Nos. 34861 & 34862

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

GUY R. CUNNINGHAM and
BRIDGETT L. CUNNINGHAM, his wife,

Appellees,

v.

SUPREME COURT NOS: 34861 & 34862

WALTER LEE HILL, an individual; ERIE INSURANCE PROPERTY AND CASUALTY COMPANY, a Pennsylvania corporation; B. MICHAEL BENTLEY, an individual; ENCOMPASS INSURANCE COMPANY OF AMERICA, an Illinois corporation; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation; and WILLIAM WILSON, an individual,

Appellants.

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

APPELLEES' RESPONSE TO ERIE'S AND STATE FARM'S BRIEF UPON CERTIFIED QUESTION

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AUTOMOBILE INSURANCE COMPANY,
an Illinois corporation; and WILLIAM
WILSON, an individual,

Appellants.

FROM THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

APPELLEES' RESPONSE TO ERIE'S AND STATE FARM'S
BRIEF UPON CERTIFIED QUESTION

To the Honorable Justices of the
West Virginia Supreme Court of Appeals

I. PRIOR PROCEEDINGS, STATEMENT OF FACTS AND STANDARD OF REVIEW

Prior Proceedings

On March 23, 2007, the Appellees, Guy R. Cunningham and Bridgett Cunningham, his wife, filed a Complaint in the Circuit Court of Boone County, West Virginia against Erie Insurance

Property and Casualty (hereafter, Erie) and State Farm Mutual Automobile Insurance Company (hereafter, State Farm) seeking a declaration that both Erie and State Farm must provide the full underinsured motorist coverage (hereafter, UIM) purchased under policies issued to the Appellees by each insurer. The Appellees, Erie and State Farm filed summary judgment motions seeking to enforce policy provisions that would both limit recovery to the highest limit and pro-rate payment of the same between the two carriers, to wit:

Specifically, the Erie policy provided:

> **OTHER INSURANCE**
>
> If **"anyone we protect"** has other similar insurance that applies to the accident, **"we"** will pay **"our"** share of the loss subject to the other terms and conditions of the policy and this endorsement. **"Our"** share will be the proportion of the Limit of Protection of this insurance bears to the total Limit of Liability of all applicable insurance. Recovery will not exceed the highest limit available among the applicable policies. (West Virginia Uninsured/Underinsured Motorist Coverage Endorsement Form. AFWU01 (Ed. 2/04) UF-8811 at page 3).

The State Farm policy provided:

> **If there is Other Coverage - Coverage W**
>
> 1. If underinsured motor vehicle coverage for ***bodily injury*** is available to an ***insured*** from more than one policy provided by us or any other insurer, the total limit of liability available for all policies provided by all insurers shall not exceed the limit of liability of the single policy providing the highest limit of liability. This is the most that will be paid regardless of the number of policies involved, persons covered, claims made, vehicles insured, premiums paid or vehicles involved in the accident.
> 2. Subject to item 1 above, any coverage applicable under this policy shall apply:
>
> ***

b. on an excess basis if the ***insured*** sustains ***bodily injury*** while ***occupying*** or otherwise using a vehicle not owned by or leased by ***you***, ***your spouse***, or any ***relative***.

3. Subject to items 1 and 2 above, if this policy an one or more other policies provided coverage for bodily injury:

***

b. on an excess basis, we are liable for only our share. Our share is that percent of the damages payable on an excess basis that the limit of liability of this policy bears to the total of all applicable underinsured motor vehicle coverage provided on an excess basis. (Form 6126GF at 5 of 8).

The total damages payable for all policies that apply on an excess basis shall not exceed the amount by which the limit of liability of the single policy providing the highest limit of liability on an excess basis exceeds the limit of liability of the single policy providing the highest limit of liability on a primary basis. (Form 6126GF at 6 of 8).

The Circuit Court of Boone County, The Honorable William S. Thompson presiding, pursuant to W.Va. Code §58-5-2, certified the following question[1]:

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The Lower Court asked the parties to stipulate if possible, unable to agree, the Appellees' proposed four (4) separate certified questions, which questions would be dispositive of all UIM coverage issues herein. Instead, the Circuit Court adopted the certified question which was proposed by both Erie and State Farm. *See* the *Plaintiffs' Proposed Certified Questions And Stipulations Of Facts* which is Exhibit 1 to both *Plaintiffs' Response To Erie Insurance Property And Casualty Company's Petition Upon Certified Question* and *Plaintiffs' Response To State Farm Mutual Automobile Insurance Company's Petition Upon Certified Question*. Appellees recognize that this Court has now accepted the singular certified question, and therefore will not further comment on this issue, but retain their objection that the same is not dispositive as required under Bass v. Coltelli, 196 W.Va. 516, 453 S.E.2d 350 (W.Va. 1994). Alternatively, Appellees note this Court has the authority to reformulate the certified question. *See* Calvert v. Scharf, 217 W.Va. 684, 619 S.E.2d 197 (W.Va. 2005). Additionally, this Court has, at times, found that a petition was improvidently granted. *See* State ex rel. Nationwide Mutual Insurance Co. v. Marks, 2009-WV-0330.665 (the Court, in Marks, found that the petition should not have been granted as it was somewhat misleading in its presentation).

> When two insurers issue separate automobile liability insurance policies upon different vehicles containing underinsured motorist coverages which provide coverage for the same loss, is policy language which provides that the limits of underinsured motorist coverage available for all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage valid and enforceable?

