



Appeal No. 35676
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES ADKINS AND MARLAINE ADKINS,

Appellants,

vs.

ERIE INSURANCE COMPANY,

Appellee.

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

BRIEF OF APPELLEE ERIE INSURANCE COMPANY

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BRIEF OF APPELLEE ERIE INSURANCE COMPANY

I. STATEMENT OF THE CASE

This appeal arises, in part, out of the Circuit Court's decision to reverse its Order granting summary judgment in favor of the Appellants. The Circuit Court granted relief from that judgment because the parties were under the mistaken belief that the applicable definition of "bodily injury" contained in the subject Erie policy included damages arising from "care" and "loss of services" when, in fact, it did not. At the time the original motions for summary judgment were briefed, counsel for the Appellee was unaware of the Policy Change Endorsement AFWA02 (Ed. 6/04) that modified the definition of "bodily injury" and did not correct the Appellants' representation as to the applicable policy language.

In their Motion for Summary Judgment, the Appellants incorrectly asserted that the Erie policy at issue contained the following provision:

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 or disease, *including care, loss of services*, or resultant death; . . . (emphasis added)

In this regard, the language relied upon by the Appellants had, in fact, been changed pursuant to Policy Change Endorsement AFWA02 (Ed. 6/04), which modified the definition of Bodily Injury as follows:

Damages must involve:

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

See Exhibit A. This is the policy language in effect at the time of Ms. Adkins' motor vehicle accident and should have been the language considered by the Circuit Court in deciding the Appellant's Motion for Summary Judgment. Although the endorsement had, upon information and belief, been previously provided to counsel for the Appellants, counsel for Erie was neither aware of the endorsement nor had the endorsement in his possession at the time the issues were being briefed and was, therefore, unable to correct this mistake of fact. The Circuit Court's decision to grant summary judgment in favor of the Appellants was predicated upon policy language not actually in effect at the time of the subject accident. Thus, the Circuit Court subsequently granted Erie's Motion for Relief from Judgment or Order because the parties were mutually mistaken as to the applicable and controlling policy language.

Although they were not themselves personally involved in the motor vehicle accident and did not sustain physical injury to their bodies, the Appellants, James Adkins and Marlaine Adkins,

as parents of Kayla Adkins, asserted claims against Erie and Johnstone for consequential damages allegedly incurred as a result of the motor vehicle collision including, but not limited to, lost wages, the loss of services and earnings during minority, and expenses incurred for necessary medical treatment of their daughter, Kayla Adkins.

Prior to and throughout the course of this litigation, Erie has consistently denied that it was obligated to tender more than one per person policy limit of One Hundred Thousand Dollars (\$100,000.00) for payment of the combined claims of James Adkins, Marlaine Adkins, and Kayla Adkins. After lengthy negotiations, the parties agreed that Erie and Johnstone would fully compromise and settle all disputes between themselves and Kayla Adkins by payment of Erie's policy limits of One Hundred Thousand Dollars (\$100,000.00) to Kayla Adkins. The Appellants consented to and acquiesced in Erie's payment of policy limits of One Hundred Thousand Dollars (\$100,000.00) to Kayla Adkins and, further, waived any right or claim to any portion of the policy limits of One Hundred Thousand Dollars (\$100,000.00) paid by Erie to Kayla Adkins. Appellants also waived any right or claim of recovery against Johnstone other than what may be available as a separate per person policy limit of One Hundred Thousand Dollars (\$100,000.00) under the Policy.

In reaching this settlement, James and Marlaine Adkins specifically reserved the right to file a declaratory judgment action against Erie to determine whether they have a right to recover, and Erie has an obligation to pay, per person policy limits separate and apart from that paid to Kayla Adkins. That was the issue presented to the Circuit Court of Cabell County on motions for summary judgment.

Thereafter, Erie renewed its Motion for Summary Judgment in light of the correct policy language. The Circuit Court granted Erie's renewed Motion for Summary Judgment, based on the

correct definition of “bodily injury.”

II. POINTS & AUTHORITIES RELIED UPON

CASES

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<i>Burgess v. Gilchrest</i> , 123 W.Va. 727, 729, 17 S.E.2d 804, 806 (1941).	15
<i>Panagopoulous v. Martin</i> , 295 F.Supp. 220, 222 (S.D.W.Va. 1969))	15
<i>Christopher v. U.S. Life Ins. Co.</i> , 145 W.Va. 707, 116 S.E.2d 864 (1960)	17
<i>Nationwide Mut. Ins. Co. v. McMahon & Sons, Inc.</i> , 177 W.Va. 734, 356 S.E.2d 488 (1987)	17

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III. AUTHORITY & DISCUSSION OF LAW

Determination of the proper coverage of an insurance contract, when the facts are not in dispute, is a question of law. Syl. Pt. 1, Tennant v. Smallwood, 211 W.Va. 703, 568 S.E.2d 10 (2002). Moreover, 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). Where the provisions in 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. Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714 (1970).

