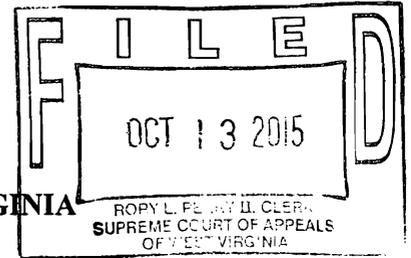


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 15-0521

REBECCA WHITE,

Petitioner,

v.

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Respondent.

BRIEF OF RESPONDENT
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY

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I. INTRODUCTION

Respondent Erie Insurance Property and Casualty Company (“Erie”) submits this brief in response to the brief of Petitioner Rebecca White. The Circuit Court of Fayette County properly granted Erie’s Motion for Summary Judgment under West Virginia Rule of Civil Procedure 56 because, as a matter of law, twenty-three year old Ms. White did not satisfy the clear and unambiguous definition of “anyone we protect” in the Erie automobile insurance policy purchased by Jerry L. White, Ms. White’s adoptive father in West Virginia. Contrary to Ms. White’s argument, she is not a “relative” who is a “resident” of Mr. White’s household. Although Ms. White is related to Mr. White by adoption, she is not a person who physically lives with Mr. White in his household on a regular basis, nor is she an unmarried, unemancipated child attending school full time, living away from Mr. White’s home as required by the definition of the term “resident” in the Erie policy. In fact, Mr. White’s home and residence in West Virginia has never been Ms. White’s home. Instead, Ms. White has lived with her mother in Austin, Texas, where she attended Austin Community College. Based on the undisputed facts and the clear and unambiguous terms of Erie’s insurance policy, the Circuit Court correctly held that Ms. White does not satisfy the definition of “anyone we protect” and granted summary judgment to Erie. The Erie policy does not provide UIM coverage for bodily injuries sustained by Ms. White. This Court should affirm the Circuit Court’s judgment in all respects.

II. STATEMENT OF THE CASE

Erie filed its Complaint for Declaratory Relief pursuant to the West Virginia Declaratory Judgment Act, W. Va. Code § 55-13-1, *et seq.*, in the Circuit Court of Fayette County against Jerry L. White and Rebecca White on August 11, 2014, seeking a declaratory judgment regarding insurance coverage for a claim submitted by Ms. White for UIM benefits under Mr.

White's automobile insurance policy with Erie in connection with an accident in or near Austin, Texas on May 19, 2013, involving a motorcycle on which Ms. White was a guest passenger. A.R. at 3-7. Attached as Exhibit A to the Complaint for Declaratory Relief is a copy of Erie's Policy No. Q08 5111202 W issued to Mr. White with a policy period from August 1, 2012, to August 1, 2013. A.R. at 9.¹

Ms. White served an Answer and Counterclaim against Erie on September 8, 2014. A.R. at 28-35. The Counterclaim seeks a declaration that the UIM provision in Mr. White's policy with Erie provides coverage to Ms. White for the motorcycle accident and also seeks attorneys' fees and costs. A.R. at 32-34.

On September 11, 2014, Erie served an Answer to Rebecca White's Counterclaim. A.R. at 16-22.

On October 17, 2014, the Circuit Court entered an Amended Consent Judgment and Partial Dismissal Order prepared by Ms. White's counsel. A.R. at 56-58. In the Consent Judgment, Mr. White acknowledges that Ms. White lives with her mother in Texas and that at the time of the motorcycle accident Ms. White was attending college and had not visited Mr. White for at least one year and had no clothing or other personal items at his home in West Virginia. Mr. White further acknowledges that when he purchased the Erie policy he did not intend for Ms. White to be insured. Pursuant to the Consent Judgment, Mr. White agreed to the entry of a judgment in favor of Erie to the effect that there is no UIM coverage for Rebecca

¹ The copy of Exhibit A to the Complaint for Declaratory Relief included in the Appendix Record is not a true and accurate copy of the document contained in the record of the Circuit Court in two respects. First, the document in the Appendix Record does not include the complete insurance policy filed with the Circuit Court, but only three pages – and not in sequential order. This omission is not prejudicial, however, because a complete insurance policy is included in the Appendix Record at other locations. A.R. at 85-116, 141-73, 177-207. Second, the document in the Appendix Record includes correspondence from Ms. White's counsel in Texas to Erie that was not filed or otherwise contained in the record of the Circuit Court. A.R. at 11-12, 14-15. These documents should be stricken from the Appendix Record and not considered by this Court.

White under his Erie Policy. A.R. at 56. Jerry White was thereby dismissed, with prejudice, from the declaratory judgment action. A.R. at 57.

On February 23, 2015, Erie and Ms. White filed a Stipulation of Facts, whereby the parties agreed to certain facts with respect to the litigation. A.R. at 81-117. In accordance with the Stipulation of Facts, the parties agreed that on May 19, 2013, in or near Austin, Texas, Ms. White was a guest passenger on a motorcycle, when it was struck in the rear by a motor vehicle. Ms. White sustained bodily injuries in the accident. At the time of the accident, Ms. White was twenty-three years old and lived with her mother in Texas.² Ms. White attended Austin Community College, and she identified her address in school records as 1400 Renaissance Court, Austin, Texas. Ms. White is Mr. White's adopted daughter. Mr. White has been divorced from Ms. White's mother for more than fifteen years. Mr. White lives in Smithers, West Virginia, and he has lived in West Virginia since 2008. Mr. White's home and residence in West Virginia was never Ms. White's home although she visited Mr. White in West Virginia. Ms. White made a claim for UIM coverage under the Erie Policy, which is attached as Exhibit A thereto. A.R. at 82-83, 85-116.