The Boone County Circuit Court correctly answered this question "NO". When answering this question, the Circuit Court properly reasoned that the relevant language in both the Erie and State Farm policies which limited the Appellees' ability to recover the full UIM limits available under each insurance policy violated the setoff prohibition contained within W.Va. Code §33-6-31(b); that neither Erie nor State Farm were aware of the presence of each other and, accordingly, neither provided a multi-vehicle discount to the Appellees; that the Appellees received no benefit of buying two separate automobile insurance policies; and that West Virginia law and public policy favor full compensation to the Appellees.

Statement of Facts

The Statement Of Facts relating to UIM coverage were stipulated by the parties and memorialized in the Boone County Circuit Court's Order Upon Certified Question, a copy of the said Order was included in State Farm's Designation of Record at No. 17.[2]

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[2] The Appellees also requested that the Circuit Court include additional stipulations of fact (specifically, Proposed Facts Nos. 11-13 as contained in *Plaintiffs' Proposed Certified Questions And Stipulations Of Facts*, a copy of which is Exhibit 1 to both *Plaintiffs' Response To Erie Insurance Property And Casualty Company's Petition Upon Certified Question* and *Plaintiffs' Response To State Farm Mutual Automobile Insurance Company's Petition Upon Certified Question*), however, both Erie and State Farm refused to stipulate to these facts and the Circuit Court, therefore, refused to incorporate Proposed Facts Nos. 11-13 in its *Order Upon Certified Question.*

Standard of Review

This Court utilizes a *de novo* standard when reviewing a circuit court's answer to a certified question. Gallapoo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E.2d 172 (W.Va. 1996); Smith v. State, Consolidated Public Retirement Board, 222 W.Va. 345, 664 S.E.2d 686 (W.Va. 2008).

II. AUTHORITIES RELIED UPON

West Virginia Statutes

W.Va. Code §58-5-2

W.Va. Code §33-6-31(b)

W.Va. Code §33-6-31(k)

W.Va. Code §33-6-30(c)

W.Va. Code §33-6-9

W.Va. Code §33-6-9(e)

W.Va. Code §33-6-9(f)

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Starr v. State Farm Fire & Casualty Co., 188 W.Va. 313, 423 S.E.2d 922 (W.Va. 1992)

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Riffe v. Home Finders Associates, Inc., 205 W.Va. 216, 517 S.E.2d 313 (W.Va. 1999)

Potesta v. United States Fidelity & Guaranty Co., 202 W.Va. 308, 504 S.E.2d 135 (W.Va. 1998)

III. NOTE OF ARGUMENT

A. W.VA. CODE §33-6-31(b) DOES NOT ALLOW AN INSURER TO REDUCE UIM COVERAGE BY PAYMENTS MADE UNDER ANOTHER UIM POLICY

W.Va. Code §33-6-31(b) twice prohibits setoff. Specifically, it states:

> Provided, that such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability and property damage liability insurance purchased by the insured *without setoff against the insured's policy or any other policy. . . . No sums payable as a result of underinsured motorist coverage shall be reduced by payments made under the insured's policy or any other policy"*. (Italics added here for emphasis).

Pursuant to W.Va. Code §33-6-31(b), neither Erie nor State Farm are allowed to reduce the amounts payable as a result of UIM coverage by payments made under the insured's policy or any other policy. In other words, Erie is not allowed to reduce its $100,000 UIM coverage to $66,666.66 because State Farm has $50,000 in available UIM coverage. Likewise, State Farm is not allowed to reduce its $50,000 UIM coverage to $33,333.34 because Erie has $100,000 in available UIM coverage. This statute is crystal clear and directly on point.

Both Erie and State Farm assert that each have complied with the mandates set forth in W.Va §33-6-31(b) because their respective policies are clear and unambiguous; that the setoff prohibition contained in W.Va. Code §33-6-31(b) merely prohibits setting off liability limits versus UIM limits, not UIM limits versus UIM limits; and that their pro-ration of the highest limit was proper. Judge Thompson correctly disagreed.

State Farm now complains that Judge Thompson did not find that its policy was ambiguous but, nonetheless, construed it terms. State Farm then cites authority for the proposition that unambiguous terms are to be applied, not construed, and, argues that the lower Court erred in

answering the certified question presented herein. State Farm is also critical that the lower Court "seemed to rely upon the absence of a multi-car discount" and then now cites a litany of cases wherein this Court has upheld various UIM, and even UM, provisions without considering whether a multi-car discount was provided, thereby suggesting that whether a multi-car discount was provided is not the test/standard to be applied. To be clear, Judge Thompson's holding was that both the State Farm and Erie policy language at issue violates West Virginia law and public policy. When a policy provision is contrary to law and public policy, this Court has not hesitated to strike the same, regardless of whether any multi-car discount was given, and the same should be true here based upon the setoff prohibition of W.Va. Code §33-6-31(b), also cited by the lower Court. *See, e.g.,* Jones v. Motorist Mut. Ins. Co., 177 W.Va. 763, 356 S.E.2d 634 (W.Va. 1987) [named driver exclusion not valid up to the mandatory liability limits of insurance]; Henry v. Benyo, 203 W.Va. 172, 506 S.E.2d 615 (W.Va. 1998) [workers' compensation exclusion not valid with respect to non co-worker tortfeasor]; Hamric v. Doe, 201 W.Va. 619, 499 S.E.2d 619 (W.Va. 1997) [physical contract requirement not valid where there is independent third party testimony to verify existence of phantom vehicle]. Moreover, just as Judge Thompson noted the lack of any discount, so did this Court in State Automobile Mut. Ins. v. Youler, 183 W.Va. 556, 396 S.E.2d 737 (W.Va. 1990), and the same did not constitute error.

