

ENTERED

12/30/08

34861/62

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

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

v.

CIVIL ACTION NO.: 07-C-51  
JUDGE WILLIAM THOMPSON

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.

ORDER UPON CERTIFIED QUESTION

On July 24, 2008, and on October 29, 2008, came the  
plaintiffs, by counsel, Matthew Hatfield; Erie Insurance Prop-  
erty and Casualty Company and B. Michael Bentley, by counsel,  
James D. Lamp; State Farm Mutual Automobile Insurance Company  
and William Wilson, by counsel, R. Carter Elkins; and, Encompass  
Insurance Company of America, by counsel, Tammy R. Harvey and  
Jaclyn A. Bryk, for hearings upon the underinsured motorist  
issues in controversy between plaintiffs, Erie Insurance Prop-  
erty and Casualty Company and State Farm Mutual Automobile  
Insurance Company.

Counsel for plaintiffs and counsel for Encompass  
Insurance Company of America jointly sought a 90 day stay in

**EXHIBIT**  
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order to allow them to explore resolution of the issues joined between them. The Court indicated that it would stay the matter as between plaintiffs and Encompass Insurance Company of America. The Court directed counsel to advise the Court of the status of matters between plaintiffs and Encompass Insurance Company of America within 100 days of the stay entered between them.

Counsel for plaintiffs then presented arguments in support of plaintiffs' presentation of four separate certified questions while counsel for State Farm Mutual Automobile Insurance Company and counsel for Erie Insurance Property and Casualty Company argued in opposition thereto and in favor of the single certified question presented by State Farm Mutual Automobile Insurance Company and Erie Insurance Property and Casualty Company. The parties also presented arguments regarding an appropriate stipulation of facts with plaintiff proposing a stipulation of facts consisting of 13 paragraphs and State Farm Mutual Automobile Insurance Company and Erie Insurance Property and Casualty Company agreeing to 10 of those 13 paragraphs. The parties disagree as to plaintiffs' proposed stipulation of facts 11, 12 and 13, with the Court noting that if the defendants could not agree with all of the plaintiffs' proposals, that it would not be appropriate to enter the same as a stipulation of facts.

The Court does, upon agreement of plaintiffs, State Farm Mutual Automobile Insurance Company and Erie Insurance Property and Casualty Company, ENTER and ADOPT the **AGREED STIPULATION OF FACTS RELATING TO UNDERINSURED MOTORIST COVERAGE LIMITS** as follows:

1. On April 11, 2005, plaintiff Guy Cunningham was operating a 2001 Mercury Grand Marquis in a southerly direction on U.S. Route 119, in Boone County, West Virginia. At the time, Guy Cunningham was in the scope and course of his employment with the United States Bureau of Alcohol, Tobacco, Firearms and Explosives and the 2001 Mercury Grand Marquis was owned by his employer, the United States government.

2. Also on April 11, 2005, Walter Hill was operating a 1997 Chevrolet truck owned by Beaury Cochran in a northerly direction on U.S. Route 119. Walter Hill turned the 1997 Chevrolet truck across U.S. Route 119 to enter Big Ugly Road and struck the vehicle operated by Guy Cunningham. Guy Cunningham was injured as a result of the collision.

3. The vehicle operated by Walter Hill was insured under an automobile liability insurance policy issued by West Virginia National Auto Insurance Company. West Virginia National Auto Insurance Company paid its per person liability policy limits of \$20,000.00 to Guy Cunningham.

4. There was no underinsured motorist coverage upon

the 2001 Mercury Grand Marquis operated by Guy Cunningham at the time of the accident.

5. On April 11, 2005, Guy Cunningham and his wife, Bridgett Cunningham, were the named insureds under an automobile liability insurance policy issued by Erie Insurance Property and Casualty Company ["Erie"] which provided coverage upon a 2001 Chevrolet Silverado and a 2003 Cadillac Escalade. Erie policy number Q01-6203856 was in full force and effect on April 11, 2005, and contained underinsured motorist coverage with limits of \$100,000.00 per person and \$300,000.00 per accident.

6. On April 11, 2005, Guy Cunningham also was the named insured under an automobile liability insurance policy issued by State Farm Mutual Automobile Insurance Company ["State Farm"], which provided coverage for a 1995 Harley Davidson motorcycle. State Farm policy number 243 1264-D26-48A contained underinsured motorist coverage with limits of \$50,000.00 per person and \$100,000.00 per accident.

