

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 35676

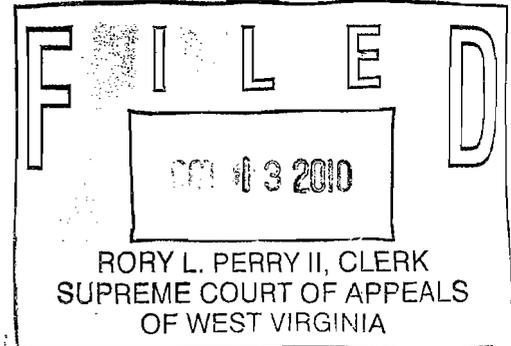
James and Marlane Adkins,

Appellants,

v.

Erie Insurance Company,

Appellees.



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

BRIEF OF APPELLANTS JAMES AND MARLAINE ADKINS

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal involves a Declaratory Judgment action filed by James and Marlaine Adkins against Erie Insurance Company, the insurer of the tortfeasor that was at fault in an accident with their then minor daughter, Kayla. The Complaint was filed against Erie in Cabell County Circuit Court on November 30, 2006. Discovery was exchanged between the parties. On January 22, 2008, Erie filed a *Motion for Summary Judgment*. On February 4, 2008, the Adkins responded to the Motion and filed a *Cross Motion for Summary Judgment*. The policy produced by Erie in response to discovery requests was the one the Adkins cited in their Memorandum in Support of Motion for Summary Judgment. On February 11, 2008, in *Defendant Erie Insurance's Reply to Plaintiffs' Response to Motion for Summary Judgment*, Erie cited the policy language that was produced by Erie in discovery, and represented that the language was undisputed.

Now retired Judge Cummings heard oral arguments on both Motions on February 28, 2008. Judge Cummings took the matter under advisement, and by Order dated May 20, 2008, granted summary judgment to the Adkins. In his Order, he concluded as follows: 1) a minor claim gives rise to two separate and distinct causes of action that are capable of being resolved independently. The parents have an action for damages separate and distinct from the child's right of action for their damages; 2) as such, the claims are capable of being resolved independently and are not derivative claims; 3) as they are not derivative claims, they cannot be subject to a limitation of liability

provision in an insurance policy that limits the payment of derivative claims to a single per person limit. The Court thus found that Erie must pay the parents claim separate from the claim of the minor and that each were entitled to separate per person bodily injury limits. This decision did not rely upon the definition of "bodily injury" in the Erie policy. Rather, it was premised upon the nature of the cause of action and the fact that the separate and distinct claims were not derivative claims subject to a derivative claim limitation provision.

On September 3, 2008, Erie filed a *Rule 60 Motion for Relief from Judgment*. In the Motion, Erie asserted that the wrong definition of bodily injury had been used, as the wrong policy had been produced by Erie during discovery. Erie asserted that the policy had been modified by an endorsement, which counsel for Erie was not aware of and did not have in his possession before summary judgment was granted. The Adkins responded, denying that there were any grounds for relief from the final judgment. The Adkins countered that, while Erie was asserting "mistake" as a basis for relief, in fact, it was attempting to introduce newly acquired evidence, *i.e.* – the correct policy. The Adkins' further pointed out to the Court that the policy language that was relied upon by them was derived from the policy that Erie produced in response to Request for Production of Documents.

The parties were heard on the matter on September 18, 2008. Pursuant to the Court's request, a supplemental memorandum regarding waiver and estoppel was filed thereafter. On October 2, 2008, the Court sent a letter advising that he would reverse the award of summary judgment on the basis of mutual mistake, and that he found

that waiver and estoppel did not apply. A proposed Order was tendered by Erie, but apparently never entered.

The matter was briefed again and heard by Judge Husted. The Adkins' asserted that the definition of bodily injury did not affect the underlying decision by Judge Cummings. Rather, the underlying reasoning would be applicable whatever the policy language may be. That is, the parents' separate and distinct claim cannot be made subject to or limited by a derivative limitation of liability provision. Thus, the Adkins' asserted that summary judgment in their favor was still mandated. The Circuit Court, however, found that summary judgment in favor of Erie was warranted. It is from this Order and the Order granting Rule 60 relief and setting aside the initial grant of summary judgment to the Appellants that they appeal.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In this Declaratory Judgment Action, James and Marlaine Adkins were seeking a determination as to their entitlement, as the parents of then minor Kayla Adkins, to insurance proceeds under a policy of insurance issued by Erie Insurance Company. The underlying facts of this case are undisputed. Kayla Adkins was a minor involved in a motor vehicle accident on April 9, 2005. Kayla sustained multiple and serious injuries in the accident, incurring medical expenses in excess of over \$100,000. Kayla's injuries included the following: (1) concussion, (2) right eye trauma, necessitating plastic surgery, (3) a broken right scapula, (4) a right infraglenoid fracture, (5) fractures of the first and third right rib, (6) a right hemothorax and pneumothorax, (7) a lacerated liver, (8) two displaced right pelvic fractures, (9) a chip of the sacroatic joint, and (10) a left knee ligament sprain with a questionable MCL tear. As Kayla was a minor when the accident occurred, her parent's were held responsible for the payment of Kayla's medical bills. Thus, they sought recovery for the medical expenses from Erie, who insured the operator of one of the vehicles involved in the accident, Nancy Johnstone.

In negotiation of the claim, James and Marlaine Adkins contended that separate per person liability limits were applicable to their claim. They asserted that the parents claim could not be made subject to the derivative limitation policy provision. They further contended that Kayla's injuries were such that the single per person limit would be exhausted just based upon her pain and suffering and permanent impairment. A second per person limit for the parents would be exhausted based upon the amount of the medical bills. Erie disagreed with this position. The parties agreed to the payment

of the per person limits to Kayla Adkins and further agreed to the filing of a declaratory judgment action to determine whether Erie has an obligation to pay separate per person policy limits to James and Marlaine Adkins.