Erie, in its Petition, contends that the Circuit Court misapplied the clear language contained in W.Va. Code §33-6-31(b) because Deel v. Sweeney states, in part, that an insurer (Erie) can limit its UIM exposure so long as the limitations do not conflict with the spirit and intent of the UIM statute and the premium charged is consistent therewith. Deel v. Sweeney, 181 W.Va. 460, 383 S.E.2d 92 (W.Va. 1989). On the contrary, the Deel Court did not have the opportunity to consider

the setoff prohibition presented herein. First, W.Va. Code §33-6-31(b) was not amended to include the above quoted setoff prohibition until the 1988 legislative session[3]. Although this Court's decision in Deel was issued in 1989, it involved a 1986 accident, and even the Circuit Court's January 1988 decision, from which the appeal was taken, was issued before the statutory amendment, so Deel is NOT dispositive. Second, Deel did not involve a setoff against UIM but, rather, upheld a UIM exclusion that barred coverage entirely. Specifically, Deel involved an "owned but not insured exclusion". The same UIM coverage exclusion would bar coverage for Mr. Cunningham if he had been in an owned vehicle at the time of the accident. Mr. Cunningham, however, was not in an owned vehicle at the time of the accident[4] so the "owned but not insured" exclusion does not defeat coverage and the actual Deel holding is inapplicable herein. Appellees urge this Court to now consider the subsequent legislative amendment prohibiting setoff and to find that the application of both State Farm and Erie's policy provisions to these facts are contrary to law.

What both Erie and State Farm overlook is the preeminent public policy of uninsured (hereafter, UM) and UIM coverage, that an injured person be fully compensated for his or her damages not compensated by a negligent tortfeasor up to the limits of the UM or UIM coverage. In Pristavec v. Westfield Insurance Company, 184 W.Va. 331, 400 S.E.2d 575 (W.Va. 1990), Ms.

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[3] Acts of the Legislature of West Virginia in enacting S.B.86 (1988), which added the set-off prohibition, was enclosed as Exhibit 2 to both *Plaintiffs' Response To Erie Insurance Property And Casualty Company's Petition Upon Certified Question* and *Plaintiffs' Response To State Farm Mutual Automobile Insurance Company's Petition Upon Certified Question.* Counsel enclosed Exhibit 2 to show that the above referenced language of W.Va. Code §33-6-31(b) did not appear in the W.Va. Code at the time of the 1986 accident discussed in Deel v. Sweeney and, accordingly, Deel v. Sweeney is not dispositive of any issue herein.

[4] See stipulated facts including that Mr. Cunningham was in an employer owned vehicle.

Pristavec was injured in a motor vehicle accident which occurred on March 2, 1987 when her vehicle was negligently struck by a vehicle operated by Leonard Williams. Mr. Williams' liability carrier paid its $100,000 liability limits to Ms. Pristavec for injuries which she sustained in this accident. Ms. Pristavec then brought an action, removed by Westfield to the United States District Court for the Northern District of West Virginia, for a declaration that Westfield is liable to her under the UIM coverage of her policy for damages in excess of the $100,000 liability limits which she received from the tortfeasor's liability policy, up to the limits of her UIM coverage of $100,000. Ms. Pristavec moved for summary judgment on this issue. Westfield also moved for summary judgment contending that UIM coverage was not available to Ms. Pristavec because the amount of Mr. Williams' liability coverage available ($100,000) to Ms. Pristavec was *not less than* the amount of Ms. Pristavec's UIM coverage ($100,000); i.e., the two coverage limits were equal and, accordingly, Mr. Williams was not an underinsured motorist. The Pristavec Court then answered the certified question in the affirmative by holding, ". . . . *in light of the preeminent public policy of the underinsured motorist statute, which is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor, this Court holds that underinsured motorist coverage is activated under W. Va. Code, 33-6-31(b), as amended, when the amount of such tortfeasor's motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the injured person, regardless of the comparison between such liability insurance limits actually available and the underinsured motorist coverage limits.*" *See* Pristavec at 338. Thus, the Pristavec Court held you compare limits to damages, not limits to limits.

Here, the issue is the availability of two UIM limits, rather than one liability and one UIM as in Pristavec, however, there is not any intuitive reason to handle availability in this context any differently. So long as damages exceed the combined limits, absent a multi-car discount, public policy requires that the full combined limits be available, and any attempted policy provision to the contrary must fail.

