

**BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Appeal No. 35676**

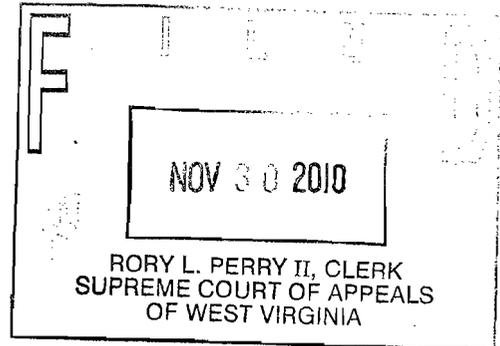
**James and Marlaine Adkins,**

**Appellants,**

**v.**

**Erie Insurance Company,**

**Appellees.**



**Appeal From The Circuit Court of Cabell County  
Civil Action No. 06-C-905**

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**REPLY BRIEF OF APPELLANTS JAMES AND MARLAINE ADKINS**

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Presented by:

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## I. DISCUSSION

### A. Erie Did Not Establish that a Mutual Mistake Occurred.

In its brief, Erie first states that “*(i)t is axiomatic that to have a just and fair adjudication of a declaratory judgment action involving a question of insurance coverage under a policy of insurance, it is imperative that the Court consider the correct insurance policy language.*” While Erie appears to recognize on appeal that it is important that the correct policy be considered, in the trial of the matter, Erie failed to produce the correct policy in response to a discovery request seeking the applicable policy! Without a doubt, Erie was not diligent in the production of discovery responses until after an adverse ruling.

Erie then asserts that a mutual mistake occurred as the parties were under the mistaken belief as to the definition of bodily injury. There could not have been a mutual mistake. The Adkins could not have committed a mistake as they relied upon the policy that Erie produced in response to Request for Production of Documents and was represented by Erie to be the policy at issue. Logically, a party cannot commit a mistake by relying upon the discovery production of the adverse party. For Erie, the basis of its mistake is that it relied in good faith on the definition of bodily injury that was cited by the Adkins. Let’s get this clear – it is not the ADKINS asserting that they had to rely upon ERIE for the policy definition, rather, ERIE contends that it had to rely upon the ADKINS for the definition of bodily injury in the ERIE policy, and that ERIE had to rely upon the ADKINS as ERIE did not have any evidence to the contrary! Unexplainably, Erie contends that it was forced to rely upon what the Adkins cited for the definition of bodily injury as it did not have a document defining bodily injury. Erie fails to address why it did

not have the correct policy language, and why it had to rely upon the Adkins representation. Erie did not establish that a mutual mistake occurred.

To distract attention from its own actions, Erie suggests that the Adkins should have corrected the mistake, as Erie thinks that it **may have** provided the correct policy to them pre-suit. While Erie contends that it produced the policy and the endorsement pre-suit, it has never produced anything that verifies that assertion. The Adkins cannot verify that the correct policy with the endorsement was produced by Erie pre-suit. That inquiry, however, is irrelevant. What may or may not have been produced pre-discovery is not what is controlling in litigation. Rather, it is what a party produces in response to discovery requests. For example, assume that the incorrect policy and endorsement was produced by Erie prior to litigation, and that was what was relied upon by the Adkins, rather than the correct policy and endorsement that were produced in discovery responses. Assume further that Erie relied upon that representation by the Adkins, and summary judgment was granted to the Adkins. Erie would then seek relief from that judgment, and argue that the Adkins should have relied upon the policy that was produced in discovery. For that reason, a consideration of what may or may not have been produced pre-litigation is irrelevant, as the intent of discovery is to avoid a mistake such as that.

The reason that discovery is served is to obtain the official position and documents from a party. Without doubt, the Adkins were entitled to rely upon what was produced by Erie in response to discovery, and had no reason to question or verify that Erie produced the correct policy in response to discovery requests. Moreover, if it were true that Erie did produce the correct policy pre-litigation, Erie has never explained why it

was allegedly able to produce a correct copy pre-litigation but yet failed to do so in the course of the litigation. Erie has also not explained why, if it did produce the correct policy pre-suit, it did not have the correct policy during the litigation to correct the “mistake” of the Adkins in what was cited. Erie argues on the one hand that it did not have any documents that would have alerted it to the fact that the Adkins cited the wrong definition, yet on the other hand, Erie contends that it provided alternative documents to the Adkins and that they cited the wrong definition. For the purpose of one argument, then, Erie says that it did not have anything to correct the Adkins representation, but for another argument, Erie says that it provided a document to the Adkins that they should have used to cite the definition. If that is true, then Erie did have documentation when the matter was being briefed and did not have to rely in good faith on the Adkins recitation.