The Appellants filed their Complaint for Declaratory Judgment on November 30, 2006. They sent discovery requests to Erie on May 3, 2007. Request for Production of Document No. 1 requested that Erie produce a copy of the policy of Nancy Johnstone in effect on the date of the accident, April 9, 2005. In response, Erie produced a document on June 12, 2007, attached to their Response as Exhibit 1, which was Pioneer Family Auto Insurance Policy FAP (Ed. 4/970 UF-8522). This was the same policy that Erie referenced in its *Second Set of Interrogatories and Request for Admissions to Plaintiffs*, filed February 26, 2007. Request for Admission Number 15 cited policy language from the applicable policy, referencing page 7 of the Pioneer Family Auto Insurance Policy FAP (Ed. 4/970 UF-8522) as the source of the language. Although Erie represented that the policy was attached as Exhibit 1, it in fact was not attached. Nonetheless, the policy that Erie was referencing in that discovery request was the one that was produced in response to Request for Production of Documents. The policy produced by Erie in response to Request for Production of Documents, in pertinent part, read as follows:

LIABILITY PROTECTION

OUR PROMISE

Bodily Injury Liability

* * * * *

We will pay all sums you legally must pay as damages caused by an accident covered by this policy. The accident must arise out of the ownership, maintenance, use, loading or unloading of an auto we insure.

Damages must involve:

1. Bodily injury, meaning physical harm, sickness or disease, including care, loss of services, or resultant death; . . .

LIMIT OF PROTECTION

Bodily Injury Liability

Property Damage Liability

Combined Single Limit of Liability

* * * * *

If coverage is purchased on a "Split Limits" basis, your Declarations will show a *per* PERSON and *per* ACCIDENT limit for Bodily Injury Liability and a *per* ACCIDENT limit for Property Damage Liability. The *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....

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.

On January 22, 2008, Erie filed a *Motion for Summary Judgment*. The Motion cited the policy language from the limit of protection section, and referenced the same policy that was produced in response to discovery. The Adkins responded to the Motion for Summary Judgment and filed a *Cross Motion for Summary Judgment* on

February 4, 2008. The policy produced by Erie in discovery was the one the Adkins cited in their response and motion for summary judgment. They relied upon this policy and set forth the policy language defining bodily injury and addressing derivative claim limits. Erie filed *Defendant Erie Insurance's Reply to Plaintiffs' Response to Motion for Summary Judgment* on February 11, 2008. In this Reply, Erie stated that certain facts were undisputed, including the policy language defining bodily injury and addressing limitation of liability for derivative claims. The Motion listed the Pioneer Family Auto policy at pages five (5) and seven (7) as the source of the undisputed facts. The Motions were heard on February 28, 2008.

The Court took the motions under advisement. On May 20, 2008, the Court issued a decision, which recited the policy language represented by Erie to be undisputed, both the definition of bodily injury and the derivative limitation language. The Court found that 1) a minor claim gives rise to two separate and distinct causes of action that are capable of being resolved independently. The parents have an action for damages separate and distinct from the child's right of action for their damages; 2) as such, the claims are capable of being resolved independently and are not derivative claims; 3) as they are not derivative claims, they cannot be subject to a limitation of liability provision in an insurance policy that limits the payment of derivative claims to a single per person limit.

On September 3, 2008, Erie filed a *Motion for Relief From Judgment or Order*. In the Motion, Erie asserted that the parties were under a mistaken belief that the

definition of "bodily injury" in the subject policy included damages arising from "care" and "loss of services" when in reality, the policy did not state that. Erie contended that the Adkins incorrectly set forth the policy language. Erie asserted that the language had been changed by an endorsement, which modified the policy as follows:

LIABILITY PROTECTION

OUR PROMISE

Bodily Injury Liability

Property Damage Liability

We will pay all sums you legally must pay as damages caused by an accident covered by this policy. The accident must arise out of the ownership, maintenance, use, loading or unloading of an auto we insure.

Damages must involve:

1. Bodily injury, meaning physical harm, sickness, disease, or resultant death to a person.¹
- * * * * *

LIMIT OF PROTECTION

Bodily Injury Liability

Property Damage Liability

Combined Single Limit of Liability

If coverage is purchased on a "Split Limits" basis, your Declarations will show a *per* PERSON and *per* ACCIDENT limit for Bodily Injury Liability and a *per* ACCIDENT limit for Property Damage Liability. The *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

¹ The definition of "bodily injury" provided originally by Erie read as follows: Bodily injury, meaning physical harm, sickness or disease, including care, loss of services, or resultant death; . . . The words "*including care, loss of services*" were deleted from the new definition provided.

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....

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.²

Erie further represented that counsel for Erie did not have the endorsement nor was he aware of the endorsement, and thus was unable to correct the Adkins' mistaken representation as to the applicable language. Erie asserted that, because the Adkins' were the ones that raised the issue of coverage under the policy definition of bodily injury, it simply relied on the language that was set forth by them. In fact, counsel for Erie claimed that he did not have any documentation that would suggest that the representation by the Adkins was incorrect. Rather, it was only after summary judgment had been granted to the Adkins that **Erie** discovered that the Erie policy language had been modified by an endorsement.

The Adkins' responded in opposition to the Rule 60 Motion. They contended that Erie was actually not seeking relief on the basis of a mistake, but was seeking to introduce newly discovered evidence - the purported correct policy language - in an effort to obtain relief from the judgment. The Adkins also advised that the policy produced by Erie as Exhibit 1 to their discovery responses was the policy represented by Erie to be the policy of Nancy Johnstone in effect on the day of the accident. As this

² The derivative limitation provision language is the same language as was in the original policy that was produced.

policy was represented by Erie to be the “official” copy of the policy of Nancy Johnstone in effect on the date of the accident, it was the one relied upon in briefing the issue on summary judgment. Moreover, in its Response to Plaintiff’s Motion for Summary Judgment, Erie represented the policy language that the Adkins’ had quoted was the undisputed policy language. The Adkins asserted that Erie’s Motion did not prove that the new policy language was the applicable language, especially since Erie had taken a contrary approach throughout the entire litigation and particularly in pleadings and discovery responses. The Adkins’ further posited that Erie had been at liberty to raise the purported correct policy language in the original summary judgment matter, but did not.

