driver who has consent from an insured other than the owner of the vehicle and the named insured is a permissive user under the omnibus statute are instructive.

In more than one case, this Court found there was no coverage when the consent came from an insured who was a resident relative but who did not have express permission from the named insured to allow others to use the vehicle. In *Metropolitan Property and Liability Ins. Co. v. Acord*, 195 W.Va. 444, 465 S.E.2d 901 (1995), the Court held that the motor vehicle omnibus statute, W.Va. Code § 33-6-31(a), requires an insurer to provide coverage when permission has been granted by the insured owner of the vehicle or its authorized agent to a driver who then causes injury or property damage during the permissive use. *Id.* at 906, citing *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358, 364 (1991). However, an insurer may properly deny liability coverage where the driver who is not otherwise insured under the policy lacks the named insured's express permission prior to using the automobile. *Id.* at 907. In *Acord*, the Court found there was no uninsured motorist coverage for an accident that resulted in the death of the insured's son who was a passenger in the insured's car driven by another person. In *Allstate Ins. Co. v. Smith*, 202 W.Va. 384, 504 S.E.2d 434 (1998), the Court affirmed the holding in *Acord* and held that an automobile liability insurance policy did not

cover injuries sustained by a passenger in the insured vehicle driven by a motorist who had permission from the named insured's resident relative but not from the vehicle's owner.

In the present case, there is no question that as the renter of the Enterprise vehicle and an insured under the Empire policy, the Appellee was permitted to operate the vehicle. However, he could not allow others to drive the rental vehicle, and such permission cannot be implied from Enterprise as the owner and named insured because of the express language of both the Rental Agreement and the SLP. In particular, the section of the Rental Agreement concerning Additional Authorized Driver(s) states that except as required by law, none are permitted without Owner's written approval. The following sentence in that section begins with "I request Owner's permission to allow" and is completed with "No other driver permitted." The same section on the Rental Agreement, which the Appellee signed, states that "Use of vehicle by an unauthorized driver will affect my liability and rights under this Agreement." Under Additional Terms and Conditions, the Rental Agreement further states that the Renter agrees that the Vehicle shall not be driven by any person other than Renter or AAD(s) without Owner's prior written consent.

Ms. Lin is not unlike the drivers in the *Acord* and *Smith* cases. While she had the permission of an insured to use the vehicle, she did not have the consent of the owner, Enterprise. In fact, Enterprise explicitly prohibited any driver other than the Appellee from using the vehicle, a restriction to which Mr. Lin agreed. *Acord* and *Smith* are also substantially similar because the injured passenger, although an insured, did not have the consent of the named insured/owner to allow others to drive the vehicle. See also *Integon National Ins. Co. v. Welcome Corporation*, 53 F.Supp.2d 599 (S.D. N.Y. 1999) (although Virginia Omnibus Insurance Statute requiring that automobile policy provide coverage for persons using vehicle

with express or implied consent of named insured is remedial and should be liberally construed, coverage generally does not extend beyond first permittee when named insured has expressly prohibited operation of vehicle by another, such that rental car customer negated liability coverage by allowing unauthorized third party to drive car). In light of this authority, any argument by the Appellee that as the renter of the vehicle, he was a "custodian" of the vehicle who could in turn grant Ms. Lin permission to drive it is simply without merit.

The Appellee relies upon *State Farm Mutual Automobile Insurance Company v. Budget Rent-A-Car Systems, Inc.*, 359 N.W.2d (Minn. Ct. App. 1984), for the proposition that coverage is available to an unlisted additional driver on a rental company's excess policy by virtue of the initial permission rule as articulated by Minnesota law. His reliance on this case is flawed for a number of reasons. First, as explained above, although West Virginia does follow the initial permission rule, it does not require an extension of coverage to a driver who did not have the consent of someone other than the owner and named insured. Ms. Lin was operating the vehicle with permission from the Appellee, but the Appellee did not have the consent of Enterprise to allow her or anyone else to operate the vehicle. As set forth above, the Rental Agreement specifically states that no other driver was authorized by Enterprise to use the vehicle. Second, the Minnesota case does not involve an omnibus statute, but rather an omnibus clause contained within the excess policy held by Budget extending coverage to Budget "as well as any individual driving with Budget's permission." *Id.* at 675. Further, the omnibus clause at issue in *State Farm* did not limit coverage should the renter violate the terms of the rental agreement. Without this language, the *State Farm* court applied Minnesota's initial permission rule to find coverage for the unauthorized driver. *But see Avis Rent-A-Car System v. Vang*, 123 F.Supp.2d 504, 509 (D.Minn. 2000) (holding that disclaimer in rental company's excess policy excluding the

renter's violations of the rental agreement expressly precluded the application of Minnesota's initial permission rule). *See also Weathers v. Royal Indemnity Co.*, 577 S.W.2d 623 (Mo. 1979), and *Continental Ins. Co. v. Body*, 557 F.Supp. 1139 (D.C.V.I. 1983).