A. The Circuit Court was correct in granting Rule 60 relief from judgment to Erie, inasmuch as the Court’s entry of summary judgment to the Appellants was predicated upon a mutual mistake as to the applicable insurance policy language.

It is axiomatic that to have a just and fair adjudication of a declaratory judgment action involving a question of coverage under a policy of insurance, it is imperative that the Court consider the correct insurance policy language. Erie’s motion for relief from the Circuit Court’s entry of

summary judgment was brought on the basis that the parties in this action were under the mistaken belief that the definition of “bodily injury” in the subject policy included damages arising from “care” and “loss of services” when, in fact, it did not. See Exhibit A.

By Order dated May 20, 2008, the Circuit Court granted judgment in favor of the Appellants based upon the mistaken belief that the applicable insurance policy included “care” and “loss of services” in its definition of “bodily injury.”

Upon discovering the parties’ mistake of fact, Erie properly moved the Court, pursuant to Rule 60, for relief from that judgment. Specifically, Erie requested that the Circuit Court reexamine its decision on the cross-motions for summary judgment in light of the fact that the correct definition of “bodily injury” was not that which was originally presented to the Court.

1. The Circuit Court correctly relieved Erie from the Order granting summary judgment in favor of the Appellants because it was based upon a mistake of fact that the policy at issue defined “bodily injury” so as to include “care” and “loss of services” when, in fact, it did not.

Pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, the court may:

relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertance, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretobefore denominated as intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b), W.Va.R.Civ.Pro. Rule 60 is to be “liberally construed for the purpose of accomplishing justice[;] . . . it was designed to facilitate the desirable legal objective that cases are to be decided on the merits.” Cook v. Channel One, Inc., 209 W.Va. 432, 549 S.E.2d 306 (2001).

The West Virginia Supreme Court has stated that Rule 60 “clearly provides that a motion for relief from judgment may be granted because of a mistake.” Allen v. Allen, 212 W.Va. 283, 569 S.E.2d 804 (2002). In addition, this Court has found that such relief may be granted to correct a misapplication of the law. Id. Furthermore, where misrepresentation, either intentional or unintentional, has been discovered after entry of the judgment, then the judgment may be set aside. Gerver v. Benavides, 207 W.Va. 228, 530 S.E.2d 701 (1999).

Notably, a motion to vacate a judgment made pursuant to W.Va.R.C.P. 60(b) is addressed to the sound discretion of the court and the court’s ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion. Jividen v. Jividen, 212 W.Va. 478, 575 S.E.2d 88 (2002). Under abuse of discretion review, the appellate court does not substitute its judgment for the circuit court’s. Burdette v. Maust Coal & Coke Co., 159 W.Va. 335, 342, 222 S.E.2d 293, 297 (1976).

Here, the Appellants cited the incorrect definition of “bodily injury” when they filed their motion for summary judgment. Because Erie’s motion for summary judgment focused solely on the exclusionary language regarding derivative claims, the Appellee did not affirmatively raise the issue of whether coverage was provided under that policy definition. In responding to the Appellants’ motion for summary judgment, counsel for Erie relied in good faith on Appellants’ representation as to the policy language. Indeed, at the time, counsel for Erie did not have any policy documentation that would suggest that the Appellants’ representation was incorrect. Instead, it was not until after judgment had been entered that counsel for Erie discovered that the subject language had been modified by an endorsement.¹ Certainly, there was no gain or unfair advantage that could have been obtained on the part of Erie by withholding this information. Consequently, the Circuit

¹In its motion for relief from judgment, Erie attached an affidavit supporting the effective date of the policy language at issue here. The Appellants did not challenge the veracity of that affidavit.

Court was correct in relieving Erie from the Order granting summary judgment in favor of the Appellants because it was based upon a mistake of fact.