At the hearing held on the Rule 60 Motion, Judge Cummings asked the parties to submit a supplemental brief on the issue of waiver and estoppel. The Adkins’ submitted a Memorandum addressing the reasons that both doctrines would apply to deny relief. Judge Cummings advised the parties by letter dated October 2, 2008 that he was going to grant the Rule 60 Motion. He found that there was a mutual mistake of fact regarding the definition of bodily injury, and that waiver and estoppels did not apply.

After fully litigating the entire Declaratory Judgment action, the parties were now back to square one. The issues were briefed again, under the new policy. Judge Husted granted Erie’s Motion for Summary Judgment, and denied the Adkins’ Motion. In granting Erie’s Motion, the court found (1) the limitation provision of the policy limited derivative claims to the per person limit, and (2) that the definition of “bodily injury” was not ambiguous, and the parents did not suffer a bodily injury.

III. ASSIGNMENTS OF ERROR

1. The circuit court erred in granting Rule 60(b) relief from judgment to Erie after the award of summary judgment to the Adkins.
2. The circuit court erred in finding that waiver and estoppel did not apply.
3. The circuit court erred finding that the parents' separate and distinct claim from their child was subject to a derivative limitations of liability provision, thereby denying them separate per person limits.
4. The circuit court erred in finding that the parents did not suffer a bodily injury as defined in the policy.
5. The circuit court erred in finding that the policy was not ambiguous.

IV. STANDARD OF REVIEW

An appeal of a motion under Rule 60 is reviewed for an abuse of discretion. *Powderidge Unit Owners Ass'n. v. Highland Properties*, 196 W.Va. 692, 474 S.E.2d 872, at 887 (W.Va. 1996).

A circuit court's award of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 558 S.E.2d 336 (W.Va. 2001). An award of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). A motion for summary judgment should be granted when there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. *Id.* The review of a denial of a motion to reconsider under Rule 60(b) is for an abuse of discretion. *Powderidge Unit Owners Ass'n. v. Highland Properties*, 196 W.Va. 692, 474 S.E.2d 872, at 885 (W.Va. 1996).

V. DISCUSSION

A. Rule 60 Relief Was Not Appropriate.

One of the purposes of West Virginia Rule of Civil Procedure 60(b) is to provide a mechanism for instituting a collateral attack on a final judgment in a civil action when certain enumerated extraordinary circumstances are present. *Jividen v. Jividen*, 212 W.Va. 478, 575 S.E.2d 88 (W.Va. 2002)(emphasis added). When such extraordinary circumstances are absent, a collateral attack is an inappropriate means for attempting to defeat a final judgment in a civil action. *Id.* A Rule 60(b) motion is designed to address mistakes attributable to special circumstances. *Powderidge Unit Owners Ass'n. v. Highland Properties*, 196 W.Va. 692, 474 S.E.2d 872, at 885 (W.Va. 1996).

1. Relief Under Rule 60(b)(1) Was Not Warranted

Rule 60(b)(1) provides a basis for relief upon the grounds of mistake, surprise, excusable neglect, or unavoidable cause. *Erie's Rule 60 Motion for Relief from Judgment Or Order* sought relief on the basis of a mistake. Erie contended that a mistake had occurred as the incorrect policy had been used to brief the insurance coverage issue. Erie contended that this led to the parties operating under the mistaken belief that the definition of "bodily injury" read one way, when in fact, it read another. To prove the "mistake", Erie relied upon the purported correct policy, which differed from the policy that Erie had produced in discovery. While Erie may have

asserted a “mistake” under 60(b)(1), the true basis for the requested relief under this subsection was excusable neglect in failing to produce the correct policy.

A longstanding legal maxim adhered to by this Court is that the law comes to the help of those who are vigilant, and not to those who sleep on their rights. *Law v. Monongahela Power Co.*, 210 W.Va 549, 558 S.E.2d 349, 361 (W.Va. 2001)(Davis, J., dissenting) (citations omitted). This has been explained to mean that when attorneys are careless and do not attend to their interests in court, they must suffer the consequences of their folly. *Id.* A party that fails to act with diligence will be unable to establish that his conduct constituted excusable neglect pursuant to Rule 60(b)(1). *Robinson v. Wix Filtration Corporation, L.L.C.*, No. 09-1167 (4th Cir. 2010). A party is bound by the acts of his lawyer-agent and is considered to have notice of all facts which can be charged upon the attorney. *Universal Film Exchanges, Inc. v. Lust*, 479 F.2d 573 (4th Cir. 1973).

Without a doubt, Erie was not vigilant and slept on its right to assert that a contrary policy governed the matter. Erie did not establish mistake or excusable neglect. It did not explain why it made the “mistake” of producing the wrong policy. Nor did Erie explain what it did to avoid making the mistake. Erie failed to set forth the reason that in its response to discovery requests, wherein it produced the policy in response to a request for the one in effect, it failed to produce the correct policy. Erie did not state what it had done in responding to the discovery that might have lead to the error occurring. Erie did not explain how it mistakenly produced an incorrect policy in a declaratory judgment action to determine coverage under the policy. Erie did not establish how it

failed to recognize the asserted error throughout the entire litigation, including answers to discovery and pleadings that set forth the policy language. Erie failed to explain why it represented that the policy language was undisputed, if the language was not the correct language. Erie did not address how it failed to catch the error prior to the award of summary judgment. Erie did not explain how it was that the “error” finally came to light. Rather, Erie simply said the wrong policy was used, here is the right one, and let’s start over. The trial court erred by failing to require Erie to establish a mistake or excusable neglect. 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.