The Erie policy lists only one driver, Mr. White, and it indicates that he received a discount for being over fifty-five years old. A.R. at 87. The insuring agreement for UIM coverage states, in pertinent part:

'We' will pay damages for bodily injury and property damage that the law entitles 'anyone we protect' or the legal representative of 'anyone we protect' to recover from the owner or operator of an 'uninsured motor vehicle.' If Underinsured Motorists Coverage is indicated on the 'Declarations', 'we' will pay damages for bodily injury and property damage that the law entitles 'anyone we protect' or the legal representative of 'anyone we protect' from the owner or operator of an 'underinsured motor vehicle.'

² Counsel for the parties conferred subsequent to the entry of the Circuit Court's summary judgment order and agreed that a nonmaterial fact was mistakenly incorrect in stipulated fact number 6. Ms. White's mother did not move to Texas approximately five (5) years ago; instead, she has lived in Texas since 1989.

Damages must result from a motor vehicle accident arising out of the ownership or use of the **'uninsured motor vehicle'** or **'underinsured motor vehicle'** as a motor vehicle and involve:

1. bodily injury to **'anyone we protect.'** Bodily injury means physical harm, sickness, disease or resultant death to a person; . . .

A.R. at 164 (emphasis in original).

The policy defines "[a]nyone we protect" as **"'you' or any 'relative;'"**. A.R. at 163 (emphasis in original). The Erie policy further states:

'You', 'your' or 'Named Insured' means the **'Subscriber'** named in Item 1 on the **'Declarations'** and others named in Item 1 on the **'Declarations.'** Except under the RIGHTS AND DUTIES – GENERAL POLICY CONDITIONS Section, these words include the spouse of the **'Subscriber'** named in Item 1 on the **'Declarations,'** provided the spouse is a **'resident.'**

A.R. at 92.

Item 1 on the Erie policy declarations identifies "Jerry L. White" as the named insured.

A.R. at 85.

According to the Erie policy, a **"relative"** is defined as:

'Relative' means a **'resident'** of **'your'** household who is a:

1. person related to **'you'** by blood, marriage or adoption; or
2. ward of any other person under 21 years old in **'your'** care.

A.R. at 91 (emphasis in original).

The term **"resident"** is also defined. The policy provides that a **"resident"** is "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." A.R. at 92 (emphasis in original).

Erie filed a Motion for Summary Judgment and supporting memorandum on February 26, 2015, on the basis that Ms. White does not satisfy the clear and unambiguous definition of "anyone we protect" as she is not a resident relative under the provisions of the Erie Policy.

A.R. at 118-136. Attached to the Motion for Summary Judgment as Exhibit A is a copy of the Stipulation of Facts. A.R. at 137. Exhibit B is a copy of the Amended Consent Judgment, A.R. at 174, and Exhibit C is a copy of Policy No. Q08 5111202 W. A.R. at 177.

On March 13, 2015, Rebecca White served a Cross-Motion for Summary Judgment. A.R. at 209-18. Attached to the Cross-Motion as Exhibit A is a copy of Ms. White's birth certificate. The remaining exhibits are copies of several documents that are uncertified and/or unsworn.

On March 20, 2015, Erie filed a reply to Rebecca White's Cross-Motion for Summary Judgment. A.R. at 209-233. Among other things, Erie's reply explained that Ms. White has failed to present sufficient evidence in the form of pleadings, depositions, answers to interrogatories, admissions, and affidavits as required by West Virginia Rule of Civil Procedure 56 to defeat Erie's Motion for Summary Judgment.

The Circuit Court heard argument on Erie's Motion for Summary Judgment on April 3, 2015. Thereafter, the Circuit Court entered its Order on April 27, 2015, *nunc pro tunc*, holding:

5. Rebecca White does not satisfy the clear and unambiguous definition of "anyone we protect" as that term is defined by 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.

6. Applying the undisputed facts to the clear and unambiguous terms of the [Erie policy], the Court concludes that said policy of insurance does not provide underinsured motorist coverage for bodily injuries sustained by Rebecca White in the May 19, 2013 motorcycle accident.

A.R. at 237-38.

Ms. White filed a Notice of Appeal to this Court on May 28, 2015. A.R. at 256.

III. SUMMARY OF THE ARGUMENT

The Circuit Court properly granted Erie's Motion for Summary Judgment under West Virginia Rule of Civil Procedure 56 because, as a matter of law, Ms. White did not satisfy the clear and unambiguous definition of "anyone we protect" in the Erie automobile insurance policy purchased by her adoptive father Mr. White in West Virginia. Contrary to Ms. White's argument, she is not a "relative" who is a "resident" of Mr. White's household. Although Ms. White is related to Mr. White by adoption, she is not a person who physically lives with Mr. White in his household on a regular basis, nor is she an unmarried, unemancipated child attending school full time, living away from home as required by the definition of the term "resident" in the Erie policy. Mr. White's home and residence in West Virginia has never been Ms. White's home. When Ms. White was injured as a guest passenger on a motorcycle in the accident for which she claims underinsured motorist ("UIM") coverage, she was twenty-three years old and lived in Texas with her mother, who had been divorced from Mr. White for more than fifteen years. Ms. White and her mother lived in Texas, where Ms. White attended Austin Community College. Moreover, at the time of the accident Ms. White had not visited Mr. White for at least one year, and she had no clothing or other personal items at Mr. White's home in West Virginia. Finally, Mr. White did not intend for Ms. White to be covered under his Erie policy. Based on the undisputed facts and the clear and unambiguous terms of Erie's insurance policy, the Circuit Court correctly held that Ms. White does not satisfy the definition of "anyone we protect" and granted summary judgment to Erie. The Erie policy does not provide UIM coverage for bodily injuries sustained by Ms. White. This Court should affirm the Circuit Court's judgment in all respects.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there is no prejudicial error.