7. Both the Erie policy and the State Farm policy contained policy language which, when more than one policy provided underinsured motorist coverage, limited recovery to the highest liability limit available.

8. 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.

9. 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 from 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** sustained **bodily injury** while **occupying** or otherwise using a vehicle not owned by or leased to **you, your spouse, or any relative**.
3. Subject to items 1 and 2 above, if this policy and one or more other policies provide coverage for **bodily injury**:  
...
  - b. on an excess basis, we are liable only for 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.

The total damages payable from 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.

10. Erie paid Guy Cunningham \$66,667.66 in underinsured motorist coverage benefits and State Farm paid Guy Cunningham \$33,333.34 in underinsured motorist coverage benefits, so that he has received \$100,000.00 in underinsured motorist coverage benefits.

The Court then ADOPTED, pursuant to W. Va. Code §58-5-2, the proposed certified question presented by State Farm Mutual Automobile Insurance Company and Erie Insurance Property and Casualty Company upon the underinsured motorist coverage at issue between plaintiffs, State Farm Mutual Automobile Insurance Company and Erie Insurance Property and Casualty Company. The Court hereby CERTIFIES, pursuant to W. Va. Code §58-5-2, to the Supreme Court of Appeals, the following question:

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 from all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage valid and enforceable?

The Court answers that question "NO".

The Court finds that an ambiguity exists in the Erie Insurance policy as that policy provides, in part:

**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.

The Erie policy's Uninsured/Underinsured Motorists Coverage Endorsement also contains the section entitled "Limitations of Payment" which provides in part:

**LIMITS OF PROTECTION**  
**Limitations of Payment**

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 Motorists Coverage applicable to any one "auto" will apply.

(Uninsured/Underinsured Motorists Coverage Endorsement--West Virginia, AFWU01(Ed. 2/04) UF-8811, p. 3).

Specifically, the Court believes an ambiguity exists between the policy language which provides "pay 'our' share..." and the policy language which provides "...the highest limit of Uninsured/Underinsured Motorists Coverage applicable to any one 'auto' will apply." The Court must construe the ambiguity against the drafter, which is Erie Insurance Property and Casu-

alty Company. Due to the ambiguity, the limitation in the Erie Insurance policy is void.

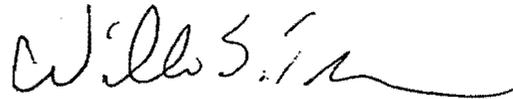
The Court further assigns as reasons for its answer that neither State Farm Mutual Automobile Insurance Company nor Erie Insurance Property and Casualty Company were aware of the presence of the other and as each insurer insured one vehicle owned by the plaintiff, there was no multi-vehicle discount for the plaintiffs. The Court does not dispute that a general discount may have been applied or given by either insurer to the plaintiffs. The Court finds that the plaintiffs received no benefit of buying two separate automobile insurance policies. The Court specifically finds that West Virginia law and public policy favor full compensation to the plaintiffs and W. Va. Code §33-6-31(b) would be violated by application of the State Farm Mutual Automobile Insurance Company and Erie Insurance Property and Casualty Company policy provisions relating to underinsured motorist coverage policy limits.

The Court notes the objections and exceptions of the parties to rulings expressed adverse to their position.

The Clerk is directed to forward copies of this Order Upon Certified Question to Matthew M. Hatfield, Post Office Box 598, Madison, West Virginia 25130; James D. Lamp, Post Office Box 2488, Huntington, West Virginia 25725; Jaclyn A. Bryk, Post Office Box 3843, Charleston, West Virginia 25338; and, R. Carter

Elkins, Post Office Box 1835, Huntington, West Virginia 25719.

ENTER this 30<sup>th</sup> day of December, 2008.



Honorable William Thompson, Judge

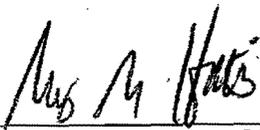
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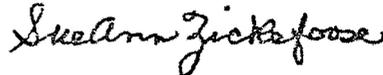
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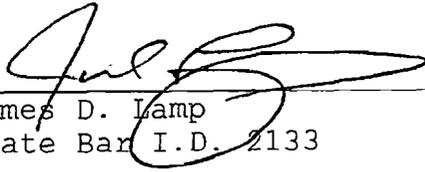
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A COPY ATTEST



CIRCUIT COURT



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