B. WEST VIRGINIA LAW AND PUBLIC POLICY ALSO MANDATE THAT THE APPELLEES BE AFFORDED THE FULL UIM BENEFITS AVAILABLE UNDER BOTH THE ERIE AND STATE FARM POLICIES

(i) West Virginia Law Does Not Prohibit Collection Under Two Separate Policies

In Allstate v. State Automobile Mutual Ins. Co., 178 W.Va. 704, 364 S.E.2d 30 (W.Va. 1987), Charles Minor (an Allstate insured) traveled in Charles Nickerson's vehicle (said vehicle was insured by State Auto) to a lumberyard in Moundsville, West Virginia. Once at the lumberyard, Mr. Minor turned the ignition key of the said vehicle in order to activate the radio, at which time the Nickerson vehicle lurched backward and struck Kevin Cook, a lumberyard employee. Mr. Cook then filed suit against Mr. Minor for personal injuries and alleged Mr. Minor was using the Nickerson vehicle with permission. A dispute then arose as to the priority between the Allstate policy issued to Mr. Minor and the State Auto policy issued to the vehicle owner, Mr. Nickerson. The circuit court ultimately ordered that the expense of defending Mr. Minor be shared equally between Allstate and State Auto. Both insurance companies appealed. The Allstate Court adopted the bright line rule of law that the primary obligation to defend and indemnify follows the automobile, and thus the State Auto policy was exposed first but, if exhausted, the Allstate policy

would be required to provide secondary liability coverage. The undersigned counsel recognizes that Allstate involves different issues than presented in this certified question, however, Allstate provides guidance as to how this Court should answer this certified question. Specifically, there is no prohibition under West Virginia law which would preclude an at-fault tortfeasor from being afforded full liability coverage/benefits under two separate policies. If West Virginia law recognizes that an at-fault tortfeasor may be afforded full liability coverage/benefits under two separate policies, then UIM, which is to fill the void when the at-fault tortfeasor has insufficient limits, should do the same. The Appellees herein are innocent victims of the tortious conduct of defendant Walter Lee Hill who was underinsured; they bought and paid for two separate UIM policies; and, certainly, as first-party insureds, they are entitled to the full benefit of their bargain under both the Erie and State Farm policies.

(ii) Neither Insurer Had Knowledge Of The Other And Provided No Discount

W.Va. Code §33-6-31(k) allows an insurer to incorporate such terms, conditions, and exclusions into a policy as may be consistent with the premium charged. Erie argues that it complied with the mandates set forth in W.Va. Code §33-6-31(k) because it generally charged lower insurance premiums than would have otherwise been necessary if the subject policy provision did not exist. *See* the *Affidavit Of Robert D. Harrington*, Erie Personal Lines Supervisor, a copy of which is attached as an exhibit to the document included in State Farm's Designation of Record at No. 16.

This argument is disingenuous at best[5]. Without question, the Appellees received no benefit for purchasing two separate automobile policies. Precisely, the Appellees would have paid the same premium with Erie regardless as to whether they paid a premium for the State Farm policy. That is to say the Appellees would have received whatever discount was built into the Erie policy (the Appellees were never allowed to conduct any discovery on this issue to determine what type of discount was provided; how much discount was provided; etc.) regardless as to whether they purchased the State Farm policy. Accordingly, the Appellees derived no benefit for purchasing two separate automobile policies and they should be entitled to the full UIM benefits available under both.

Erie relies upon this Court's earlier decision in Jenkins v. State Farm Mut. Auto. Ins. Co., 219 W.Va. 190, 632 S.E.2d 346 (W.Va. 2006) to suggest that it was not required to provide the Appellees a multi-car discount in order to limit the amount of UIM coverage it must afford herein. In Jenkins, the West Virginia Supreme Court of Appeals held that the Roy Jenkins estate was not entitled to collect $100,000 pursuant to a UIM policy issued by State Farm because the exclusionary language contained in the relevant State Farm policy clearly limited the estate's recovery to $25,000 pursuant to the UIM policy insuring the vehicle operated by Roy Jenkins at the time the accident

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The Appellees moved the Boone County Circuit Court to allow additional discovery (i.e. a deposition of Mr. Harrington, etc.) if the Court was going to allow Erie make the Affidavit a part of the record herein. *See* the *Plaintiffs' Response In Opposition To Defendant Erie Property And Casualty Company's Motion To Reconsider Order Upon Certification*, a copy of which was attached as Exhibit 4 to *Plaintiffs' Response To Erie Insurance Property And Casualty Company's Petition Upon Certified Question*. The Circuit Court, however, overruled the Appellees' objection and ordered that the Affidavit be made a part of the record. The Circuit Court did, however, again correctly rule that although a general discount may have been given by Erie to the Appellees, the Appellees did not receive a benefit for purchasing two separate automobile polices.

occurred. The factual scenario presented in Jenkins, however, is clearly different from the factual scenario in this case. Specifically, on July 3, 2003, Roy Jenkins was driving a Nissan truck which was owned by his mother, Yantes Belcher, in Wayne County, West Virginia. This Nissan truck was struck by a Chevrolet Camaro owned by Thomas Holbrook and operated by Josh Holbrook. Roy Jenkins died as a result of injuries sustained in this accident. Allstate, the insurer for the Holbrook vehicle paid its $50,000 liability limits. The Roy Jenkins estate then made a claim for UIM benefits with State Farm. The Roy Jenkins estate claimed that it was entitled to collect $100,000 in UIM benefits under a State Farm policy on a Pontiac Sunfire owned by Carolyn Jenkins, Roy Jenkins' widow. State Farm, however, contended that the Roy Jenkins estate was only entitled to collect the $25,000 UIM limits pursuant to the State Farm policy insuring the Nissan truck operated by Roy Jenkins at the time of the accident[6]. The Jenkins Court ultimately ruled that in consideration for the multi-car discount actually afforded under all four Jenkins policies, the exclusionary language contained in the State Farm policies clearly limited the Roy Jenkins estate's recovery to the $25,000 UIM limits applicable to the policy insuring the Nissan truck. The obvious distinction here is, significantly, the two policies were issued by separate carriers (Erie and State Farm), neither of