As the trial court did not require Erie to explain the cause of the error, it is hard to know if Erie was aware of the error and failed to correct it, or if Erie’s counsel was careless in producing a policy and making representations on behalf of Erie. This wasn’t a case where a voluminous number of documents were produced, and one was overlooked. Rather, the very heart of the case was the Erie insurance policy. So that there would be no mistake as to the applicable policy at issue, the Adkins’ sent discovery that requested that Erie produce a copy of the policy that was in effect on the date of the accident. Erie responded and produced a policy. Erie failed to set forth how the wrong policy was produced in the response to discovery. Certainly, a minimal amount of diligence by Erie would have produced the correct policy. The failure to produce the correct policy was not a “mistake” or ‘excusable neglect” that would permit Rule 60(b)(1) relief.

In the Rule 60 Motion, Erie further asserted that relief could be granted on the basis that the **Adkins** had misrepresented the true policy language. Erie argued that relief was appropriate where either an intentional or unintentional misrepresentation has been discovered after the entry of the judgment. The Adkins denied that there was either an intentional or unintentional misrepresentation by them. The Adkins posited that they relied upon the policy produced in discovery by Erie.³ Thus, the representation of the Adkins as to the applicable Erie policy language came directly from documents produced in discovery by Erie. Moreover, Erie **in pleadings** filed with the court, represented that the language cited by the Adkins was the undisputed and applicable language. There simply could not have been a finding that the Adkins misrepresented the policy language. Accordingly, there was no basis for setting aside the judgment on the basis of a misrepresentation.

The circuit court abused its discretion in granting Rule 60 relief to Erie after the award of summary judgment. Certainly, a finding that a mutual mistake had occurred is an abuse of discretion, as it is apparent that the Adkins did not make a mistake. Rather, the Adkins quite reasonably and expectedly relied upon the policy and policy

³ Erie asserted that it believed that it may have given a copy of the correct policy to the Adkins pre-litigation, apparently in an attempt to bolster the misrepresentation argument. This insinuated that the Adkins either were aware of the true policy language and chose to rely on differing language or that they should have corrected Erie in regards to the policy that it produced during discovery. This argument is a misplaced attempt to shift the blame from Erie for its own failures. A consideration of what may or may not have been produced pre-litigation is irrelevant, as the documents relied upon by the Adkins were what Erie produced in discovery and represented to be the policy in effect and at issue. The very reason that discovery is served is to obtain the official position and documents that are at issue. Moreover, if it were true that Erie did produce the correct policy pre-litigation, Erie did not explain why it was allegedly able to produce a correct copy pre-litigation and failed to do so in the course of the litigation. Without question, 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.

language produced by Erie as the one in effect and at issue. Erie did not establish excusable neglect to warrant relief. Rule 60(b)(1) relief was not warranted, and should be set aside.

2. Erie Was Actually Introducing New Evidence

While Erie may have asserted a mistake as the basis for relief, it was in fact attempting to introduce new evidence. Thus, the relief sought was under Rule 60(b)(2), newly discovered evidence. It is well established that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original summary judgment motion. *Powderidge Unit Owners Ass'n. v. Highland Properties*, 196 W.Va. 692, 474 S.E.2d 872, at 866 (W.Va. 1996). A motion for reconsideration should not be used as a vehicle to introduce new evidence that could have been adduced during pendency of the previous motion. *Id.*(*citations omitted*). The great weight of authority is that failure to file documents in an original motion does not convert the late filed documents into "newly discovered evidence." *Id.* To come within the newly discovered evidence rule, the party must show that the evidence was discovered since the ruling and that the party was diligent in ascertaining and securing the evidence. *Id.* By this, the evidence must be such that due diligence would not have permitted the securing of the evidence before the circuit court's ruling. *Id.*

As a basis for relief in its Motion, Erie was introducing newly discovered evidence – *i.e.* the purported correct policy. Thus, the basis for relief was in fact under Rule 60(b)(2), newly discovered evidence. In order for Erie to establish a mistake or

excusable neglect, it had to rely on the policy – which would be newly discovered evidence. Erie could not establish any basis for relief without producing the new policy that it contended should have been considered. There was no showing by Erie that the “newly discovered evidence” was not available and able to be introduced before the circuit court’s original ruling.

During the discovery period, Plaintiffs propounded discovery upon Erie. Request for Production of Document No. 1 requested that Erie produce a copy of the policy of Nancy Johnstone in effect on the date of the accident, April 9, 2005. In response, Erie produced a document on June 12, 2007, attached to their Response as Exhibit 1. (See, *Defendant’s Response to Plaintiffs’ Request for Production of Documents and Request for Admissions*, attached as Exhibit A to *Plaintiff’s Response to Defendant’s Motion for Relief from Judgment or Order*, Index page 198). The policy produced by Erie as Exhibit 1 to their discovery responses was the policy represented by Erie to be the policy of Nancy Johnstone in effect on the day of the accident. Furthermore, Request for Admission Number 15 cited policy language from the applicable policy, referencing page 7 of the Pioneer Family Auto Insurance Policy FAP (Ed. 4/970 UF-8522) as the source of the language. Although Erie represented that the policy was attached as Exhibit 1, it in fact was not attached. Nonetheless, the policy that Erie referenced in that discovery request was the same one that was produced in response to Request for Production of Documents. This policy was the one the Adkins used for briefing the issue on summary judgment. Moreover, in *Defendant Erie*

Insurance's Reply to Plaintiffs' Response to Motion for Summary Judgment filed on February 11, 2008, Erie cited the following policy language and stated that the following was an undisputed fact:

the policy provides bodily injury liability protection for damages that involve "bodily injury, meaning physical harm, sickness or disease, including care, loss of services or resultant death. (See Defendant's Response, Page 3).

