No. 34861

CHARLESTON

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Plaintiffs,

v.

SUPREME COURT NO. 34861

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,

Defendants.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY'S REPLY TO THE PLAINTIFFS' RESPONSE TO ITS BRIEF UPON CERTIFIED QUESTION

JAMES D. LAMP
WV Bar No. 2133
JULIE A. WARREN
WV Bar No. 9789
Lamp, O'Dell, Bartram, Levy & Trautwein, P.L.L.C.
P.O. Box 2488
Huntington, WV 25725-2488
(304) 523-5400
Counsel for Defendant, B. Michael Bentley
Erie Insurance Property and Casualty Company

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Comes now the Defendant, Erie Insurance Property & Casualty Company ("Erie"), by and through the undersigned counsel, and replies to Plaintiffs' Response to Erie's Brief Upon Certified Question.

I. Erie's interpretation of the "other insurance" provision is consistent with the Court's application of W.Va. Code §33-6-31(b).

Erie's application of the "other insurance" provision is consistent with the Court's interpretation of W.Va. Code §33-6-31(b). As support for this position, Erie cites Deel v.

Sweeney, 383 S.E.2d 92, 95 (W.Va 1989), in which this Court states that "clearly an insurer can limit its liability so long as limitations are not in conflict with the spirit and intent of the statute and the premium charged is consistent therewith." The plaintiffs address Deel, by arguing that it is no longer authoritative because the accident at issue in the case, and the circuit court's decision, took place prior to the legislature's amending of §33-6-31(b). However, as recently as May 14, 2009, this Court relied on Deel in its decision to uphold an exclusion included in an insurance policy finding it did not violate §33-6-31(b). See Boniey v. Kuchinski, 2009 W. Va. LEXIS 37 at 6-7 (May 14, 2009)("However, we also have held that '[i]nsurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes.' Syllabus Point 3, Deel v. Sweeney, 181 W. Va. 460, 383 S.E.2d 92 (1989). Thus, even though the exclusion at issue in the State Farm automobile insurance policy is unambiguous, it will be given full effect only if it does not conflict with the intent and purpose of the uninsured motorist statute.") Furthermore, Deel is important to the case at bar because it sets forth the rule that limitations to UIM coverage are permitted, so long as the limits are consistent with §33-6-31(b) and the premiums charged. It is important to note that the Court made broad reference to "terms, conditions and exclusions," and not just specifically addressing "owned but not insured" exclusions, as the plaintiffs suggest.

Erie has not overlooked the purpose behind §33-6-31(b), which is to ensure that the insured is provided full compensation, (*not exceeding coverage limits*). Erie has done its part to see that the plaintiffs have been fully compensated up to the limits of coverage pursuant to the Erie policy. The policy language included in the UIM coverage unambiguously states that if there is "other insurance" present, then the insured has a right to the highest limit available

between the applicable policies, which in this case was $100,000 prorated between Erie and State Farm.

The plaintiffs rely on Pristavec v. Westfield Insurance Co., 184 W.Va. 331, 400 S.E.2d 575 (1990), which is not analogous to the case at bar. Pristovec dealt with an insurer that denied UIM coverage arguing the plaintiff was not an underinsured motorist since the tortfeasor's liability coverage was equal to her UIM coverage. There the Court ruled against the insurer, finding that UIM coverage is applied when the damages exceed the liability coverage. Pristavec, at 338. Erie never refused coverage to the plaintiffs, nor did it attempt to offset the UIM coverage from the tortfeasor's liability coverage.