In seeking relief on the basis of a mistake, Erie has never explained how it made the “mistake” of producing the wrong policy. Erie has never explained how it failed to produce the correct policy in response to request for Production of Documents. Erie has never explained what it did to avoid making the mistake. Erie simply contends that the wrong policy was used, and that relief should be granted. Rule 60 relief is designed to address extraordinary circumstances and mistakes attributable to special circumstances. The trial court erred by failing to require Erie to establish a mistake, excusable neglect or extraordinary and special circumstances. The trial court further abused its discretion in granting the Rule 60 Motion in the absence of Erie explaining how the “mistake” or “excusable neglect” occurred. A finding that a mutual mistake had occurred was an abuse of discretion, as, clearly, the Adkins were not mistaken in relying on the policy

produced by Erie in discovery. The circuit court abused its discretion in granting Rule 60 relief to Erie after the award of summary judgment.

**B. Erie Failed to Address How It Was Not Introducing Newly Discovered Evidence.**

Erie contends that since it did not move for Rule 60 relief on the basis of newly discovered evidence, the Adkins have incorrectly asserted this as error. Erie totally misunderstands this argument. The Adkins position is that the only potential basis for Rule 60 relief was newly discovered evidence, not mistake. The only method by which Erie could prove the correct policy language was to introduce new evidence. Erie could not prove that there had been a mutual mistake without introducing new evidence – the different policy language. Additionally, absent the reliance upon the language provided in the new policy that was produced, *i.e.* the new evidence, there was no basis for revisiting the motion for summary judgment.

The Adkins contend that the correct policy language could have been produced by Erie prior to summary judgment. Erie has never addressed how it failed to produce the correct policy prior to the entry of summary judgment. Erie never addressed its lack of diligence in ascertaining the correct policy definition prior to the entry of summary judgment. Erie never addressed how, despite diligence, it was unable to produce the correct policy prior to the entry of summary judgment. The likely reason that Erie fails to respond to the newly discovered evidence argument is because it cannot establish that relief under that provision is warranted. Even a modicum of diligence would have permitted Erie to produce the correct policy language. The trial court abused its discretion in indulging Erie in another round of judicial proceedings after the award of summary judgment.

**C. Erie's Waiver Argument Fails to  
Address the Waiver of Policy Language.**

In its response brief, Erie contends that waiver is inapplicable as it never wavered in the position that the Adkins were not entitled to coverage under the policy. Thus, it contends that the Adkins waiver argument is flawed. Erie apparently does not understand the waiver argument. The Adkins contend that Erie either waived or intentionally relinquished its right to rely on alternate policy language defining bodily injury, in its effort to deny coverage. Erie assumes that simply maintaining the position that there is no coverage is sufficient to defeat the waiver argument. However, this analysis fails to recognize that the court based the decision of coverage on policy language defining bodily injury. The analysis also fails to recognize that the Adkins assert that Erie waived or relinquished the right for the court to consider the definition of bodily injury other than what it produced in response to discovery requests and represented in a pleading was the undisputed policy language.

The Adkins contend that Erie waived or relinquished the right to have the court consider an alternative definition of bodily injury as a basis for a denial of coverage. Erie produced a policy which language was relied upon in litigating a declaratory judgment action. Erie was privy to the numerous pleadings and orders wherein the allegedly incorrect policy language was cited and relied upon by the Adkins, Erie's counsel, and the circuit court. From the time Erie first referenced this policy in February, 2007 until the case was resolved by summary judgment in May, 2008, Erie never raised the issue of alternative policy language. By this, Erie waived or relinquished the right to have a different definition considered.