In seeking relief from judgment, Erie contended that the policy was different in that there was an endorsement that applied, that had not been discovered during the litigation. However, there was no evidence produced as to why Erie did not discover and produce the correct policy prior to the entry of summary judgment against it. Presumably, Erie was aware of the discovery responses that it filed in this matter. Presumably, Erie was also aware of the Request for Admissions that it propounded, with the referenced applicable policy therein. Presumably, Erie was further aware of the applicable policy language when it filed its Response to the Plaintiff's Motion for Summary Judgment, and represented what it says was the undisputed policy language.

Erie had more than ample opportunity to verify that the policy language that it was citing was in fact correct. One would presume that in a declaratory judgment action, the one thing that an insurance company would verify would be that the correct policy was being litigated. It was only after the production of a policy to the contrary in discovery, a representation in a pleading that the policy language was undisputed, and an adverse ruling on summary judgment, that Erie contended that the language was wrong

and there was actually another policy which applied. However, there was no showing that Erie was now setting forth the correct policy language, when on multiple occasions it had produced or stated that the applicable policy language was to the contrary.

Erie, in an apparent attempt to place blame on Adkins's counsel for the use of the purported incorrect policy and policy language, stated that "*there can be no doubt that the Plaintiffs cited the incorrect definition of "bodily injury" when they filed their Motion for Summary Judgment.*" The Adkins could not have cited the incorrect definition, when the definition that they obtained came straight from what Erie had given them and said was the applicable policy! Erie further asserted that it relied in good faith on the Adkins' representation as to the policy language. Erie stated that counsel for Erie did not have any documentation that would suggest that the Adkins' representation as to the applicable Erie policy language was incorrect. Incredibly, Erie stated that counsel for Erie Insurance Company was not aware of the correct policy language nor had the correct policy language in his possession during the declaratory judgment action. This was an obvious attempt to shift responsibility from Erie and its counsel to the Adkins.

Erie was actually asserting that the policy was not something that it could have reasonably found during the litigation, and thus were forced to rely on the representations of the Adkins. The premise that Erie did not have the correct Erie insurance policy and had to rely on the Adkins' representation is absurd. It is ludicrous for Erie to assert that Erie was not privy to what Erie alleges was the correct Erie policy. Certainly, Erie did have in its possession the Pioneer Family Auto Insurance Policy of

Nancy Johnson in effect on the date of the accident, as it produced it in response to discovery. To lay blame on the Adkins or their counsel, or contend that Erie had to rely on them for the accuracy of the policy language, is simply nonsense. Erie did not establish that, despite its diligence in ascertaining the correct policy, it was unable to do so prior to summary judgment. Even a modicum of diligence would have permitted Erie to produce the correct policy. The trial court abused its discretion in indulging Erie in another round of judicial proceedings after the award of summary judgment. Thus, the granting of Rule 60 relief should be set aside, and the original award of summary judgment to the Adkins reinstated.

B. Erie Waived Its Right to Assert That Alternative Policy Language Applied.

To affect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right. *Potesta v U.S. Fidelity and Guaranty Company*, 202 W.Va. 308, 504 S.E.2d 135, 142 (W.Va. 1998). This intentional relinquishment or waiver may be expressed or implied. *Id.* Waiver may be established by express conduct or impliedly, through inconsistent actions. *Id.* The doctrine of waiver focuses on the conduct of the party against whom waiver is sought. *Id.* There is no requirement of prejudice or detrimental reliance by the party asserting waiver. *Id.* Consistent reliance by an insurer on one condition or defense may have the effect of constituting a waiver of other possible known forfeitures. *Potesta*, 504 S.E.2d at 144 (citations omitted).

In *Potesta*, this Court noted that implied waiver has been found to occur in various circumstances, including when an insurer was deemed to have waived a sixty day term limit imposed on the insured to submit a proof of loss where the insurer failed to initially deny the claim on that ground, acknowledged receipt of the proof of loss that was submitted after the sixty days had expired, and requested additional information from the insured in its letter acknowledging receipt of the proof of loss. *Id.* (citation omitted). The *Potesta* court also noted that an insurance company impliedly waived its challenge to the sufficiency of a notice of potential claim it received from its insured where it was silent as to the sufficiency of the notice for ten months, did not request any additional information from its insured and did not raise the issue of the sufficiency of notice until after a lawsuit had been initiated. *Id.* (citations omitted).

In this case, it is easy to find that Erie, either expressly or impliedly, has waived or intentionally relinquished its right to rely on alternate policy language defining bodily injury. One must presume that Erie was provided with a copy of the pleadings filed and the *Order Granting Summary Judgment* filed in this matter. Erie first had an opportunity to assert alternative policy language in response to the discovery requests, wherein the Adkins asked for a copy of the policy of Nancy Johnstone in effect on the date of the accident. It can be presumed that Erie was consulted and supplied the policy that was produced in June, 2007. However, even if one assumes, *arguendo*, that Erie did not participate in producing the policy or answering discovery, it can logically be assumed that Erie was provided with a copy of the policy and the Response to Requests for Production of Documents filed on its behalf by its counsel. No objection or alternative policy

language was brought forth at that juncture.

One can also logically assume that Erie was provided with a copy of the *Plaintiffs' Motion for Summary Judgment*, which set forth the policy language as produced in response to discovery. No objection or alternative policy language was raised at that time. One can also logically assume that Erie was provided with a copy of the *Response to the Plaintiffs' Motion* filed on its behalf, where it was represented that the definition of bodily injury was undisputed. No objection or alternative policy language was raised at that point. One can also logically assume that Erie was provided with a copy of the circuit court's Order entered on May 20, 2008, wherein the circuit court set forth the definition of bodily injury under the Erie policy. No objection or alternative policy language was raised for over three (3) months.

Undoubtedly, Erie had knowledge of the policy language that formed the basis of the Adkins' Motion, Erie's response, and the circuit court's order. Erie, only belatedly, after the civil action was final, and immediately prior to the running of the appellate period, raised the issue of alternative policy language. One has to conclude that Erie intentionally relinquished its known right to rely on this alternative policy language.