V. STANDARDS OF DECISION AND REVIEW

A party is entitled to summary judgment under West Virginia Rule of Civil Procedure 56(c) if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(e) further provides in part:

Form of Affidavits; further testimony; defense required. – Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995), this Court established the following standard of decision for motions for summary judgment:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional

evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Id., 459 S.E.2d 329 at Syl. Pts. 2, 3.

This Court further explained in *Williams*:

A nonmoving party need not come forward with evidence in a form that would be *admissible at trial in order to avoid summary judgment*. [*Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265, 274 (1986)]. However, to withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party. *Hoskins v. C&P Tel. Co. of W. Va.*, 169 W. Va. 397, 400, 287 S.E.2d 513, 515 (1982) (allegations in an affidavit that would be inadmissible at trial cannot be used to respond to a motion for summary judgment). For example, “[u]nsupported speculation is not sufficient to defeat a summary judgment motion.” *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987). If the evidence favoring the nonmoving party is “merely colorable . . . or is not significantly probative, . . . summary judgment may be granted.” [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] (Citations omitted). “[I]f the factual context renders [the nonmoving party’s claim implausible – if the claim . . . simply makes no economic sense – [the nonmoving party] must come forward with more persuasive evidence to support [the] claim[.]” [*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986)].

Id. at 337-38 (emphasis in original). See Syl. Pt. 3, *Guthrie v. Nw. Mut. Life Ins. Co.*, 158 W. Va. 1, 208 S.E.2d 60 (1974) (holding that “[s]ummary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for summary judgment”). See also Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 56(e)[2], 1237-42 (4th ed. 2012).

This Court reviews a circuit court’s entry of summary judgment *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994). On appeal, the Court applies the same test that the circuit court should have applied initially. See *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996).

VI. ARGUMENT

The Circuit Court properly granted Erie's Motion for Summary Judgment under West Virginia Rule of Civil Procedure 56 because, as a matter of law, Ms. White did not satisfy the clear and unambiguous definition of "anyone we protect" in the Erie policy. In *Miller v. Lemon*, 194 W. Va. 129, 459 S.E.2d 406 (1995), this Court held as follows with respect to the construction of uninsured ("UM") and UIM coverage in automobile insurance policies:

1. "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.' Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970)." Syl. pt. 1, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992).

2. "Language in an insurance policy should be given its plain, ordinary meaning.' Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986)" Syl. pt. 2, , *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992).

3. "Insurers 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.' Syl. Pt. 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989)." Syl. pt. 4, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992).

Id. at Syl. Pts. 1-3. See also Syl. Pt. 2, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985) (holding "[w]here provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed").

In *Deel v. Sweeney*, 181 W. Va. 81, 383 S.E.2d 92 (1989), this Court held that the underinsured motorist coverage in an automobile policy purchased by the plaintiff's father did not provide coverage to the plaintiff while he was driving his personally owned vehicle insured by another company. In that case, the underinsured motorist provision of the father's policy

expressly excluded family-owned vehicles not insured for coverage under the policy. *Id.*, 383 S.E.2d at 93-94. In upholding the validity of the owned but not insured exclusion at issue in *Deel*, the Court explained the public policy considerations that separate the West Virginia Legislature's treatment of UM and UIM coverage as follows:

. . . [T]he Legislature does not view uninsured and underinsured coverage in the same light. Uninsured motorist coverage is required, while underinsured motorist coverage is optional. There are significant public policy reasons for the mandatory requirement of uninsured coverage. . . . The State has a legitimate interest in assuring every citizen is protected from the risk of loss caused by the uninsured motorist. The purpose of optional underinsured motorist coverage is to enable the insured to protect himself, if he chooses to do so, against losses occasioned by the negligence of other drivers who are underinsured. A contract for greater benefits generally justifies a greater premium. . . . The insurer must offer underinsured motorist coverage; the insured has the option of taking it; and terms, conditions, and exclusions can be included in the policy as may be consistent with the premiums charged. Clearly, an insurer can limit its liability so long as such limitations are *not* in conflict with the spirit and intent of the statute and the premium charged is consistent therewith.

Id., 383 S.E.2d at 95 (citations and footnote omitted) (emphasis in original). *See also Thomas v. Nationwide Mut. Ins. Co.*, 188 W. Va. 640, 425 S.E.2d 595 (1992) (holding that family use exclusion in UIM coverage provision was valid and did not violate public policy).³

³ The cases cited by Ms. White, beginning on page five of her brief, *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), *Farmers & Mechanics Mutual Fire Insurance Co. v. Hutzler*, 191 W. Va. 559, 447 S.E.2d 22 (1994), and *Horace Mann Insurance Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988), are largely inapposite. None of these cases involved construction of UIM provisions in first-party claims, but instead involved situations in which the insured was sued by a third party and a request was made for a defense or indemnification. Although some of the same rules of construction may apply, the cases cited by Ms. White do not involve the recognized public policy in West Virginia accepting policy limitations on UIM coverage.