**D. Erie's Estoppel Argument Fails to Address the Policy Language.**

Erie asserts that estoppel does not apply, as, again, it has always taken the position that coverage does not exist. As with the waiver argument, Erie misconstrues the Adkins position. The Adkins contend that the doctrine of estoppel precluded Erie from asserting that there was a new ground upon which the circuit court should rule upon the declaratory judgment action. The new ground for relief was a different definition of bodily injury. Erie cannot deny that it was seeking to repudiate the prior act of producing a differing definition, and even stipulating to that definition as the one at issue. Erie cannot deny that the Adkins relied upon the definition on the policy that it produced in response to discovery. Erie cannot deny that the case was litigated to finality prior to its raising a different definition. Without a doubt, Erie cannot establish that the belated assertion furthers judicial economy or finality to actions.

**E. The Parents Claim is Not Derivative by Law, Thus Erie's Reliance on Derivative Claims Language and Cases are Inapplicable.**

Erie asserts that the parents claim is deemed to be derivative for the purpose of construing the policy language. However, Erie offers no support for this position. Erie does not cite one case that states that it can unilaterally deem a separate and distinct claim to be a derivative claim. Rather, it relies solely upon cases addressing claims that by definition are derivative. Such cases are inapplicable as the parents claim by definition is a separate, distinct and independent one. In order to limit coverage, Erie simply states that it will deem the claim to be a derivative claim, subject to the derivative limitation of protection provision. However, Erie has no right to deem a separate and

distinct claim as derivative.

In a further effort to get to the desired result, Erie focuses solely on one provision in the policy, the *Limit of Protection* provision. However, as the parents have a separate and distinct claim, their claim is not subject to this provision. Moreover, Erie jumps straight to this provision, without even considering the language in the Liability Protection provision. The Erie policy, in the "*Liability Protection*" section states that it "*will pay all sums you legally must pay as damages caused by an accident covered by this policy.*" It goes on to state "*damages must involve: bodily injury, meaning physical harm, sickness, disease, or resultant death to a person.*" Erie's insured is legally obligated to pay damages to the Adkins, which is their claim for medical expenses that were caused by the accident. The damages that the parents seek to recover involve a bodily injury. Thus, they met the requirements of suffering damages and the presence of a bodily injury to a person. Erie ignores this provision, instead going straight to the limitation provision and saying that the parents claim is deemed derivative and is hence limited by this provision.

Erie also ignores the "*per person/per accident*" provision in the policy immediately preceding the derivative limitation provision, which provides that "*[t]he per person limit for Bodily Injury Liability is the most we will pay for all damages arising out of bodily injury to one person in any one accident. The per accident limit for Bodily Injury Liability is the most we will pay for all damages arising out of bodily injury to all persons resulting from any one accident, subject to the per person limit.*" Erie ignores this provision as well when jumping straight to the derivative limitation provision.

The Erie policy, though, must be read in total and construed as one

document. Thus, the derivative limitation provision must be construed with the policy language that sets forth the payment of damages for bodily injury as well the language that sets forth the payment of the per person/per accident limits. The Adkins have suffered a bodily injury under the policy. The next question, then is whether the per person or per accident limit applies. The policy provides that “[t]he *per accident limit for Bodily Injury Liability is the most we will pay for all damages arising out of bodily injury to all persons resulting from any one accident, subject to the per person limit.* As the minor child and the parents each suffered damages which arose from a bodily injury in the one accident, the per accident limit applies. This is the amount of coverage for all damages due to bodily injury to all persons who are damaged in the same accident. The per person clause is the amount of coverage for all damages due to bodily injury to one person. “*Bodily injury to one person*” is not defined in the policy. In order to limit coverage, Erie construes the bodily injury to one person language as including both the injured person and others who have suffered damages resulting from that bodily injury, without any consideration as to whether the person has met the definition of bodily injury nor the type of claim being asserted.

Only after considering both the bodily injury and per person/per accident provisions can Erie even consider the applicability of the limitation of protection provision. However, as the parents meet the definition of bodily injury and are due separate per person limits, and the claim is not a derivative one, then this provision cannot be employed to deny them coverage. Simply deeming the claim to be derivative for the purpose of denying coverage is not proper.