The SLP in this case specifically excludes coverage for a loss arising out of the operation of a rental vehicle by a driver who is not the Renter or an Additional Authorized Driver. The SLP policy also specifically excludes coverage for a loss arising out of the use of the vehicle in violation of the terms and conditions of the Rental Agreement. Accordingly, any reliance on *State Farm* in light of the previous holdings of this Court in *Acord* and *Smith* as well as the express language of the SLP policy is misplaced, as specifically recognized in *Vang*.

Courts in other jurisdictions have considered the same or similar provisions and exclusions as those in the Empire SLP policy in other supplemental liability policies on rental vehicles and found them to be valid and consistent with state omnibus clauses and public policy, even though they also void or restrict coverage. *See TIG Ins. Co. v. Smith*, 243 F.Supp.2d 782, 785 (N.D. Ill. 2003) (self-insured automobile rental agency could contract to limit coverage to only renter, spouse and additional drivers listed by renter on agreement, and such limitation is not contrary to public policy of state and is in accord with rental agency's interest in protecting its property and knowing in advance its liability exposure); *Avis Rent-A-Car System v. Vang*, 123 F.Supp.2d 504, 508-509 (D. Minn. 2000) (non-authorized driver was not covered by additional liability insurance policy issued by rental car company and automobile insurer where driver who failed to complete additional driver form was not additional insured under policy, automobile rental agreement included as authorized drivers only persons who had completed form and were otherwise eligible to drive car, and policy incorporated definitions in rental agreement, which was given to renter at time he purchased coverage); *Geico v. Morris*, No. 95C-09-081-WTQ,

1997 WL 527982 *6 (Del. Super. Ct. Feb. 19, 1997) (family member exclusion in rental agency policy held valid and consistent with state motor vehicle financial responsibility law where insured or renter had applicable insurance policy containing required mandatory minimum liability coverage, other insurance expressly provided coverage for rental vehicle, and renter was provided written notice of exclusion in rental agreement); *Piening v. Enterprise Rent-A-Car of Cincinnati*, No. C-060535, 2007 WL 2685147 *5 (Ohio Ct. App. Sept. 14, 2007) (estate of renter did not have coverage under supplemental liability protection she purchased, where SLP exclusion printed on the back of Rental Agreement and on ticket jacket provided to the renter excluded, in clear language, losses arising out of bodily injury sustained by renter and family members who resided in renter's household); and *Craster v. Thrifty Rent-A-Car System, Inc.*, 187 S.W.3d 33, 39 (Tenn. Ct. App. 2005) (enforcing unambiguous rental contract that renter acknowledged she voluntarily signed which, as written, contained exclusion for "bodily injury to the renter" and thus provided no coverage for bodily injuries she sustained under supplemental liability insurance she purchased). *See also Empire Fire & Marine Ins. Co. v. Bennett*, No. L-1770-06, 2008 WL 110388 (N.J. Super. Ct. App. Div. Jan. 3, 2008) (although statutory provisions mandating automobile insurance evince strong legislative policy of assuring at least some financial protection for victims, effectuation of policy only requires coverage up to amount required by law, and where required minimum coverage is provided by primary liability coverage Enterprise provided to lessees of its vehicles, Empire could exclude coverage under supplemental rental liability insurance excess policy for accidents that occur while insured is under influence of alcohol); *Philadelphia Indemnity Ins. Co. v. Carco Rentals, Inc.*, 923 F.Supp. 1143 (W.D. Ark. 1996) (insurer providing excess liability insurance to rental car customers did not violate public policy by excluding coverage for operation of vehicle while renter was legally

intoxicated, and exclusion was not misleading or deceptive even though exclusion was not mentioned in rental record which renter signed, and copy of policy was not available at rental premises, where exclusion was contained on rental folder jacket and insurer's brochure specified there were exclusions for violations of terms of rental agreement); and *Arredondo v. Avis Rent A Car System, Inc.*, 24 P.3d 928, 931-32 (Utah, 2001) (additional liability insurance policy purchased by renter of vehicle was not purchased to satisfy statutory security requirement and, thus, insurer was not required to provide coverage for accident with rental car was driven by renter's non-covered minor child, as additional policy provided excess coverage).

The Appellee attempts to make some distinctions between these cases and the present case, but any minor differences noted are not material and do not diminish their relevance or their applicability to the fundamental legal issues in this case. Thus, while there is no common law directly on point in West Virginia, there are numerous decisions from other state and federal courts which support the argument advanced by the Appellants here and which enforce the same type of exclusions for supplemental liability insurance on rental vehicles, including that the driver was not the renter or an additional authorized driver and that the loss arose out of bodily injury sustained by the renter. These exclusions are not rendered invalid by omnibus statutes, motor vehicle financial responsibility laws or public policy. Furthermore, courts uphold these provisions when they are stated clearly and unambiguously in the rental agreement provided to the renter, even if the policy itself was not available.