State Automobile Mutual Insurance Co. v. Youler, 183 W. Va. 556, 396 S.E.2d 737 (1990), which is cited on page seven of Ms. White's brief is also inapposite because that case involved only the question of limits of UIM coverage in anti-stacking provisions. The public policy of full indemnification stated in *Youler* simply does not address the question of the validity of terms, conditions, or exclusionary language such as were at issue in *Deel*. In any event, in *Russell v. State Automobile Mutual Insurance Co.*, 188 W. Va. 81, 422 S.E.2d 803, 806-07 (1992), this Court held that neither statute nor public policy required stacking of UM coverage, relying on the public policy considerations discussed in *Deel* and declining to extend *Youler*.

A. The Circuit Court Properly Granted Summary Judgment to Erie because under the Clear and Unambiguous Terms of Erie's Policy Ms. White was not a "Relative" who was a "Resident" of Mr. White's Household since Ms. White Did Not Physically Live with Mr. White in His Household on a Regular Basis.

The Circuit Court properly granted Erie's Motion for Summary Judgment because under the clear and unambiguous terms of Erie's policy Ms. White was not a "relative" who was a "resident" of Mr. White's household since Ms. White did not physically live with Mr. White in his household on any basis, let alone on a regular basis. Although this Court has not considered the precise question at issue, in *McComas v. Tucker*, No. 01-C-1070, 2004 WL 5538554 (W. Va. Cir. Ct. Aug. 3, 2004), the Circuit Court of Kanawha County construed a similar Erie policy issued to the decedent's stepfather and held that it did not provide UIM coverage for the decedent's death in a motor vehicle accident. In *McComas*, the plaintiff was the father and administrator of the estate of decedent Jason McComas, who was twenty-one years old and a full-time student at Marshall University at the time of the motor vehicle accident that caused his death in 1999. McComas's parents divorced when he was one-year old. During his minority, McComas lived with his father. On the date of his death, McComas was temporarily residing at a fraternity house at Marshall. McComas listed an address in Charleston, West Virginia, which had been his father's address since 1991, as McComas's permanent address. McComas never lived with his mother, but rather had weekend and holiday visits with her. His stepfather, Allen Bayes, had been married to McComas's mother since 1982, and the couple lived in Ripley, West Virginia. McComas was not listed on his stepfather's applications for insurance as either a driver or member of the Bayes' household. This information was not changed at the time of the accident which resulted in McComas's death. In that case, the circuit court held that the

undisputed material facts revealed that McComas did not “physically live” with his mother and stepfather in the Bayes “household,” reasoning:

Commentators have noted that, “A child living with one of his or her separated parents is not a resident of the household of the other parent for purposes of automobile liability insurance coverage. Furthermore, that divorced parents have joint custody under a custody decree of their children is not enough alone to establish the residence of their child in the mother’s household for purposes of insurance coverage under her automobile liability policy.” 7 Am. Jur. 2d Automobile Insurance § 224 (1997) (footnote omitted). The commentary further indicates that “[t]he term ‘residence,’ in the context of coverage of a relative residing in the same household as the named insured, has been said to refer to the place where an individual physically dwells, while regarding it as his principal place of abode.” *Id.* It is clear from the testimony of the Plaintiff and the decedent’s mother that the decedent considered the Plaintiff’s residence, not his mother’s residence, to be his “principal place of abode.”

The court in *McComas* relied on the Third Circuit’s opinion in *St. Paul Fire and Marine Insurance Co. v. Lewis*, 935 F.2d 1428 (3d Cir. 1991), as follows:

In *St. Paul Fire and Marine Ins. Co. Lewis*, 935 F.2d 1428 (3d Cir. 1991), the Third Circuit Court of Appeals examined the phrase “living with,” akin to the policy language at issue herein, in the context of insurance coverage for the insured’s adult child. The Court determined that the phrase “living with” required “at a minimum, some consistent, personal contact with that person’s home. Occasional, sporadic, and temporary contacts are insufficient.” *Id.* at 1431-1432. The court stated:

Having determined this contract requires that a party have at least some regular, personal contacts with the insured’s residence, we apply that determination to the facts before us. The evidence presented, even when viewed in a light most favorable to the defendants, contains no indication that Klinghoffer had the requisite contacts with his parents’ condominium. The record indicates that he did not sleep at his parents’ or take his meals there with any regularity.

. . . As there is no evidence that could even create an inference that Klinghoffer had regular, personal contacts with his parents’ home, we find that a directed verdict was appropriately entered in favor of St. Paul.

Id. at 1433.⁴

The court in *McComas* explained that this Court's opinion in *Farmers Mutual Insurance Co. v. Tucker*, 213 W. Va. 16, 576 S.E.2d 261 (2002), was distinguishable insofar as *Tucker* involved a homeowner's policy, rather than a UIM policy, and "the phrase 'resident of your household'" was "not defined." *Id.*, 576 S.E.2d at 270. Thus, Syllabus Point 3 of *Tucker* was inapplicable.⁵ Nonetheless, the court in *McComas* determined that there would not be insurance coverage even under *Tucker* as follows:

In the instant case, the term "resident" is defined to include only "a person who physically lives with you in your household." Your unmarried, emancipated children under age 24 attending school full-time, living away from home will be considered residents. . . ." The *Tucker* Court defined a "resident of your household" as "a person who dwells – though not necessarily under a common roof – with other individuals who are named insureds in a manner and for a sufficient length of time so that they could be considered to be a family living together. The factors to be considered in determining whether that standard has been met include, but are not limited to, the intent of the parties, the formality of the relationship between the person in question and the other members of the named insured's household, the permanence or transient nature of that person's residence therein, the absence or existence of another place of lodging for that person, and the age and self-sufficiency of that person." *Id.* Application of these factors to this case, dictate the award of summary judgment to the Defendant. Specifically, this Court has considered the following:

- (a) First, with respect to the intent of the parties, it is clear that the decedent's intent as evidenced by his permanent records and his conduct, was to consider his father's home as his residence. Further, his stepfather never listed him as a driver or member of his household for motor vehicle insurance purposes.