**F. The Parents Meet the Definition of Bodily Injury.**

Erie contends that the definition of bodily injury does not encompass the consequential damages of the parents, especially as they did not suffer a physical injury themselves. However, Erie fails to establish that the payment of damages for a bodily injury requires that there be physical injury to that person. The language provided in the policy states that Erie “*will pay all sums you legally must pay as damages caused by an accident covered by this policy,*” and that “*damages must involve: bodily injury, meaning physical harm, sickness, disease, or resultant death to a person.*” This provision contains two requirements: 1) the insured must be legally obligated to pay damages for an accident. Here, the Erie insured is legally obligated under West Virginia law to pay the parents claim for medical expenses; and 2) the damages that the person seeks must involve a bodily injury to a person. The parents’ damages that they seek involve a bodily injury to a person – their daughter. The policy does not require that there must be physical harm to **THE** person claiming damages, only that there must be physical harm to **A** person. This certainly does not require that in order to suffer a bodily injury, there must be physical injury to the person. As the insured is obligated to pay the parents for their damages, and their damages involve a bodily injury, then they meet the definition of bodily injury and are entitled to separate per person limits.

**G. The Policy Is Ambiguous.**

Erie contends that the definition of bodily injury is clear and that the language in the Liability Protection provision is not ambiguous. Erie contends that the promise to pay all sums as damages is clarified or explained in the provision defining what damages

must involve – bodily injury. According to Erie, this clarification is not susceptible to more than one meaning. That is not correct. The “clarification” of what damages must involve only states that it must involve a bodily injury. It does not set forth that the bodily injury and damages must be suffered by one and the same person. The two sentences in this one provision state that Erie will pay all sums that the insured must legally pay as damages and that damages must involve bodily injury, meaning physical harm, sickness, disease, or resultant death to **A** person. It does not limit the payment of damages to **THE** person in the accident.

The promise to pay **all damages** that an insured must pay would include both economic and non-economic damages. The damages that are to be paid must involve bodily injury to a person. Are those damages limited to a bodily injury to **THE** person in the accident, or is it broad enough to include damages incurred because of a bodily injury to any person? The two sentences, when read together, certainly supports the Adkins position that their damages are included as a bodily injury. If the policy language is ambiguous, it is to be strictly construed against Erie.

Erie also contends that the derivative provision is not ambiguous. That provision states: *“If an individual’s damages derive from, arise out of or otherwise result from bodily injury to another person injured in the accident or the death of another person killed in the accident, we will pay only for such damages within the per PERSON limit available to the person injured or killed in the accident.”* This provision is ambiguous. To be clear, the provision should have stated “[i]f an individual’s damages derive **solely** from, arise **solely** out of or otherwise **solely** result from bodily injury to **a** person injured in the accident or the death of **a** person killed in the accident, we will pay only for such damages

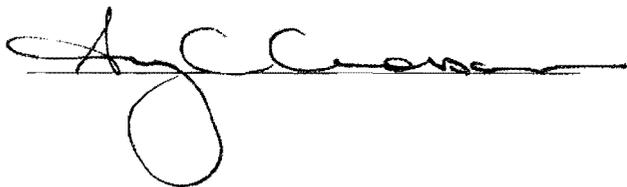
*within the per PERSON limit available to the person injured or killed in the accident.”* It can be construed to mean that this provision only applies if two persons were injured in the same accident – meaning both physically present in the accident. Moreover, it can be construed to mean that the per person limit is applicable to the separate claim of the individual claiming damages due to bodily injury to another person. If the plain language of the policy does not provide for a separate per person limit, at a minimum, the policy is ambiguous and must be construed in favor of coverage.

## CONCLUSION

Based upon the record in this case, the Circuit Court abused its discretion in granting the Rule 60 Motion, erred in finding that waiver and/or estoppels did not apply, and erred in granting summary judgment to Erie. Hence, the Order granting Rule 60 relief should be reversed and summary judgment reinstated to the Adkins. Alternatively, the Court erred in granting summary judgment to Erie, and in denying summary judgment to the Adkins, which should be reversed and summary judgment granted to the Adkins, finding that separate per person limits apply.

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A handwritten signature in black ink, appearing to read "Amy Crossan", written over a horizontal line.

## CERTIFICATE OF SERVICE

I, AMY C. CROSSAN, counsel for JAMES AND MARLAINE ADKINS, do hereby certify that a true and correct copy of the foregoing *REPLY BRIEF OF APPELLANTS JAMES AND MARLAINE ADKINS* was served by United States mail, postage prepaid, in an envelope addressed to the following, on the 29<sup>th</sup> day of November, 2010:

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