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The Nissan truck owned by Yantes Belcher and operated by Roy Jenkins at the time of the accident was insured by a State Farm policy which provided $25,000 in UIM limits. In addition, Carolyn Jenkins had a Pontiac Sunfire which was insured by a State Farm policy which provided $100,000 in UIM limits; and Donnie Jenkins, Roy Jenkins' son, had a Ford Escort which was insured by a State Farm policy which provided $25,000 in UIM limits; and Donnie Jenkins also had a Ford Crown Victoria which was insured by a State Farm policy which provided $25,000 in UIM limits. Yantes Belcher, Roy Jenkins, Carolyn Jenkins, and Donnie Jenkins were named insureds under all four State Farm policies. Further, all four policies indicated these four people were living at the same address and each policy included a multi-car discount.

which had inquired about, or had any knowledge of, the other[7]. *See* the *Application For State Farm Automobile Insurance,* a copy of which is attached as Exhibit A to the document included in State Farm's Designation of Record at No. 6, and Erie Insurance *Private Passenger Auto Application WV*, a copy of which is attached as Exhibit B to the document included in State Farm's Designation of Record at No. 6. Obviously, since neither carrier had knowledge of the other, no actual discount was given based upon the other policy and, therefore, there is not any justification for the purported reduction in UIM limits. Indeed, the State Farm policy insured only one vehicle and offered no discount at all. *See* Response 1 of *Response To Plaintiffs' First Set Of Requests For Admissions To Defendant State Farm Mutual Automobile Insurance Company*, a copy of which is attached as Exhibit C to the document included in State Farm's Designation of Record at No. 6. Any discount which Erie provided was solely with respect to the multiple vehicles insured under that policy and not an additional vehicle insured elsewhere. *See* the Erie Declarations page, a copy of which was attached as Exhibit D to the document included in State Farm's Designation of Record at No. 6. The Appellees do not argue they should be able to stack two Erie limits even though there were two Erie insured vehicles, only that they should be able to receive what they paid for, one limit under each policy, without restriction.

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[7] Both carriers admitted the genuineness of the respective applications. Specifically, see Response 2 of *Response To Plaintiffs' First Set Of Requests For Admissions To Defendant State Farm Mutual Automobile Insurance Company*, a copy of which was attached as Exhibit C to the document included in State Farm's Designation of Record at No. 6 and Response 1 of *Response To Plaintiffs' Second Set Of Requests For Production Of Documents And First Set Of Requests For Admission To Defendant Erie Insurance Property And Casualty Company*, a copy of which is attached as Exhibit 3 to both *Plaintiffs' Response To Erie Insurance Property And Casualty Company's Petition Upon Certified Question* and *Plaintiffs' Response To State Farm Mutual Automobile Insurance Company's Petition Upon Certified Question.*

(iii) The Statutory Presumption Was Not In Effect, Neither Carrier Advised The Commissioner Of Any Change Relating To The UIM Language At Issue Herein, And There Certainly Was No Determination As To Whether The Benefits Were Reasonable In Relation To The Premium Charged Or That The Benefits Were Sufficiently Broad As To Be In The Public Interest.

State Farm argues that it complied with the mandates set forth in W.Va. Code §33-6-31(k) because the Insurance Commissioner's "approval" of the relevant policy language connotes compliance with West Virginia law thus entitling State Farm to a presumption that the benefits provided are consistent with the premium charged pursuant to W.Va. Code §33-6-30(c)[8]. *See* also W.Va. Code §33-6-9. First, the presumption under W.Va. Code §33-6-30(c) was not added until 2002 amendment and the approval upon which State Farm relies is dated in 2001, so the new statutory presumption does not apply. In State Farm's own case of Findley v. State Farm Mut. Auto Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (W.Va. 2002), the West Virginia Supreme Court refused to give retroactive application to that amendment. Moreover, the Appellees are not arguing that the subject provision is always improper. The Appellees are arguing that State Farm is misapplying it to the facts at hand. Neither the explanatory cover letter to the Commissioner, nor the form filing itself, ever cites facts similar to the instant case. *See* the cover letter made a part of the filing attached as Exhibit A to State Farm Mutual Automobile Insurance Company's Response to Plaintiffs' Combined Motion for Summary Judgement Against Defendant Erie Insurance Property and Casualty Company and State Farm Mutual Automobile Insurance Company With Regard to Applicable UIM Limits[9]. For each of these reasons, the presumption does not apply, and with that

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8 Insurance Commissioner approval addressed more specifically, infra, at Argument D below.

9 Item 10 in State Farm's Designation of Record.

said, the Appellees are again on a level playing field on which numerous approved policy provisions have been stricken by our Court either as contrary to statute, public policy, or both. *See, e.g.,* Jones v. Motorist Mut. Ins. Co. [named driver exclusion not valid up to the mandatory liability limits of insurance]; Henry v. Benyo [workers' compensation exclusion not valid with respect to non co-worker tortfeasor]; Hamric v. Doe [physical contract requirement not valid where there is independent third party testimony to verify existence of phantom vehicle] as cited supra.