⁴ The court in *McComas* also relied on *State Farm Mutual Insurance Co. v. Taussig*, 227 Ill. App. 3d 913, 592 N.E.2d 332, 334 (1992), which held that a twenty-year old who had dropped out of college and lived in an apartment paid for by his father with two roommates was not a "resident" of his father's home as that term was defined by the phrase "lives with you" for his father's automobile liability insurance purposes.

⁵ Subsequently, in Syllabus Point 1 of *Glen Falls Insurance Co. v. Smith*, 217 W. Va. 213, 617 S.E.2d 760 (2005), this Court applied Syllabus Point 3 of *Tucker* to an automobile policy. In *Smith*, the Court determined that "[t]he meaning of the phrase 'resident of your household,' if not otherwise defined, would be the same when used in an automobile policy as it is when used in a homeowners' liability policy." *Smith*, 617 S.E.2d at 766. Applying the *Tucker* factors to an automobile insurance policy in which the term was undefined, the Court in *Smith* held that a twenty-two year old son was not a resident of his mother's household because he had not dwelt with her in her household for a sufficient length of time so that they could be considered to be a family living together. *Id.*

(b) Second, with respect to the formality of the relationship between the parties, the decedent had resided with his father as custodial parent since he was a baby, with his mother paying child support for several years prior to his reaching the age of majority. Plainly, the parties considered the decedent's home or permanent residence to be with his father.

(c) Third, with respect to the permanence or transient nature of the decedent's residence, he had resided with his father at [his address in] Charleston, West Virginia, since 1991, and visited his mother's home in Ripley on an occasional, sporadic basis.

(d) Fourth, with respect to the absence or existence of another place of lodging, at the time of his death, the decedent had both his father's residence and the fraternity house, and plainly would not have needed to seek residence with his mother.

(e) Finally, with respect to the age and self-sufficiency of the decedent, he was not a minor, but was twenty-one years old; he had resided either in an apartment or a fraternity house for a number of years, subsidized financially by both parents; and according to the plaintiff's own testimony would routinely visit [his father's address in] Charleston, West Virginia, before leaving to visit his mother in Ripley.

(f) Plainly, under *Tucker*, the decedent did not "dwell" with the named insureds "for a sufficient length of time so that they could be considered to be a family living together."

McComas, 2004 WL 5538554 (footnote omitted).⁶

In addition to *Lewis*, which the court cited in *McComas*, in *Nationwide Mutual Insurance Co. v. Budd-Baldwin*, 947 F.2d 1098 (3d Cir. 1991), the Third Circuit construed an insurance provision similar to Erie's that included the policy term "regularly lives." The *Budd-Baldwin* court denied coverage under a sister's policy and held that the policy did not provide first party and UIM coverage for her brother's death as a passenger in a motor vehicle accident. In *Budd-*

⁶ The Court in *McComas* further distinguished *Aetna Casualty & Surety Co. v. Shambaugh*, 747 F. Supp. 1203 (N.D.W. Va. 1990), in which the court held that the child of divorced parents, one of whom had visitation rights, may have dual residency. In *McComas* the child was not a minor and did not claim that a parent had visitation rights. Because *McComas*'s visits to his mother's home were sporadic he was the type of "temporary or transient visitor" expressly excluded from the *Shambaugh* dual residency analysis. *McComas*, 2004 WL 5538554 at n.1.

Baldwin, the court defined “regularly living” as (1) occupying a particular home (2) at fixed intervals. *See id.* at 1102. The Third Circuit explained the meaning of ‘occupying a particular home’ in the following manner:

When we combine the dictionary definition with the facts of everyday life, it is clear that to occupy a home means to be able to call that place one’s own, to claim it as a place where one has a right to be. The word home itself connotes a place where one belongs and can always go with the certainty that he will be taken in. It connotes not only a physical place, i.e., the place where one eats meals, sleeps, socializes and generally spends time when not “otherwise engaged with the activities of life,” but a sense of belonging. This definition clearly excludes persons who are mere visitors to the residence, however frequently they may visit and however certain they may be that they will always be taken in. Temporary visits, however, frequent or regular, are simply insufficient to establish residency.

Id. at 1102 (footnote omitted). *See also Nationwide Mut. Ins. Co. v. Krause*, No. 98-3350, 2000 WL 255987 (E.D. Pa. Mar. 7, 2000) (holding that child of divorced parents did not “regularly live” with her non-custodial father as she had on occasion “occupied” the house but “such occupation was not at fixed intervals”); *Nationwide Mut. Ins. Co. v. White*, No. 93-962, 1993 WL 315639 (E.D. Pa. Aug. 18, 1993) (holding that there was no insurance coverage for a son as a relative residing with or regularly living with his insured father at the time of an automobile accident because “the phrase ‘regularly living with’ connotes a consistent and significant physical presence” not present in that case).

