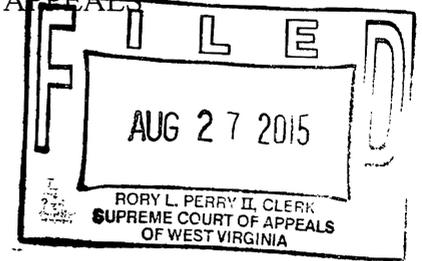


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-0521



REBECCA WHITE,

Appellant/Counterclaim Plaintiff below,

v.

**ERIE INSURANCE PROPERTY
AND CASUALTY COMPANY,**

Appellee/Counterclaim Defendant below.

Appeal from the Circuit Court of Fayette County, West Virginia

APPELLANT'S BRIEF

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I. Assignment of error

Whether the trial court erred in concluding the daughter of the insured failed to meet the broad definition of “resident of your household” where as the child of divorced parents, the daughter must be deemed as living with both of her parents, which is consistent with contemporary realities of family living as opposed to the narrow and strait-jacketed interpretation applicable only to idealized notions of a pristine family unit?

II. Statement of the case

On August 11, 2014, Appellee Erie Insurance Property and Casualty Company (hereinafter referred to as Erie) filed a declaratory judgment action in the Circuit Court of Fayette County against its insured, Jerry L. White, and Appellant Rebecca White (hereinafter referred to as Rebecca), who is Mr. White’s daughter. (JA at 3).¹ At issue was whether or not the underinsurance provisions in the Erie Family Auto Insurance Policy issued to Mr. White provided coverage to Rebecca, who suffered multiple serious and permanent injuries as a passenger on a motorcycle in an accident that occurred on May 19, 2013, in Austin, Texas, where Rebecca was attending college. (JA at 4). On September 8, 2014, Rebecca filed her answer and a counterclaim against Erie, asserting she was covered by the underinsurance provisions in her father’s policy. (JA at 27).

After some limited discovery and discussions between the parties, Erie and Rebecca agreed to provide the Honorable Judge John W. Hatcher, Jr., with agreed upon stipulation of facts. (JA at 81). To resolve the insurance coverage dispute in this case, the following undisputed facts stipulated by the parties are relevant:

1. Rebecca White is the adopted daughter of Jerry L. White.² (**STIPULATION OF FACTS** No. 4)(JA at 81);

¹References to the Joint Appendix will be designated as “JA at ____.”

²Mr. White is listed as Rebecca’s father on her birth certificate. (JA at 219).

2. Jerry L. White and Rebecca's mother divorced more than fifteen (15) years ago. **(STIPULATION OF FACTS No. 5)(JA at 82);**
3. Rebecca White visited Jerry White in West Virginia. **(STIPULATION OF FACTS No. 8)(JA at 82);**
4. On May 19, 2013, in or near Austin, Travis County, Texas, Rebecca White was a guest passenger on a motorcycle which was being operated by Alexander Polanco-Lopez, when it was struck in the rear by a motor vehicle operated by Kristina Elena Gonzalez. **(STIPULATION OF FACTS No. 14)(JA at 83);**
5. As a result of the May 19, 2013 motor vehicle accident, Rebecca White sustained bodily injuries.³ **(STIPULATION OF FACTS No. 15)(JA at 83);**
6. Rebecca White recovered the available insurance policy limits from the carrier providing coverage for the vehicle operated by Kristina Elena Gonzalez. **(STIPULATION OF FACTS No. 16)(JA at 83);**
7. There was no available automobile insurance coverage in effect providing coverage for the motorcycle operated by Alexander Polanco-Lopez. **(STIPULATION OF FACTS No. 18)(JA at 83); and**
8. At the time of the accident, Rebecca White was an unmarried, unemancipated child of Jerry White, who was attending school in Texas.⁴ **(STIPULATION OF FACTS No. 21)(JA at 83).**

Also included in the record is a notarized statement from Ann Brennan, who is Rebecca's mother. As the child of divorced parents, Rebecca regularly spent time residing with each parent. In the early years following the divorce, Rebecca resided on a regular basis with her mother and

³In this accident, Rebecca suffered severe, life-altering injuries. In the discharge summary from the Texas NeuroRehab Center, it is noted Rebecca suffered "severe traumatic brain injury with residual partial cortical blindness, markedly improved." (JA at 220). Rebecca was in a coma for a couple of weeks, also suffered a foot fracture and ruptured bladder. The limited insurance proceeds Rebecca has received to date are woefully insufficient to compensate her for the injuries she suffered.