The plaintiffs claim that Pristovec is analogous, and should be interpreted to also prohibit the offsetting of two UIM policy limits, and they argue that "[s]o long as damages exceed 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." (Plaintiffs' Response at 11). The plaintiffs not only misconstrue the ruling of this Court in Pristovec, they ignore the many cases cited by Erie and State Farm, in which this Court upheld policy language that limits or even excludes UIM coverage. Furthermore, W.Va. Code §33-6-31(b) in part states, "[n]o sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy." This case centers on the management of two UIM policies when applied to the same loss. The statutory provision governs the amount of "sums payable." Here, the plaintiffs are entitled to recover the amount "not to exceed the highest limit available among the applicable policies." That amount is $100,000 from Erie's UIM

coverage, and pro rated, Erie paid $66,666.67, which is the "sum payable." Erie did not offset from this sum payment.[1]

II. Erie's UIM Coverage Does Not Violate West Virginia Public Policy.

The plaintiffs' brief and the amicus curiae brief, submitted on behalf of the West Virginia Association for Justice ("Association"), are misplaced in their argument that the "other insurance" provision violates public policy because it did not include a multi-car discount. The plaintiffs focus on the fact that the discount provided by Erie would have been provided to them without the second policy, which activated the "other insurance" provision. First, Erie provides the discount without making it incumbent upon the insured to inform Erie of "other insurance." Erie contends that an insured should not have to report all policies in the application process in order to benefit from Erie's discount. Furthermore, a carrier should not be expected to take into account policies from other insurers and provide a specific discount for a vehicle owned by the plaintiffs but insured with another company. The "general discount" is helpful to an insured who might later acquire other insurance, but does not think to inform Erie for the purpose of obtaining the discount.[2]

The plaintiffs contend that the Insurance Commission did not approve all of the language contained in Erie's Uninsured/Underinsured Coverage Endorsement. They argue that the filing, which was Exhibit B to Erie's Petition, was only a form filing and that no consideration was

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[1]In their amicus brief, the Association relies on Morrison v. Haynes, 192 W. Va. 303, 452 S.E.2d 394 (1994), as "precluding pro rata reductions." However, this case is not "on point" as the Association suggests, because Morrison involved an attempt to offset uninsured motorist coverage from uninsured motorist coverage already paid from another carrier.

[2] The Association cites Joslin v. Mitchell, 213 W. Va. 771, 584 S.E.2d 913 (2003), where the Court ruled "the phrase 'bargained for discount' in W.Va. Code, 33-6-31(b) allows an insurance company to unilaterally give an insured a multi-car discount as consideration for the enforcement of anti-stacking language in an automobile insurance policy." Joslin at 778. However, in Joslin there were 5 separate policies for 5 separate vehicles issued by one carrier, and the issue was the enforceability of the anti-stacking provisions. Joslin is not analogous, because here there are two policies issued by two separate carriers, Erie and State Farm, and the issue presented to this Court involves the "other insurance" provision, not "anti-stacking" language.

given to whether the rates were commensurate with the "other insurance" provision. The plaintiffs further argue that the "other insurance" provision was not approved by the Commission because it was not directly brought to their attention in the cover letter. This argument is flawed both in fact and in law. First, the cover letter to the Commission listed the changes made to the proposed Uninsured/Underinsured Coverage Endorsement language, but it also made clear to the Commission that it was Erie's intention to incorporate this endorsement, which included the "other insurance" provision, with the policies purchased from Erie starting February 1, 2004. [Letter to the Insurance Commission is attached as Exhibit B to Erie's Petition] With that knowledge the Insurance Commission approved Erie's Uninsured/Underinsured Coverage Endorsement. The plaintiffs are incorrect in their assumption that the Insurance Commission only considered the specified changes, as opposed to the endorsement as a whole, when it approved Erie's Uninsured/Underinsured Coverage Endorsement.[3]

Second, the plaintiffs state that Erie's submission to the Commission was only a form filing, and as such, the Commission did not make the determination that the "other insurance" language, limiting coverage to the highest limit available among the applicable UIM policies, was consistent with the premium charged. However, W. Va. Code § 33-6-9 grants the Commission with the authority to "disapprove any such form of policy, application, rider, or endorsement or withdraw any previous approval." Specifically, W. Va. Code § 33-6-9(a) and (e) states that the Commission should disapprove any form filing "[i]f it is in any respect in violation of or does not comply with this chapter," or "[i]f the benefits provided therein are unreasonable in relation to the premium charged." The Insurance Commission is charged by the legislature to review the policy language in context with the premium charged, and to ensure that it comports