Subsequent to *McComas*, in *State Farm Mutual Automobile Insurance Co. v. Fultz*, No. 2:06-cv-15, 2007 WL 2789461 (N.D.W. Va. Sept. 24, 2007), the Northern District of West Virginia construed a similar insurance provision with the policy term “resides primarily” issued to a divorced adoptive father and held that it did not provide UIM or medical payments coverage for the adopted daughter’s injuries in a motor vehicle accident. In *Fultz*, an injured guest passenger sought coverage from her adoptive father’s insurance policy following his divorce from her biological mother, the custodial parent. *Id.* at *1. The insurance policy in *Fultz* defined

“‘relative’ as, ‘a person related to you or your spouse by blood, marriage or adoption who resides primarily with you. It includes your unmarried and unemancipated child away at school.’” *Id.* at *3. The court found that even a child of divorce cannot “primarily reside at more than one residence.” *Id.* The court determined that the injured party “primarily resided with her mother, Jane Fultz, and thus, is not entitled to the medical payments coverage afforded by State Farm’s policy insuring Joseph Fultz.” *Id.* at *4.

More recently, in *Lafferty v. State Farm Mutual Automobile Insurance Co.*, No. 2:10-cv-00175, 2011 WL 777886 (S.D. W. Va. Feb. 25, 2011), the Southern District of West Virginia construed a similar insurance provision with the policy term “resides primarily” issued to the decedent’s father and held that it did not provide UIM coverage for the decedent’s death in a motor vehicle accident. With regard to the policy language, the court reasoned:

Although the plain language of the State Farm policy is readily understandable [sic], it is worth noting that courts in other jurisdictions have interpreted the policy term “resides primarily” to mean that the person resided at one particular place “for the most part” or “chiefly.” *See, e.g., State Farm Mut. Auto. Ins. Co. v. Harris*, 882 So.2d 849, 854 (Ala. 2003) (“[W]e fail to see how a person may ‘primarily’ or ‘for the most part’ live in more than one place at one time.”); *State Farm Mut. Auto. Ins. Co. v. Fultz*, No. 2:06-cv-15, 2007 WL 2789461, at *4 (N.D.W. Va. Sept. 24, 2007). These holdings comport with the meaning given to a similar policy term, “resident of your household,” by the Supreme Court of Appeals of West Virginia. *See Farmers Mut. Ins. Co. v. Tucker*, 576 S.E.2d 261, 270 (W. Va. 2002).

Id. at *2.⁷

⁷ Nonetheless, like the court in *McComas* the court in *Lafferty* distinguished *Tucker* as follows:

the decision in *Tucker* is distinguishable because the policy in that case did not define the term “resident of your household.” . . . Moreover, the *Tucker* Court focused on the unique meaning in the law given to the broad and unrestricted terms “resident” and “household.” . . . In this case, by contrast, the State Farm policy defines the term “resident relative” to include the important phrase “resides primarily.” The court agrees with the authorities above in concluding that “primarily” means something more than mere residence in a household.

Lafferty, 2011 WL 777886 at n.2. (citations omitted).

The court concluded as follows:

[I]f the phrase “resides primarily” is to have any meaning, it must be the case that the decedent would have to primarily reside at his father’s home on Miller Bragg Circle to be a resident relative. That he did not *primarily* reside on Miller Bragg Circle is not controverted, however. Indeed, the fact that he resided elsewhere is established by the decedent’s own signed writing to the public housing authorities, as well as by the deposition testimony of the insured, the decedent’s mother, and his fiancée. Moreover, the affidavits themselves (the only evidence submitted in opposition to summary judgment) concede that the decedent spent “most nights in the trailer that he lived in with his fiancé.” The Estate’s interpretation of the policy language would extend “resident relative” coverage to frequent guests among close-knit family members, when the clear policy language limits coverage to those who primarily reside with the named insured.

Id. at *3 (emphasis in original). See also *Lewis v. Likens*, No. 3:12-1675, 2013 WL 633208 (S.D.W. Va. Feb. 20, 2013) (holding that UIM provision in insurance policy issued to daughter did not provide UIM coverage for elderly mother residing in nursing home who died in motor vehicle accident).

In this action, Erie’s policy provides that a “**resident**” is “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.” (emphasis added). The undisputed evidence shows that Ms. White fails to meet this definition because she did not physically live with Mr. White on any basis, let alone on a regular basis. At the time of the accident, Ms. White was twenty-three years old and lived with her mother in Texas. Ms. White attended Austin Community College, and she identified her address in school records as 1400 Renaissance Court, Austin, Texas. Ms. White is Mr. White’s adopted daughter. Mr. White has been divorced from Ms. White’s mother for more than fifteen years. Mr. White lives in Smithers, West Virginia, and he has lived in West Virginia since 2008. Mr. White’s home and residence in West Virginia was never Ms. White’s home although she visited Mr. White in West Virginia. A.R. at 82-83. In addition, Mr. White acknowledges that at the

time of the accident Ms. White had not visited Mr. White for at least one year and had no clothing or other personal items at his home in West Virginia. Mr. White further acknowledges that when he purchased the Erie policy he did not intend for Ms. White to be covered. A.R. at 56.⁸