Implied waiver has been found to occur in less egregious circumstances. If an insurer waives a sixty day time limit by failing to deny the claim on that ground and accepting proof of loss after the sixty days has expired, then certainly the actions of Erie in this case would be found to constitute an implied waiver. Furthermore, if an insurer can be deemed to waive its challenge to the sufficiency of notice of a potential claim where the

insurer was silent as to the sufficiency of the notice for a period of ten months, did not request any additional information and did not raise the issue until after a lawsuit had been initiated, then certainly the conduct of Erie could be deemed to constitute an implied waiver. In this case, Erie affirmatively 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 policy with the attendant 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. In fact, such issue was not raised until after the lawsuit had been finalized by way of summary judgment. Accordingly, Erie should be held to have waived the right to assert that alternative policy language is applicable.

C. Estoppel Also Precludes Erie From
Asserting that Alternative Language Applied.

Estoppel applies where the party is induced to act or to refrain from acting to his/her detriment because of reasonable reliance on another party's misrepresentation or concealment of a material fact. *Potesta*, 504 S.E.2d at 143. Estoppel is properly invoked to prevent a litigant from asserting a claim against a party who has detrimentally changed his or her position on reliance upon the litigant's misrepresentation or failure to disclose a material fact. *Id.* The doctrine is designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice

and good conscience. *Moreland v. Wetzel County Board of Education*, 212 W.Va. 215, 569 S.E.2d 462, 472 (W.Va. 202). When an insurer specifies the ground on which it denies coverage to its insured, and the insured pursues a course of action on reliance on the insurer's asserted defense, the insurer is estopped to raise a new ground upon which to deny coverage. *Potesta*, 504 S.E.2d at 143 (citations omitted).

In this case, the doctrine of estoppel should have precluded Erie from asserting that there was a new ground upon which the circuit court should rule upon the declaratory judgment action. Erie asserted a defense or alternative policy language after the civil action had been fully litigated and summary judgment granted to the Adkins. To permit Erie to disavow its prior conduct in producing one policy was not responsive to the demands of justice nor good conscience. Furthermore, the Adkins reasonably relied upon Erie's representation as to the applicable policy language, and complied in all respects with the Rules of Civil Procedure in litigating and briefing the case to finality. The untimely assertion of the alternative policy language left the Adkins without any means by which to be assured that the alternative policy language belatedly submitted was in fact the correct policy language.

Throughout the action, the Adkins relied, reasonably, upon the representation of Erie as to the applicable policy language. Erie then sought to have the circuit court case to begin again, once the Adkins had already fully litigated the matter for a year and one-half. Judicial economy and finality certainly was not served by the belated motion of Erie. There is supposed to be finality to litigation. Certainly, a party should be held to the representations that it makes in pleadings. Unquestionably, the Plaintiffs

relied to their detriment upon the representations of Erie as the Adkins pursued a course of action in reliance on Erie's asserted policy language. Erie should have been estopped to raise a new policy language upon which to deny coverage after summary judgment was granted against it.

D. The Adkins Claim is a Separate and Distinct Cause of Action, Entitling Them to the Separate Per Person Limits.

An injury to a minor child gives rise to two causes of action: (1) an action on behalf of the child for pain and suffering, permanent injury, and impairment of earning capacity after majority; and (2) an action by the parent for consequential damages, including the loss of services and earnings during minority and expenses incurred for necessary medical treatment for the child's injuries. *Glover v. Narick*, 184 W.Va. 381, 400 S.E.2d 816, 821 (W.Va. 1990). Thus, a parent's right of action for consequential damages is **separate and distinct** from the child's right of action for his or her injuries. *Id.* (emphasis added). The liability of a defendant between the parent's and the minor's claim is **entirely severable**. *Id.*⁴

⁴ This Court, in *Packard v. The Honorable Roger Perry, et. al.*, 221 W.Va. 526, 655 S.E.2d 548, (W.Va. 2007), reiterated the fact that a parent has a cause of action for medical bills incurred as a result of a minor's injuries. In *Packard*, the parent of an injured minor had not filed a suit for the medical expenses within the applicable statute of limitations period. The Circuit Court of Logan County ruled that only the mother, through her own action, could seek recovery for the medical expenses of her minor child. This Court found that a minor also has the right to recover such expenses, but under no circumstances is a double recovery permitted. Thus, if a procedural bar would prevent the parent's recovery, then the minor can recover. *Packard* did not change the fact that a parent still has a separate and distinct cause of action for medical bills, nor the fact that an injury to a minor gives rise to two separate and distinct causes of action. *Packard* simply ensured that the tortfeasor was held responsible for the harm caused by his conduct, in light of the mother's failure to timely present her claim.

In support of its *Motion for Summary Judgment*, Erie acknowledges that the parents claim is defined as one that is separate and distinct from the claim of the minor. However, it contends that for the purpose of construing available coverage, it can deem the parents claim to be derivative in nature. Upon doing so, Erie then relies upon the *Limit of Protection* provision that applies to derivative claims. While this re-characterization of the nature of the parents claim permits Erie to reach the intended result of restricting coverage, it does not comport with West Virginia precedent. Quite simply, the parents claim is not a derivative claim. Rather, it is defined as a separate and distinct cause of action from that of the minor. Thus, their claim cannot be subject to a derivative claim limitation provision.

The fact that the claims are separate, distinct and severable is well illustrated by the differing statute of limitations periods that apply. The parents can, and in fact must, present their claim within two years of the date of the accident. The minor, however, is not governed by this same statute of limitations period. Should the parents timely file their claim, and recover, then the minor, who enjoys tolling provisions that do not require an action be filed within two years of the date of the injury, could only recover for pain and suffering, permanent injury and impairment of earning capacity after majority. West Virginia does not require that the parent and the minor present their separate claims at the same time. In fact, it specifically contemplates that they will not. It is the separate injury that both kinds of claims suffer that entitles them to separate per person limits.