⁴The record includes a printout from Austin Community College and a copy of Rebecca's grade card from the Spring 2013 semester. (JA at 222-23).

father at different times during the course of a week. Even after her father moved to West Virginia and Rebecca was a full-time college student attending Austin Community College, Rebecca and her sister regularly visited and resided with their father in West Virginia. In fact, during the period of time covered by the effective dates of the insurance policy at issue, August 1, 2012, through August 1, 2013, Rebecca and her sister visited with their father over Christmas, 2012. (JA at 224; **STIPULATION OF FACTS** No. 10, listing the effective dates of the policy).

After the parties submitted cross motions for summary judgment, on April 27, 2015, the trial court entered an order granting Erie's motion for summary judgment and denying Rebecca's motion. (JA at 251). On May 27, 2015, Rebecca filed her notice of appeal challenging this final ruling. (JA at 240).

III. Summary of argument

Since insurance policies are prepared solely by insurers, any ambiguities in the language of insurance policies must be construed liberally in favor of the insured. Any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations.

The key provision in Erie's policy is the definition of "**Resident,**" which is defined as "**a person who physically lives with `you' in `your' household on a regular basis. `Your' unmarried, unemancipated children attending school full time, living away from home, will be considered `residents' of `your' household.**" Because Rebecca is an unmarried, unemancipated child attending school full time, living away from home, she is a "resident" under this policy.

Given the contemporary realities of family living, the average, reasonable person would broadly construe the phrase "lives with" to include an unemancipated child's relationship with both parents where that child reasonably feels that he or she "belongs" at either home. The phrase "lives

with you” should reflect the contemporary realities of family living and should not be narrow and strait-jacketed to apply only to idealized notions of a pristine family unit, harmonious and integrated.

IV. Statement regarding oral argument and decision

Counsel for Rebecca always believes oral argument of some sort can be beneficial to the Court in understanding the issues and addressing any questions. This case also permits the Court to address an insurance issue impacted by the frequency of children growing up with divorced parents who live in separate households. Because the issues are very focused, Rebecca respectfully submits, at a minimum, Rule 19 oral argument would be sufficient and due to the new law this case would create, the decision should be authored by a Justice, rather than being resolved through a memorandum opinion.

V. Argument

The trial court erred in concluding the daughter of the insured failed to meet the broad definition of “resident of your household” because as the child of divorced parents, the daughter must be deemed as living with both of her parents, which is consistent with contemporary realities of family living as opposed to the narrow and strait-jacketed interpretation applicable only to idealized notions of a pristine family unit

In granting Erie’s motion for summary judgment and denying Rebecca’s motion, the trial court concluded:

5. Rebecca White does not satisfy the clear and unambiguous definition of “anyone we protect” as that term is defined in the Erie Policy. While Ms. White is Jerry White’s adopted daughter, Ms. White was not a resident of Jerry White’s household on May 19, 2013. Furthermore, Ms. White did not and does not physically live in Jerry White’s home on any basis, let alone on a regular basis. (JA at 254-55).

Rebecca respectfully submits this conclusion is contrary to the language used in the Erie policy and inconsistent with similar cases decided in other jurisdictions involving the children of

divorced parents. The parties in this case are in agreement as to the critical facts and that the issue raised is appropriate for summary judgment resolution. However, the parties disagree over the application of the law to these facts.

In reviewing the language in Erie's insurance policy, this Court has provided the following guidance in *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156, 160 (1986):

We have long recognized that since insurance policies are prepared solely by insurers, any ambiguities in the language of insurance policies must be construed liberally in favor of the insured. Syllabus Point 1, *Hensley v. Erie Insurance Co.*, 168 W. Va. 172, 283 S.E.2d 227 (1981), quoting Syllabus Point 3, *Polan v. Travelers Insurance Co.*, 156 W. Va. 250, 192 S.E.2d 481 (1972); see also *Huggins v. Tri-County Bonding Co.*, W. Va. , 337 S.E.2d 12 (1985); *Broy v. Inland Mutual Insurance Co.*, 160 W. Va. 138, 233 S.E.2d 131 (1977); *State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.*, 154 W. Va. 448, 175 S.E.2d 478 (1970). As a result, **any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations.** (Emphasis added).