B. ENTERPRISE PROVIDED MR. LIN WITH A CLEAR AND UNAMBIGUOUS SUMMARY OF THE COVERAGE AND EXCLUSIONS UNDER THE SLP.

The Appellee argues that the exclusion for loss arising out of bodily injury sustained by a Renter is not valid because he was not provided with a copy of the insurance policy or a summary of coverage so as to make the exclusion conspicuous, plain and clear. Although a copy

of the SLP was not provided to the Appellee, there is no question that a summary of coverage was provided to him. The Rental Agreement which Mr. Lin received and signed identifies each and every policy provision and exclusion on which Empire relies to deny coverage to Ms. Lin.

As set forth in the Appellant Brief, the Rental Agreement states as follows:

SLP Exclusions:

For all exclusions, see the SLP policy issued by Empire Fire Insurance Company. Here are a few key exclusions:

... (b) Loss arising out of bodily injury or property damage sustained by a Renter or AAD(s) or any relative or family member of Renter or AAD(s) who resides in the same household; (c) Loss arising out of the operation of Vehicle by any driver who is not Renter or AAD(s); ... (j) **Loss arising out of the use of Vehicle when such use is otherwise in violation of the terms and conditions of the Rental Agreement.**

While the Rental Agreement is not the SLP policy, the supplemental liability coverage was purchased incidental to the rental of the Enterprise vehicle, and the SLP policy incorporates the terms of the Rental Agreement. Moreover, regardless of which document the Appellee received, he had adequate notice that there was no coverage for loss arising out of the operation of the rental vehicle by a driver who is not the Renter or an Additional Authorized Driver or for loss arising out of bodily injury to the Renter. Each of the relevant provisions and exclusions was brought to his attention in the Rental Agreement. Furthermore, the automobile rental coverage statute, W.Va. Code § 33-12-32, provides that at every rental location where rental agreements are executed, brochures or other written material must be readily available to the prospective renter that summarize, clearly and correctly, the material terms of coverage offered to renters, including the identity of the insurer. The statute does not state that the policy itself must be provided to the renter, just a clear, correct summary of the material terms of coverage. That requirement was met in the present case.

The summary the Appellee received in the Rental Agreement from Enterprise was entirely consistent with the terms of the SLP issued by Empire. The relevant provisions of the SLP were brought to his attention. The Appellee does not allege that he did not receive or review the Rental Agreement or that the explanation of the SLP coverage and exclusions in the Rental Agreement were not conspicuous, plain and clear. Rather, the Appellee conveniently ignores the explicit language of Rental Agreement in his brief.

Lastly, coverage is not afforded to the Appellee as a guest passenger under the SLP. In *Dairyland Ins. Co. v. East*, 188 W.Va. 581, 425 S.E.2d 257, 261 (1992), the Court held that the insured who was a passenger in her own vehicle was not a guest passenger within the provision of W.Va. Code § 33-6-29. Similarly, as the renter of the Enterprise vehicle and the insured on the Empire SLP, the Appellee cannot be considered a guest passenger entitled to the benefit of the statute. The Appellee does not cite any case on point in West Virginia or any other jurisdiction where the renter who is the insured on a policy incidental to the rental of a vehicle qualifies as a guest passenger.

WHEREFORE, the Appellants, Enterprise Rent A Car of Kentucky and Empire Fire and Marine Insurance Company, respectfully requests that this Honorable Court reverse the March 19, 2008 Order issued by the Circuit Court of Kanawha County and grant summary judgment in their favor, finding that there is no supplemental liability coverage for Ms. Lin and, therefore, no duty to indemnify the Appellee under that coverage for the injuries he sustained in the automobile accident at issue.

ENTERPRISE RENT A CAR OF KENTUCKY
and EMPIRE FIRE AND MARINE INSURANCE
COMPANY,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 081596

ENTERPRISE RENT A CAR OF KENTUCKY,
and EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Appellants,

v.

WANG-YU-LIN,

Appellee.

CERTIFICATE OF SERVICE

I, Erica M. Baumgras, counsel for Appellants, Enterprise Rent A Car Of Kentucky and Empire Fire and Marine Insurance Company, do hereby certify that a true and exact copy of the attached *Reply of Appellants, Enterprise Rent A Car of Kentucky and Empire Fire and Marine Insurance Company, to Appellee Brief of Wang-Yu Lin* has been served on the following counsel of record on this the 2nd day of April, 2009, via postage prepaid, first class,

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EXHIBITS

ON

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