State Farm also relies the fact that the subject policy language was "approved" by the West Virginia Insurance Commissioner to suggest this Court should, therefore, infer that the premium charged was found to be commensurate with the policy language at issue. But, the Commissioner does not have the authority to approve policy language that is contrary to West Virginia law. Indeed, the Commissioner is required to disapprove any form for which the benefits provided are unreasonable in relation to the premium charged and/or under which the coverage provided and not sufficiently broad as to be in the public interest. *See* W.Va. Code §33-6-9(e) and (f).

Appellees urge the Court to noted that the May 7, 2001, cover letter made a part of the State Farm filing in no way advises the Commissioner that proposed 6126GF Endorsement contains the addition of, or any change whatsoever to, the If There Is Other Coverage - Coverage W section of the State Farm policy, and the May 14, 2001, "Filed and Approved For Use" stamp thereon cannot fairly be said to be an approval of the particular language addressed herein.

For a previous case noting the significance of what is represented (or not represented) to the Commissioner in a form filing, see Joy Technologies, Inc. v. Liberty Mutual Insurance Company, 187 W.Va. 742, 421 S.E.2d 493 (1992). Specifically, in Joy, and in weighing the representations heavier than the actual policy language, this Court held:

> The Public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that corporation which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies.

Similarly, here, having failed to note any change, State Farm cannot now assert approval of the changes requested as approval of additional language not brought to the attention of the Commissioner. Moreover, even in the context of a formally promulgated legislative rule, this Court has held that it is the final authority, not the Commissioner, with respect to statutory construction and, indeed, that the Court is obligated to reject administrative constructions which are contrary to statute. Lovas v. Consolidation Coal Company, ___ W. Va. ___, 662 S.E.2d 645 (W.Va. 2008).

Like State Farm[10], Erie contends that the language limiting the Appellees' ability to recover UIM benefits under its policy was "approved" by the West Virginia Insurance Commissioner and implies that it should be able to rely upon the same. To support this argument, Erie attached, as Exhibit B to *Erie Insurance Property And Casualty Company's Brief Upon Certified Question*, the form filing which allegedly "approved" the same. This is a form only filing, not a rate filing, therefore no determination was made by the Commissioner that the rate was commensurate with the policy language at issue (Ex. B at "West Virginia S.E.R.F.F. Filing Form). Also, the description of change made by endorsement AFWU01 (E. 2/04) was simply "Diminished Value Exclusion and various revisions to replacement from" (Ex. B at Form Filing Abstract, page 2). Likewise, the October 1, 2003 cover letter which more specifically lists the subject changes makes no reference whatsoever to the provision at issue (Ex. B at letter dated October 1, 2003). The interlineated copy of AFWU01 reflecting the precise changes form the 4/99 to the 2/04 version reflects only the

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[10] See B (ii) above.

addition of quotation marks around certain defined terms as used in the paragraph at issue but no substantive change (Ex. B at interlineated form). It can hardly be argued that this form filing approved anything with respect to the language at issue.

Suffice it to say that if neither carrier made the changes known to the Commissioner, there certainly could not have been any determination as to whether the benefits provided were reasonable in relation to the premium charged and/or whether the coverage provided was sufficiently broad as to be in the public interest and this Court being the final authority, Joy Technologies and Lovas supra, must now determine the same.

C. THE APPELLEES ARE CLASS ONE INSUREDS UNDER BOTH THE ERIE AND STATE FARM POLICIES AND THEREFORE, PURSUANT TO WEST VIRGINIA LAW, THEY ARE ENTITLED TO FULL UIM BENEFTIS UNDER BOTH POLICIES

Interestingly, although raised below, neither Erie nor State Farm discussed in their respective briefs to this Court the decision and importance of Starr v. State Farm, 188 W.Va. 313, 423 S.E.2d 922 (W.Va. 1992). The Appellees believe the Starr decision also provides guidance as to how this Court should answer the certified question presented herein and, accordingly, will unilaterally discuss the same. In Starr, the West Virginia Supreme Court of Appeals examined whether Judith Starr (a guest passenger) in a vehicle owned by William Cline (an unrelated third party) was entitled to recover UIM benefits pursuant to another insurance policy covering another vehicle owned by Mr. Cline which was not involved in the subject accident. To answer this question, the Starr Court examined W.Va. Code §33-6-31(c) and ultimately concluded that this statute created two classes of insureds for purposes of UM and UIM coverage. The first class of insureds includes the named

insured, his or her spouse, and their resident relatives. The Starr Court concluded *"that broader coverage is afforded a Class One insured in the sense that the uninsured or underinsured motorist coverage on other vehicles owned by the insured can be stacked though the Class One insured was not occupying the other vehicles at the time of the accident"*. *See* Starr at 317. *"The purpose for allowing a named insured the benefit of all policies for which he has paid a premium is to provide a fulfillment of the contractual expectations that the party had when purchasing the policies"*. *Id.* The second class of insureds includes permissive users of the named insured's vehicle. *"A claimant whose coverage is solely a result of membership in this class [Class Two] has not paid premiums, nor is he a specifically intended beneficiary of the policy. Thus, he has no recognizable contractual relationship with the insurer, and there is no basis upon which he can reasonably expect multiple coverage"*. *See* Starr at 318 quoting Utica Mutual Insurance Co. v. Contrisciane, 504 Pa. 328, 473 A.2d 1005 (1984). The Starr Court eventually concluded that since Judith Starr was a guest passenger in the Cline vehicle, she would be considered a Class Two insured. Accordingly, since Judith Starr was a Class Two insured, she was not entitled to collect UIM benefits under an automobile policy which covered another vehicle (a Ford) owned by the insured, Mr. Cline, which was not involved in the automobile accident. The facts of this case, however, are different from the facts contained in Starr. Specifically, the Appellees (specifically Mr. Cunningham) are a Class One insured under both the Erie and State Farm policies (he paid premiums for both policies and is a named insured under both policies). Following the reasoning outlined in Starr, the Appellees are entitled to full UIM benefits under both the Erie and State Farm policies. Starr makes it clear that this Court has previously held individuals who are named insured(s) and pay premiums for an insurance policy are entitled to full benefits under those insurance policies (the Appellees paid

premiums for both the Erie and State Farm policies and therefore, pursuant to West Virginia law, they should be entitled to full UIM benefits under both policies).