Moller v. State Farm Mutual Automobile Insurance Co., 252 Neb. 722, 566 N.W.2d 382 (1997), *Tokley v. State Farm Insurance Cos.*, 782 F. Supp. 1375 (D.S.D. 1992), and *American Standard Insurance Co. v. Savaiano*, 298 F. Supp. 2d 1092 (D. Co. 2003), which are relied upon by Ms. White, are readily distinguishable. All three cases involved minor children of divorce with some type of custody arrangement. In *Moller*, the policy provided that a relative is one who “lives with you.” *Moller*, 566 N.W.2d at 384. The court in *Moller* specifically noted that “in the coverage provision in question, State Farm did not qualify or limit the phrase ‘lives with.’” *Id.* at 387. Although the *Moller* court ultimately found coverage for the insured Mr. Moller’s non-custodial daughter, the evidence in that case indicated that since his divorce the daughter had visitation with her father on a regular basis once every two weeks, she stopped at her father’s house after school approximately twice a week, and she kept clothes and toiletries at her father’s house. *Id.* at 384. *Moller* cited *Tokley* with approval for the proposition that “where the extent of the relationship and the contacts between the child and the noncustodial parent were of the duration and regularity presented, it would adopt the generally accepted view that the child lived with both parents.” *Id.* at 386.⁹

⁸ The statement of Ms. White’s mother attached as an exhibit to Ms. White’s Cross-Motion for Summary Judgment is not competent evidence under Rule 56(e) because it is not an affidavit, nor is it otherwise sworn or certified. In any event, there is no dispute about whether Mr. White loves his daughter. The question is whether Ms. White lived with Mr. White in his West Virginia household on a regular basis. See *Erie Ins. Exch. v. Weryha*, 931 A.2d 739, 744 (Pa. Super Ct. 2007) (“[w]hile we do not doubt Timothy loved his father and enjoyed visiting his father, the terms ‘residence’ and ‘living’ require, at the minimum, some measure of permanency or habitual repetition”).

⁹ *Moller* also cited with approval the Third Circuit’s opinion in *Budd-Baldwin*, which is discussed above.

In *Tokley*, the court construed the same policy term “lives with you” and found that any reasonable interpretation of that phrase must include the non-custodial son’s visitations with his father, which the court estimated to have been at a minimum between 78 and 117 days out of the year. *Tokley*, 782 F. Supp. at 1379. The court concluded that the facts of that case more closely resemble cases where the courts have extended coverage to a relative than cases where courts have declined such coverage, explaining that “[the son’s] relationship with his father was of a continuous duration and regularity despite the separation of [his] parents.” *Id.* at 1380-81.

Savaiano relied in part on *Tokley* and predicted that Colorado would hold that a child has dual residency where contacts with the non-custodial parent’s home are of a substantial nature. *Savaiano*, 298 F. Supp. 2d at 1099-1100. The court in *Savaiano* found that the “undisputed facts here portray a regular and continuous relationship between Savaiano and her father despite the separation of Savaiano’s parents. The facts of this case demonstrate that Savaiano intended to live with her mother and father to the fullest extent possible at least during the duration of her minority.” *Id.* at 1099. The court distinguished several cases that had reached the opposite result because the child had insubstantial connections to the non-custodial parent’s household. *Id.* at 1099 & n.4.

The contemporary realities of family living, particularly for minor children of divorce living under custody agreements that involve both parents, presented to the courts in *Moller*, *Tokley*, and *Savaiano* bear no resemblance to the realities in this action. Among other things, at the time of the accident Ms. White was twenty-three years old and lived with her mother in Texas. Mr. White has been divorced from Ms. White’s mother for more than fifteen years. Mr. White lives in Smithers, West Virginia, and he has lived in West Virginia since 2008. Mr. White’s home and residence in West Virginia was never Ms. White’s home although she visited

Mr. White in West Virginia. A.R. at 82-83. Ms. White never lived in Mr. White's West Virginia household on any basis, let alone on a regular basis. At the time of the accident Ms. White had not visited Mr. White for at least one year and had no clothing or other personal items at his home in West Virginia. A.R. at 56. Summary judgment was proper because under the clear and unambiguous terms of Erie's policy Ms. White did not physically live with Mr. White in his household on any basis, let alone on a regular basis.

B. The Circuit Court Properly Granted Summary Judgment to Erie because under the Clear and Unambiguous Terms of Erie's Policy Ms. White Was Not an Unmarried, Unemancipated Child of Mr. White Attending School Full Time, Living Away from Mr. White's Home.

The Circuit Court properly granted Erie's Motion for Summary Judgment for the additional reason that under the clear and unambiguous terms of Erie's policy Ms. White was not an unmarried, unemancipated child of Mr. White attending school full time, living away from Mr. White's home. In *State Farm Mutual Automobile Insurance Co. v. Brown*, 26 So.3d 1167 (Ala. 2009), the court held that an unmarried and unemancipated minor, who primarily lived with her mother and attended high school, was not "away at school" so as to be covered under her father's UIM policy. The court examined a policy definition of "relative" that was similar to the Erie definition, "a person related to you or your spouse by blood, marriage or adoption *who lives primarily with you*. It includes your unmarried and unemancipated child *away at school*." *Id.* at 1169 (emphasis in original). State Farm argued that the two sentences in the definition were to be read conjunctively, meaning the minor had to be away from her primary residence, not simply the policyholder's residence, in order to recover UIM benefits under her father's policy. *Id.* at 1170. In contrast, the claimant maintained that a disjunctive reading of the policy language was required. *Id.* The court agreed with the insurer's reading, stating:

The second sentence is obviously intended to expand on the first sentence and to indicate that a child who is away at school is not excluded from the term “relative” in the policy by virtue of the language “lives primarily with you.” . . . A child whose primary residence is not the policyholder’s residence and who is attending a local high school is not “away at school” under any reasonable interpretation of the phrase. To read the two-sentence definition of “relative” disjunctively would, in effect, rewrite State Farm’s policy to expand UIM coverage to unintended beneficiaries.