In the Syllabus of *Farmers & Mechanics Mutual Fire Insurance Co. v. Hutzler*, 191 W. Va. 559, 447 S.E.2d 22 (1994), the West Virginia Supreme Court held:

When a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide.

In *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 378, 376 S.E.2d 581, 584 (1988), the West Virginia Supreme Court recognized the following general tenets of insurance law applicable where a court is asked to determine whether there was a duty to defend or there was coverage:

First, any ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer. This principle applies to policy

language on the insurer's duty to defend the insured, as well as to policy language on the insurer's duty to pay. Second, the duty of an insurer to defend an insured is generally broader than the obligation to provide coverage, that is, to pay a third party or to indemnify the insured, in light of the language in the typical liability policy which obligates the insurer to defend even though the suit is groundless, false or fraudulent. Third, an insurer's duty to defend is normally tested by whether the allegations in the complaint against the insured are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. Consequently, there is no requirement that the facts alleged in the complaint against the insured specifically and unequivocally delineate a claim which, if proved, would be within the insurance coverage.

Thus, the facts in this case must be reviewed in light of these general principles.

The key provision in Erie's policy is the definition of "**Resident**," which is defined as "**a person who physically lives with `you' in `your' household on a regular basis. `Your' unmarried, unemancipated children attending school full time, living away from home, will be considered `residents' of `your' household.**" (JA at 13). Erie's argument is because Rebecca is an unmarried, unemancipated child attending school full time, living away from home, she should not be considered a "resident" under this policy because Rebecca otherwise does not "live with" Mr. White "on a regular basis."

Erie's policy does not define what is meant by "lives with" nor does it explain how many visits would constitute living with her father "on a regular basis" nor does it define what is meant by "home." There is no language in this broadly written inclusive provision requiring a narrow reading that a person can have only one residence under this policy. Furthermore, the two sentences defining what is meant by the word "Resident" can be viewed separately because under this definition, if the person seeking coverage meets the requirements of the second sentence—unemancipated, unmarried child attending school full time, living away from home—by the plain meaning of this language, such a person will be considered "'residents' of `your' household."

Thus, while Erie's insurance policy contains definition after definition, several phrases are undefined and overall the language used is ambiguous. As noted above, under the rules for interpreting insurance policies, "[A]ny ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer." *Id.* Furthermore, "the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured person be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage." *State Automobile Mutual Insurance Company v. Youler*, 183 W.Va. 556, 564, 396 S.E.2d 737, 745 (1990).

Courts recognize the residency provisions in insurance policies must be viewed in light of the number of households where the children of divorced parents are involved. There are a number of decisions addressing the residency of a student who is attending school, is the child of divorced parents, and is seeking to be covered by the underinsurance policy issued to the noncustodial parent. A very thorough decision summarizing these decisions is *Moller v. State Farm Mutual Automobile Insurance Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). In *Moller*, as in the present case, a child of divorced parents sought to be covered by the underinsurance provisions in a policy issued to the noncustodial parent. This policy covered relatives, meaning "a person related to you or your spouse by blood, marriage or adoption who lives with you. It includes your unmarried and unemancipated child away at school."

In analyzing this policy language, the Nebraska Supreme Court, 252 Neb. at 729-30, 566 N.W.2d at 386-87, first noted there was a split of authority over whether the phrase "lives with" was ambiguous and found the decision of *Tokley v. State Farm Ins. Companies*, 782 F.Supp. 1375 (D.S.D.1992), to be particularly instructive:

The court in *Tokley* concluded that the policy language was not ambiguous. In determining that under the unambiguous terms of the policy, the child “lived with” his father, the court in *Tokley* reasoned that the policy provisions and corresponding definitions were terms that defined persons to whom coverage was extended and were therefore inclusionary clauses. *See, also, Row v. United Services Auto. Ass’n*, 474 So.2d 348 (Fla.App.1985). The court in *Tokley* quoted *Novak v. State Farm Mut. Auto. Ins. Co.*, 293 N.W.2d 452 (S.D.1980), for the proposition that “ ‘[w]here the policy provision under examination relates to the inclusion of persons other than the named insured within the protection afforded, a broad and liberal view is taken of the coverage extended.’ ” *Tokley*, 782 F.Supp. at 1379. The court in *Tokley* further reasoned: “[T]he phrase ‘lives with you’ should reflect the contemporary realities of family living and should not be narrow and strait-jacketed to apply only to idealized notions of a pristine family unit, harmonious and integrated.” *Id.* (Emphasis added).