[3] The Association contends that no consideration should be given by this Court to the Commission's approval of the language. However, adopting this argument would require the Court to ignore the authority the Legislature bestowed upon the Insurance Commission in W. Va. Code § 33-2-3, and more specifically in W. Va. Code § 33-6-9.

with the underinsured motorist statute as a whole. Therefore, the Insurance Commission's approval of Erie's Uninsured/Underinsured Coverage Endorsement confirms that the policy, including the "other insurance" provision, is compliant with the public policy of this state.[4]

III. The Status of the Plaintiffs as Class One Insureds is Irrelevant to the Case at Bar.

The plaintiffs are critical of Erie and State Farm for not acknowledging this Court's decision in Starr v. State Farm, 188 W.Va. 313, 423 S.E.2d 922 (1992), nor addressing the plaintiffs status as class one insureds. However, the Starr case is not on point, because in Starr, the issue was whether the plaintiff was a class one or class two insured for the purpose of stacking UIM coverage included in the insurance policies issued by State Farm. Here, the plaintiffs admit that they are not attempting to stack coverage. Furthermore, the fact that the plaintiffs are class one or class two insureds is irrelevant, as the class of the plaintiffs was not a factor in Erie's calculation of coverage. Erie applied the plain language of the policy, and provided payment to the plaintiffs in conformity with the policy language.

IV. The Language in Erie's UIM Policy is clear and unambiguous.

The plaintiffs have continually failed to provide the Court with any authority or reasoning to support their ambiguity argument beyond the mere allegation that the Erie provisions are in conflict. Contrary to what the plaintiffs argue, Erie did not ignore the "Limits of Payment" provision in favor of the "other insurance" provision. These provisions are in perfect harmony and consistent with Erie's payment to the plaintiffs. As previously mentioned, the Insurance Commission approved the Endorsement as a whole, and pursuant to W. Va. Code § 33-6-9(b), the Commission is not to approve policy language "[i]f it contains or incorporates by reference

[4] The plaintiffs also argue that West Virginia law does not prohibit their collecting benefits from two separate policies. Erie has never contended otherwise. In fact, the plaintiffs did collect under both the Erie and State Farm UIM coverage policies.

any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract."

The "Limits of Payment" provision states that the "highest limit" of UIM coverage "will apply," (not "will be paid"), and the "highest limit," which was the $100,000.00 limit from the Erie policy, was in fact applied. Since the plaintiffs were also covered by a State Farm UIM policy for their motorcycle, the scenario also covered by the second provision kicked in, so the $100,000 was paid on a pro rata basis. Erie paid two-thirds ($66,667.66), and State Farm, the other insurer, paid one-third ($33,333.34). Payment was made in strict conformity with the policy provisions. Since no ambiguity exists in the Erie UIM coverage, the provisions should be applied as written and enforced accordingly.

V. Erie is not estopped from asserting the "other insurance" provision.

The plaintiffs argue that Erie should be estopped from asserting the "other insurance" provision, because it failed to assert the provision prior to consenting to the settlement between the plaintiffs and the liability carrier. They argue that by Erie's having consented to the settlement with the liability carrier, the plaintiffs were "led to believe they would be entitled to collect additional damages, up to the combined UIM limits." They imply that had they known they would not be offered the full limits under both the State Farm and Erie policies, they would not have settled with the liability carrier.[5]

The plaintiffs reference letters where Erie merely informed the plaintiffs counsel what the policy limits were, and a letter in which Erie waived its subrogation rights, to support the notion that such correspondence amounted to a promise that the plaintiffs would collect the full policy limits. However, at no time did Erie indicate that a decision had been made to pay the full limits under both policies. In fact, in the letter informing the plaintiffs of its intent to waive its

[5] The Plaintiffs settled with the liability carrier for the full limits of $20,000.

subrogation rights. [The subrogation of rights letter is attached to the Designation of Record as Exhibit I to Record No. 6] Erie actually requests the plaintiffs provide it with updated medical records and a demand package for the purpose of evaluating the claim. Nothing in the correspondence referenced by the plaintiffs would lead a reasonable person into believing that Erie already reached the decision to offer full policy limits of $100,000.