Id.

Similarly, in *Erie Insurance Exchange v. Weryha*, 931 A.2d 739 (Pa. Super Ct. 2007), the court examined the issue and held that a child did not physically live with his father so as to be a resident relative away at school for UIM purposes. The court stated:

[T]he issue in this case is whether Timothy physically lived with his father; the issue is *not* why it was impossible for Timothy to physically live with his father. Aside from sporadic visits and overnight stays, Timothy basically had no connection with his father’s residence. While we do not doubt Timothy loved his father and enjoyed visiting his father, the terms “residence” and “living” require, at the minimum, some measure of permanency or habitual repetition. See Merriam Webster’s Collegiate Dictionary 681, 996 (10th ed. 1996). . . .

Appellants’ next argue Timothy was a resident of Mr. Weryha’s home by virtue of being an “unmarried, unemancipated child under age 24 attending school full-time, *living away from home.*” . . . The problem with this argument is that it presupposes Timothy’s “home” was where Mr. Weryha resided, not the Weryha family marital home where Timothy’s mother resided—where Timothy did, in fact and in law, reside at the time of the accident. This presupposition is erroneous because if Timothy did not “reside” with Mr. Weryha, which we have concluded he did not, his “home” could not be where Mr. Weryha lived. See Merriam Webster’s Collegiate Dictionary, *supra* at 554 (defining home as “one’s place of residence.”).

Id. at 744 (emphasis in original). See also *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 364 So.2d 215, 216 (La. Ct. App. 1978) (holding that plaintiff college student injured in motor vehicle accident could not recover under UIM provision of his father’s insurance policy where plaintiff had moved 75% of his belongings out of his parents’ home and into his apartment).

In this action, because the policy terms should be read conjunctively, Ms. White’s argument that she was an unmarried, unemancipated child attending school full time, living away

from home is meritless. Again, the critical aspect of Erie's policy definition indicates that "unmarried, unemancipated children attending school full time, *living away from home*, will be considered 'residents'". (emphasis added). As discussed above, at the time of the accident Ms. White was twenty-three years old and lived with her mother in Texas. Ms. White attended Austin Community College, and she identified her address in school records as 1400 Renaissance Court, Austin, Texas. Mr. White's home and residence in West Virginia was never Ms. White's home although she visited Mr. White in West Virginia. A.R. at 82-83. At the time of the accident Ms. White had not visited Mr. White for at least one year and had no clothing or other personal items at his home in West Virginia. A.R. at 56. Therefore, under *Brown* and *Weryha* Ms. White was not living away from Mr. White's home because she was not a resident of Mr. White's household in the first place.

This action is readily distinguishable from *Drake v. Snyder*, 216 W. Va. 574, 608 S.E.2d 191, 197 (2004) (*per curiam*). In that case, this Court held that a fifteen-year old girl in the sole legal custody of her divorced father who permitted his daughter to live with her mother for the purpose of attending a different high school satisfied the definition of an "unemancipated child away at school." *Id.*, 608 S.E.2d at 196. Moreover, on the particular facts in that case, the Court further found that because the father had sole legal custody of his daughter she was domiciled with him and therefore a member of his household. *Id.* at 199.

In this action, Ms. White is twenty-three years old and legal custody is not an issue. Indisputably, Ms. White did not leave her father's home to attend Austin Community College. In addition, Ms. White has not proven that she was a full time student. The printout from Austin Community College and copy of Ms. White's grade card from the Spring 2013 semester attached as exhibits to Ms. White's Cross-Motion for Summary Judgment are not competent evidence

under Rule 56(e) because they are neither sworn nor certified. In any event, they show only that Ms. White was enrolled in six hours of classes which is less than needed to be a full-time student. Therefore, the Circuit Court properly granted summary judgment because Ms. White was not an unmarried, unemancipated child attending school full time, living away from home.

C. It Was Not Jerry White's Intent that Rebecca White Be Covered under Erie's Policy.

Finally, it was not Mr. White's intent that Ms. White be covered under Erie's policy. The insured's intent was identified as a factor to consider by this Court in Syllabus Point 3 of *Tucker*, and by the courts in *McComas* and *Weryha*. In this action, Mr. White has expressly acknowledged that when he purchased the Erie policy he did not intend for Ms. White to be insured. A.R. at 56. Moreover, the Erie policy lists only one driver, Mr. White, and it indicates that he received a discount for being over fifty-five years old. The policy explains that if an individual listed as a driver is not a resident relative as defined in the policy, coverages, benefits and rights may be limited. A.R. at 87. Assuming that Mr. White could have obtained coverage for Ms. White under this or any other Erie policy, Erie would have adjusted Mr. White's insurance rates appropriately. Although Erie is not taking the position that the intention of the parties governs or does not govern this or any other coverage question, Mr. White has expressed his intent as purchaser of the policy at issue that Ms. White not be deemed insured thereunder.

VII. CONCLUSION

For all of the foregoing reasons, this Court should hold that Rebecca White did not satisfy the clear and unambiguous definition of "anyone we protect" and affirm the Circuit Court's grant of summary judgment to Erie Insurance Property and Casualty Company in all respects.

Respectfully submitted this 13th day of October 2015.



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October 2015, I caused the foregoing "**Brief of Respondent Erie Insurance Property and Casualty Company**" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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A handwritten signature in black ink, appearing to be 'RW', is written above a solid horizontal line.