In finding coverage under these facts, the Nebraska Supreme Court, 252 Neb. at 730-31, 566

N.W.2d at 387, concluded:

Given the contemporary realities of family living noted by the court in *Tokley*, we determine that the average, reasonable person would broadly construe the phrase “lives with” to include an unemancipated child’s relationship with both parents where that child reasonably feels that he or she “belongs” at either home.

We note that in the coverage provision in question, State Farm did not qualify or limit the phrase “lives with.” Moreover, as was the case in *Tokley*, the phrase “lives with” is contained in a provision of inclusion rather than exclusion. Limitation of the phrase “lives with” to include only one residence or other similar limitations may be written into the policy by an insurer if it elects to do so. *See Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995).

At the time of the accident, Rhiannon was unmarried and unemancipated, and she was related to Gary as his daughter. Because the relevant facts are undisputed, we find as a matter of law that at this time, Rhiannon “lived with” Gary. As such, Rhiannon was an insured “relative” under Gary’s policy.

See also American Standard Insurance Co. v. Savaino, 298 F.Supp.2d 1092 (D.Col. 2003)(In footnote 3 of this decision, the Court provides an extensive listing of cases finding coverage under these facts).

All of the cases cited by both sides can be reconciled or distinguished based upon the addition or subtraction of one word. For example, in *Lafferty v. State Farm Mutual Automobile Insurance Co.*, 2011 WL 777886 (S.D.W.Va. 2011), and *State Farm Mutual Automobile Insurance Co. v. Fultz*, 2007 WL 2789461 (N.D.W.Va. 2007), a “relative” was defined as a person “who resides **primarily** with you.” The word “primarily” is not in Erie’s policy and, therefore, those cases are not controlling.

The common sense analysis in *Moller* is applicable and controlling in this case. While Rebecca does live most of the time in Austin, Texas, where she attended college on a full-time basis until the accident, she regularly visited and resided with her father in West Virginia. Erie’s policy does not say how many visits Rebecca would have to make to West Virginia to meet the standard of living with her father on a regular basis. Moreover, as noted previously, even if the Court concludes Rebecca did not live with her father on a regular basis, she absolutely meets the criteria of a “resident” under the second sentence of the definition provided by Erie because at the time of the accident, she was the unmarried, unemancipated child of Mr. White attending school full-time and living away from home. Thus, under any analysis, Rebecca is entitled to the underinsurance coverage provided by Erie’s policy.

VI. Conclusion

For the foregoing reasons, Appellant Rebecca White respectfully asks the Court to reverse the final order issued by the Circuit Court of Fayette County and to enter an order holding Appellant is covered by the underinsurance provisions in the policy issued by Erie to her father, Jerry White. Furthermore, Appellant seeks such other relief as this Court deems appropriate.

REBECCA WHITE, Appellant

–By Counsel–



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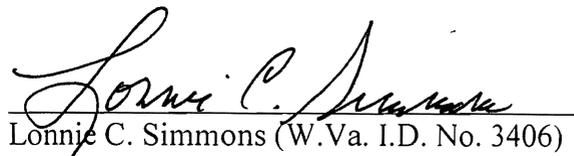
Appeal from the Circuit Court of Fayette County, West Virginia

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify a copy of the foregoing **APPELLANT'S BRIEF** was served on counsel of record by mail on 27th day of August, 2015, to the following:

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CERTIFICATION

The contents of the Appendix are true and accurate copies of items contained in the record of the lower tribunal. Counsel for Petitioner has conferred in good faith with all parties to the Appeal in order to determine the contents of the Appendix.



Lonnie C. Simmons (W.Va. I.D. No. 3406)