D. THE ERIE POLICY IS AMBIGUOUS AND, PURSUANT TO WEST VIRGINIA LAW, THAT AMBIGUITY MUST BE CONSTRUED IN FAVOR OF COVERAGE

The aforesaid Erie UM/UIM Endorsement contains a section called Limitations of Payment which states:

> If **"anyone we protect"** insures more than one **"auto"** and none of the **"autos"** are involved in the accident, the highest limit of Uninsured/Underinsured Coverage applicable to any **"auto"** will apply. (*See* the West Virginia Uninsured/Underinsured Motorist Coverage Endorsement Form. AFWU01 (Ed. 2/04) UF-8811 which was attached as an Exhibit to *Petition For Certified Question Of Defendants Erie Insurance Property And Casualty Company And B. Michael Bentley*).

Obviously, Guy R. Cunningham insures more than one auto (the Declarations indicated he insures two autos; namely, a 2001 Chevrolet and a 2003 Cadillac) and neither of these autos which Erie insures was involved in the subject accident. Accordingly, based upon this language, Erie must afford the Appellees $100,000 in UIM benefits.

Erie, however, seemingly ignores the above-referenced policy provision and relies upon the Other Insurance clause in its policy which states, in pertinent part:

> If **"anyone we protect"** has other similar insurance that applies to the accident, **"we"** will pay **"our"** share of the loss subject to the other terms and conditions of the policy and this endorsement. **"Our"** share will be the proportion of the Limit of Protection of this insurance bears to the total Limit of Liability of all applicable insurance. Recovery will not exceed the highest limit available among the applicable policies. (*See* the West Virginia Uninsured/Underinsured Motorist Coverage Endorsement Form. AFWU01 (Ed. 2/04) UF-8811 which was attached as an Exhibit to *Petition For Certified Question Of Defendants Erie Insurance Property And Casualty Company And B. Michael Bentley*).

Thus, in one provision in the policy Erie states if, as here, none of the Erie insured vehicles are involved in the accident, then its insured is afforded the highest UIM limit available from Erie; i.e., $100,000, but in another provision in its policy Erie states if there is other similar insurance, Erie must only pay a pro-rate portion; i.e, $66,666.66. These two policy provisions are in direct conflict and, accordingly, this creates an ambiguity. The Boone County Circuit Court Judge (Judge Thompson) agreed with the Appellees and found that the Erie policy was ambiguous[11]. It is well settled West Virginia law that this ambiguity must be construed in favor of the insured (the plaintiffs) and coverage ($100,000 UIM benefits). *See* National Mutual Insurance Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (W.Va. 1987); Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (W.Va. 1988); and Riffe v. Home Finders Associates, Inc., 205 W.Va. 216, 517 S.E.2d 313 (W.Va. 1999).

E. ESTOPPEL PRECLUDES BOTH ERIE AND STATE FARM FROM ASSERTING POLICY LANGUAGE WHICH WOULD REDUCE THE AVAILABLE UIM BENEFITS FROM $150,000 TO $100,000

Again, although also raised below, neither Erie nor State Farm discussed in their respective briefs to this Court the significance and importance of the doctrine of estoppel as outlined in Potesta v. USF&G, 202 W.Va. 308, 504 S.E.2d 135 (W.Va. 1998). Likewise, the Appellees believe the

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Erie comments in Footnote 4 of its brief to this Court, that one of the conflicting provisions of its policy was not contained in the Stipulated Facts. That is because Erie refused to stipulate to said fact and the lower Court ruled that it could not order Erie to stipulate to a fact which it did not want to stipulate. To again specify the ambiguity, under the "highest" provision, Erie affords $100,000 in UIM coverage whereas, under the "pro-rata" provision, Erie affords $66,666.66 in UIM coverage. Erie chose to apply the latter, and ignore the former, because it served its own interest, and not that of its first party insureds (the Appellees).

Potesta decision provides guidance as to how this Court should answer the certified question presented herein and, accordingly, will discuss the same. Erie acknowledged by letters of April 25, 2005 and April 26, 2005, copies of which are attached as Exhibits E and F, respectively, to the document included in State Farm's Designation of Record at No. 6, that the relevant Erie policy provided $100,000/$300,000 in UIM coverage[12]. On January 21, 2006, West Virginia National, the liability carrier, offered its $20,000 liability coverage herein. A copy of this January 21, 2006 letter is attached as Exhibit H to the document included in State Farm's Designation of Record at No. 6. On February 6, 2006, Erie waived its subrogation rights in regards to the UIM coverage and med pay coverage, if determined to apply, and consented to the liability settlement. A copy of the February 6, 2006 letter is attached as Exhibit I to the document included in State Farm's Designation of Record at No. 6. By letter of March 15, 2006, a copy of which is attached as Exhibit J to the document included in State Farm's Designation of Record at No. 6, State Farm also consented to this liability settlement and waived its subrogation rights with respect thereto. The $20,000 liability limits settlement was then accepted by the Appellees and disbursed on March 17, 2006. Several months later, by letter of July 25, 2006, a copy of which is attached as Exhibit K to the document included in State Farm's Designation of Record at No. 6, State Farm indicated that Erie would be responsible for 2/3rds of any UIM settlement. Note, at no point during this time frame did either Erie or State Farm assert contractual language which would reduce the available UIM limits from $150,000 to $100,000 (all State Farm asserted was that Erie was responsible for 2/3rds of any