Further, as the plaintiffs rightly note, it is a requirement of estoppel that a party detrimentally rely on another party's misrepresentation or concealment of a material fact. Potesta v. USF & G, 202 W.Va. 308, 504 S.E.2d 135 (1998). The letters from Erie to the plaintiffs do not misrepresent or conceal, and further, the plaintiffs cannot genuinely assert that they have acted, or failed to act, in some way to their detriment, by settling with the liability carrier. With a $20,000 liability policy, and the admitted existence of UIM coverage, the plaintiffs were going to accept the $20,000 limit upon the waiver of subrogation and pursue UIM coverage, whatever the limit was determined to be. To suggest otherwise is disingenuous and inconsistent with normal practice in claims involving minimal liability limits and UIM coverage.

VI. Prayer for Relief

WHEREFORE, for the foregoing reasons, the defendant, Erie Insurance Property and Casualty Company, respectfully prays the question presented by the Boone County Circuit Court be answered in the affirmative, because Erie's underinsured motorist coverage is unambiguous and compliant with the public policy of West Virginia, and thus should be enforced as written.

Respectfully submitted,

Of Counsel for Petitioner Erie Insurance Property
and Casualty Company and B. Michael Bentley

James D. Lamp, Esquire WVSB ID: 2133
Julie A. Warren, Esquire WVSB ID: 9789
Lamp, O'Dell, Bartram, Levy & Trautwein, PLLC
Suite 700, River Tower
1108 Third Avenue
P.O. Box 2488
Huntington, WV 25725
(304) 523-5400
Counsel for Defendant Erie Insurance Property & Casualty Company

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WILSON, an individual,

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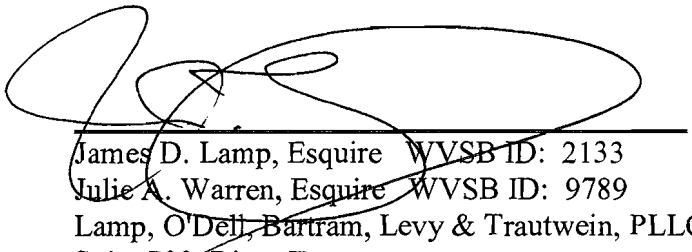
CERTIFICATE OF SERVICE

I, James D. Lamp, do hereby certify that I have served a true and correct copy of the foregoing ERIE INSURANCE PROPERTY AND CASUALTY COMPANY'S REPLY TO THE PLAINTIFFS' RESPONSE TO ITS BRIEF UPON CERTIFIED QUESTION by personal delivery on this 17th day of July, 2009, addressed as follows:

Matthew M. Hatfield, Esquire
Hatfield & Hatfield
P. O. Box 598
Madison, WV 25130
Counsel for Plaintiffs

R. Carter Elkins, Esquire
Laura L. Gray, Esquire
Campbell Woods, PLLC
P. O. Box 1835
Huntington, WV 25719-1835
Counsel for Defendants State Farm Mutual Automobile Insurance Company and William Wilson

Nathaniel K. Tawney, Esquire
Jaclyn B. Bryk, Esquire
Flaherty, Sensabaugh & Bonasso
P. O. Box 3843
Charleston, WV 25338
Counsel for Encompass Insurance Company of America



James D. Lamp, Esquire WVSB ID: 2133
Julie A. Warren, Esquire WVSB ID: 9789
Lamp, O'Dell, Bartram, Levy & Trautwein, PLLC
Suite 700, River Tower
1108 Third Avenue
P.O. Box 2488
Huntington, WV 25725
(304) 523-5400
Counsel for Defendant Erie Insurance Property & Casualty Company