The payment of the parent's separate and distinct claim, however, was made subject to Kayla's separate and distinct recovery for her pain and suffering and

permanent impairment. As Erie claimed only one per person limit applies, the parents acquiesced and permitted their daughter to receive the proceeds for compensation for her immense pain and suffering that she had endured. This forced a minor - who absolutely and undeniably had a right to wait to prosecute her own claim until she attained majority - to prematurely resolve her claim when her parents attempted to resolve their own personal and independent claim. This is clearly violative of West Virginia law, which permits separate, independent and entirely severable recovery for the parents and the child. It also violates *West Virginia Code* §33-6-31(a), which requires an insurer to issue a policy that insures against liability for death or bodily injury sustained or loss or damage occasioned as a result of the negligence of the insured. In essence, the policy is actually only covering either bodily injury to the minor or loss to the parents, but not both claims. It is also inconsistent with the policy language promising to pay on behalf of the insured all sums the insured must legally pay as damages caused by an accident.

As the parent's claim under the law of West Virginia is defined as a separate and distinct personal injury to the parent's upon the happening of the injury to their child, then the parent's have in fact suffered a compensable injury, separate and apart from that of their child, which is subject to a separate per person limit. The liability that arises to the parents is severable from the liability to the minor. The parent's claim can be resolved, and the tortfeasor faces no more exposure for the payment of the minor's medical bills, nor a risk of double recovery. Often, the need to quickly resolve the parent's claim is because of the pressing need to pay the medical providers, even if the full nature and extent of the future effects of the injury to the minor are not ascertainable at that point. In fact, often

times the money is needed so that the minor can receive or continue to receive treatment. The minor can wait to determine the future effects of the injuries prior to resolving their claim. However, the position of Erie that the claims are derivative and must be resolved simultaneously strips a minor of the tolling of their statute of limitations period, subjecting both claims to the two year limitation period of the parents. This violates West Virginia law and public policy.

E. The Cases Relied Upon
By Erie are Inapplicable.

Erie's argument is premised on its position that the claim at issue is a derivative claim, and thus is subject to the limitation provision for derivative claims. The cases it relies upon for the proposition that a derivative claim can be made subject to a single per person limit are inapplicable in this case. *Davis v. Foley* was a wrongful death action. The *Davis* court held that the damages from a wrongful death action arise out of the death of the decedent thereby making a wrongful death action a derivative claim. *Davis v. Foley*, 193 W.Va. 595, 457 S.E.2d 532, 537 (W.Va. 1995). This Court relied upon the premise that the death of an individual does not cause the estate and survivors to suffer a direct loss from the collision, but rather from the loss of the individual. *Id.* at 536. *Federal Kemper Ins. Co. v. Karlet*, 189 W.Va. 79, 428 S.E.2d 60 (W.Va. 1993) was a parental loss of consortium claim. In reaching the decision in that case, this Court noted that the nature of the claim could not be construed as an independent action. *Karlet*, 428 S.E.2d at 63. This Court noted in these decisions that the nature of the claim did not deal with a direct loss or an independent action. The reliance on *Erie Ins. Prop. & Cas. Co. v.*

Keneda, 142 F.Supp.2d 756 (S.D. W.Va. 2001), was also misplaced. *Keneda* dealt with a wrongful death claim, which was defined as derivative in nature.

In contrast to the cases relied upon *Erie*, the parents suffer an immediate and direct loss upon the injury of their child, and have an independent cause of action. The two claims asserted are by definition separate and distinct. Quite clearly, the claim at issue herein is not a derivative claim. West Virginia defines the parent's claim as separate, distinct, severable and independent of the child's, and expressly stated that an injury to a child gives rise to **two personal injuries** actions - *i.e.* **two separate bodily injuries**. West Virginia has expressly not defined the claim of the parent's as a derivative claim, like it has a wrongful death or loss of consortium claim. *Erie* cannot require that the two separate and independent causes of action be subject to the same per person limit, much like they could not require two different individuals injured in an accident to share in one per person limit. For that reason, this Court should declare that, pursuant to the definition stating that a parent's claim is separate and distinct, and severable from that of the minor, then an injury to a child gives to rise to two personal injuries, which are not derivative, are to be considered separate bodily injuries subject to separate per person limits, and are not subject to a derivative limitation policy provision.

Ohio has recognized that a parent's claim is a separate and distinct cause of action, subject to separate per person limits. The determination of whether the parties are entitled to separate per person limits turns on whether the parties have suffered a "separate injury". *Myers v. Cent. Ins. Co.*, 119 Ohio App.3d 277, 695 N.E.2d 49 (Oh. 1997). *Myers* arose from an automobile accident where Camile Myers, a minor, was

injured by the negligence her mother, Kay Cee Berkey. *Id.* at 279. Camile's father, Mark Myers, asserted that he was entitled to his own separate limit and benefits due to the injury to his child and the resultant medical expenses. *Id.*

The Ohio court found that the father had a separate and distinct cause of action that entitled him to relief, relying on the following: "[w]here a minor child sustains an injury allegedly as a result of negligence of a defendant, two separate and distinct causes of action arise: an action by the minor for his personal injuries and a derivative action in favor of the parents of the child for the loss of services and his medical expenses". *Id.* (citations omitted). The Ohio court found that he was an insured, had suffered a separate injury, and in keeping with public policy considerations, should be protected from losses that would otherwise go uncompensated. *Id.* An endorsement that attempted to limit his damages to a single per person limit was found to be unenforceable. *Id.* Thus, the father was found to have a separate injury which entitled him to a separate per person limits. *Id.* This was so even though Ohio termed the cause of action inconsistently as both a separate and distinct cause of action and a derivative claim.

The Adkins suffered a direct loss when their daughter was injured. Any policy provision that attempts to limit their recovery would be void as against public policy and unenforceable. The result reached by the *Myers* court is mandated here.