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Erie did at first contend that UIM coverage was not available in this case, however, by letter of June 30, 2005, a copy of which is attached as Exhibit G to the document included in State Farm's Designation of Record at No. 6, Erie did concede that UIM coverage would be available on an excess basis.

settlement, which would still be the case if both afforded the full UIM benefits available under each policy, i.e. $100,000 from Erie and $50,000 from State Farm). The Appellees then submitted a demand package on February 14, 2007 to both Erie and State Farm wherein the full UIM limits were demanded of each carrier. During a phone conversation on or about February 28, 2007 between Appellees' counsel and defendant William Wilson, State Farm Claim Representative, State Farm first asserted that it may have limited exposure in this case since the Appellees had two policies which afforded UIM coverage, i.e., the Appellees could only collect $100,000 total from both Erie and State Farm, not the full $150,000 UIM limits[13]. The Complaint herein was then filed on March 23, 2007. After the filing of the Complaint, both Erie and State Farm asserted contractual language which would reduce the available UIM limits from $150,000 to $100,000. Subsequently, Erie paid $66,667.66 (2/3rds) and State Farm paid $33,333,34 (1/3rd) of the UIM settlement thus far obtained. Equity demands that both Erie and State Farm be estopped from asserting contractual language which purportedly reduce the available UIM limits from $150,000 to $100,000.

In Potesta v. USF&G the West Virginia Supreme Court was presented with two certified questions from the United States Court of Appeals for the Fourth Circuit involving the application of the doctrines of waiver and estoppel. The Potesta Court concluded that in order to establish the doctrine of waiver applies an insured must show an insurer intentionally relinquished a known right. Alternatively, *"[e]stoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment*

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This conversation was confirmed by plaintiffs' counsel via a letter dated March 1, 2007, a copy of which is attached as Exhibit L to the document included in State Farm's Designation of Record at No. 6.

of a material fact". Further, *"[t]he insured must prove that s/he relied to her/his detriment on the initially stated ground for denial"*. Potesta at 310. In this case, neither Erie nor State Farm timely asserted contractual language which purports to reduce the combined available UIM limits from $150,000 to $100,000. Indeed, there was no mention of it until AFTER the Appellees had released the tortfeasor from personal liability in exchange for payment of only his liability limits, with the UIM carriers' blessing. That is to say, at the time Erie and State Farm consented to the liability settlement, and Appellees proceeded to accept the same, Appellees had been led to believe they would be entitled to collect additional damages, up to the combined UIM limits of $150,000 (see correspondence cited above). Thus, by the failure to advise to the contrary[14], Appellees were induced to act to their detriment and, if the pro-rata clauses are upheld, they will now be precluded from collecting the additional $50,000 either from UIM coverage or the tortfeasor's personal assets. Instead, Appellees contend the both Erie and State Farm should be estopped under Potesta, supra. While the certified question proposed by the Appellants, and adopted by the Circuit Court, does not put such facts squarely before this Court, Appellees felt it was important for this Court to know such issues remain unresolved when it issues instructions to the Circuit Judge upon remand.

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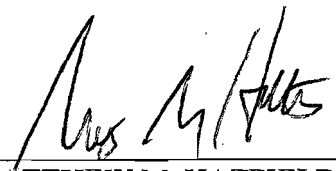
114 WVSCR 14-4.1 prohibits insurers from failing to fully disclose to first party claimants all pertinent or other provisions of an insurance policy under which a claim is presented.

VI. PRAYER FOR RELIEF

WHEREFORE, the Appellees, Guy R. Cunningham and Bridgett L. Cunningham, his wife, respectfully pray that the certified question presented by the Boone County Circuit Court be answered in the negative.

Respectfully submitted,

Guy R. Cunningham and
Bridgett L. Cunningham, his wife,
By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos: 34861 & 34862

GUY R. CUNNINGHAM and
BRIDGETT L. CUNNINGHAM, his wife,

Appellees,

v.

WALTER LEE HILL, an individual;
ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY, a Pennsylvania
corporation; B. MICHAEL BENTLEY,
an individual; ENCOMPASS INSURANCE
COMPANY OF AMERICA, an Illinois
corporation; STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
an Illinois corporation; and WILLIAM
WILSON, an individual,

Appellants.

CERTIFICATE OF SERVICE

I, Matthew M. Hatfield, counsel for Appellees, do hereby certify that I have this the 30th day of June, 2009, mailed by United States mail, postage paid, a true copy of the foregoing *Appellees' Response To Erie's And State Farm's Brief Upon Certified Question*, unto the following:

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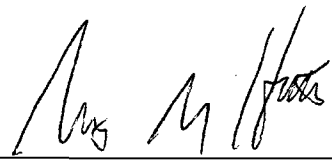

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