F. Alternatively, The Adkins' Have Suffered Damages Under the Policy.

The determination of the proper coverage of an insurance contract when the

facts are not in dispute is a question of law. *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (W.Va. 2002); *Jenkins v. State Farm Mut. Auto Ins. Co.*, 219 W.Va. 190, 632 S.E.2d 346, 349 (W.Va. 2006)(*per curiam*). The language in an insurance policy should be given its plain, ordinary meaning. *Potesta v. United States Fid. & Gaur. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (W.Va. 1998). Thus, where the provisions of an insurance policy contract are clear and unambiguous and where such provisions are not contrary to a statute, regulation or public policy, the provisions will be applied and not construed. *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (W.Va. 1985).

Insurance policies are controlled by rules of construction that are applicable to contracts generally. *Payne v. Weston*, 195 W.Va. 502, 466 S.E.2d 161, 166 (W.Va. 1995). A court will apply, and not interpret, plain and ordinary meaning of insurance contract in absence of ambiguity or some other compelling reason. *Id.* All parts of an insurance contract are to be construed together. *Id.*

The parents have suffered a separate and distinct personal injury cause of action as defined by West Virginia law, and for that reason a finding of separate injuries and separate per person limits is mandated. The Erie policy, in the "*Liability Protection*" section states that it "*will pay all sums you (the insured) 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. Erie's position that an individual must physically be

present in the automobile in order to incur a bodily injury entitling them to their own separate per person limits is not supported by the definition. The policy sets forth that damages sustained as a result of bodily injury will be paid. The definition of bodily injury does not require actual, physical contact. As the insured is obligated to pay the parents for their damages, and their damages involve a bodily injury, then they are entitled to separate per person limits.

Erie's argument is premised on the theory that the single policy limit by necessity applies if one person's injuries result from or arise out of the bodily injury of another. Erie characterizes the claim of the parents as "derivative" of their daughter's claim for personal injuries. According to Erie, the parents claim is by its nature derivative of their daughter's claim as it arises out of her injuries, and therefore must fall under the single per person bodily injury limit. The policy 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 asserts that the phrase *arising out of bodily injury to one person in any one accident* encompasses the parents medical expenses because the expenses arise out of their daughter's bodily injury within the intention of the policy language used to define bodily injury.

The Erie policy, though, must be read in total and construed as one document. Thus, the "*arising out of*" clause must be construed with the policy language that defines the coverage for Each Accident. The policy further 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. However, “*bodily injury to one person*” is not defined in the policy. In order to limit coverage, Erie construes the per person sentence to include all bodily injury and damages to others resulting from that bodily injury. Thus, under its construction, if a driver was forced off the road by another car, the driver was injured by that event, then hit a tree, which injured his passenger, then the passenger's injuries would have resulted from the driver's injuries, and thus be subject to a single bodily injury limit. This would be an absurd result.

If Erie intended for the per person sentence to restrict all claims that arise or derive from one individual's bodily injury, then the provisions should have stated “[*t*]he per person limit for Bodily Injury Liability is the most we will pay for bodily injury and all damages arising from this bodily injury to one person in any one accident. (underlined words added to make the sentence clear). Erie reads the per person sentence in its policy in isolation, disregarding the remainder of the policy that promises to pay the per accident limits for all damages that arise out of bodily injury to all persons that results from the one accident. The each person limit would apply if only one person suffered a bodily injury. However, separate limits apply if more than one person suffers a bodily injury.

The Adkins and their daughter suffered a bodily injury under the policy, and thus the per accident limit applies, not the per person limit.

G. Alternatively, the Policy Is Ambiguous.

Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree to its meaning, it is ambiguous. *Jenkins v. State Farm Mut. Auto Ins. Co.*, 219 W.Va. 190, 632 S.E.2d 346, 350 (W.Va. 2006). 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. *Id.* 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. *Id.* Likewise, where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated. *Id.* For this reason, an insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. *Id.* It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured. *Id.* at 351.

The *Liability Protection* provision promises to pay **all damages** that an insured must pay. This would by necessity include both economic and physical damages. To the extent that the next paragraph stating what damages must involve restricts the damages to physical damages only, then the policy is reasonably susceptible

to two different meanings, and is ambiguous. What the first sentence appears to give, the next one appears to take away. If the policy language is ambiguous, it is to be strictly construed against Erie.

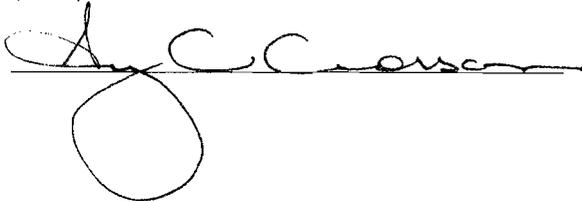
Erie relies on the following paragraph to limit coverage to the per person limit: *“If an individual’s damages derive from, arise out of or otherwise result from bodily injury to another person injured in the accident or the death of another person killed in the accident, we will pay only for such damages 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. Additionally, the argument set forth in Section F above would also apply here. 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.

JAMES ADKINS AND
MARLAINE ADKINS
BY COUNSEL

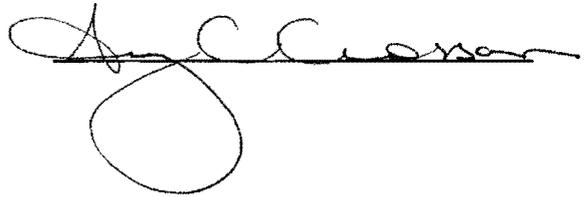
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A handwritten signature in cursive script, appearing to read "Amy C. Crossan", written over a horizontal line. Below the line is a large, stylized circular flourish.

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 BRIEF OF APPELLANTS JAMES AND MARLAINE ADKINS' was served by United States mail, postage prepaid, in an envelope addressed to the following, on the 12th day of October, 2010:

CHRISTOPHER J. SEARS (WVSB #8095)
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(304) 343-1826 (facsimile)

A handwritten signature in black ink, appearing to read "Amy C. Crossan". The signature is written in a cursive style with a large loop at the end.