The Circuit Court correctly found that this case presents a situation where a mutual mistake was made by both of the parties – the Appellants and the Appellee – as to the correct definition of the phrase “bodily injury” as it was defined under the insurance policy made subject to this declaratory judgment action. There can be no question that the Appellants incorrectly presented to the court and the Appellee failed to correct the policy language upon which the Court was asked to render its decision. It has also not been disputed by the Appellants that, prior to the institution of this action, Erie, in fact, forwarded to counsel for the Appellants the insurance policy which included the indorsement that changed the definition of “bodily injury.” This fact was asserted in the Appellee’s original motion and again at oral argument and counsel for the Appellants has never denied that it occurred. Thus, this case presents the text-book situation to which Rule 60(b) of the West Virginia Rules of Civil Procedure was designed to apply – relief from judgment that was based upon a mistake. It is only by granting the relief from judgment that the desirable legal objective that cases should be decided on their merits was realized in this case. Cook v. Channel One, Inc., supra.

2. The Circuit Court properly granted Rule 60 relief because Erie’s motion was predicated upon a mutual mistake of fact, not newly discovered evidence.

In their Petition, the Appellants have incorrectly asserted that Erie’s motion for relief from judgment was predicated upon “newly discovered evidence” – a basis that was not asserted by Erie in its motion and a basis that was not relied upon by the Circuit Court in granting said motion. For example, the Appellants erroneously rely upon Powderidge Unit Owners Ass’n. v. Highland Properties, 196 W.Va. 692, 474 S.E.2d 872 (1996), which case stands for the proposition that Rule

60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit. Stated another way, “[w]here the motion is nothing more than a request that the court change its mind . . . it is not authorized by Rule 60(b).” *Id.* That is not the case here. Rather than asking the Circuit Court to revisit its analysis of the legal issues in this case, the Appellee properly requested the Circuit Court to apply a definition of bodily injury which, due to a mutual mistake, was completely different from that which was originally considered.

Indeed, the Circuit Court initially found that coverage existed only because the definition of “bodily injury” presented to it contained language that included “care and loss of services.” That definition was presented to the Court by mistake, inasmuch as those words do not exist in the definition that actually was in effect at the time of the underlying motor vehicle accident. Consequently, the Circuit Court did not merely revisiting the same legal analysis conducted before; rather, the motion for relief and the Circuit Court’s Order granting the same were properly predicated upon a mutual mistake.

The Appellants have made no showing that the Circuit Court abused its discretion in granting Rule 60 relief to Erie. Therefore, the decision of the Circuit Court should not be disturbed on appeal.

3. The doctrine of waiver is inapplicable.

Erie’s mistake in not catching and correcting the Appellants’ assertion of the wrong definition of “bodily injury” does not constitute a waiver. The Appellants’ factual analysis is flawed. In order to effect a waiver under the law of West Virginia, a party must intentionally relinquish a known right. Potesta v. U.S. Fidelity and Guaranty Company, 202 W.Va. 308, 504 S.E.2d 135, 142 (W.Va. 1998). Here, Erie did not intentionally relinquish a known right, in that it has never waived in its position that the Appellants are not entitled to coverage under the applicable insurance policy.

Long before this action was filed, Erie took the position that the parents of Kayla Adkins did not suffer a bodily injury. When Kayla Adkins' claim was compromised, Erie took the position that her parents did not suffer a bodily injury and thus could not recover under the policy. When her parents then filed the instant declaratory judgment action, Erie took the position that they were not entitled to coverage under the policy. Throughout the course of discovery and briefing of the issues on summary judgment, Erie continued to take the position that the Adkins' were not entitled to coverage under the policy. Even after summary judgment was entered in favor of the Appellants, Erie continued to take the position that the Appellants' parental claims did not trigger coverage under the applicable insurance policy.

In short, Erie never intentionally relinquished its right to rely upon the correct policy language. Only through mistake was the incorrect language presented to the Court by the Appellants and subsequently addressed by Erie. Further, Erie has never waived in its defense that coverage does not apply in this case. The only difference is that Erie discovered that a mistake was made regarding the correct definition of "bodily injury." Consequently, at no time did Erie ever intentionally relinquish the known right to deny coverage in this case. Instead, Erie consistently took the position that no coverage existed. As such, the situation presented by this case reconciled seamlessly with the relief afforded under Rule 60(b) for mistake rather than the harsh consequence realized under the doctrine of waiver.

4. The doctrine of estoppel is inapplicable.

Similarly, the doctrine of estoppel is inapplicable in the instant case because the Appellants never detrimentally changed their position in reliance upon any alleged misrepresentation or failure to disclose a material fact on the part of Erie. As explicated above, at all times throughout this

litigation, Erie has consistently taken the position that coverage does not exist in this case because the parental claims of the Appellants do not satisfy the definition of “bodily injury.”

After summary judgment was entered in favor of the Appellants, Erie did not, as the Appellants would contend, attempt to deny coverage on a new ground. Instead, Erie has held steadfast to its position that coverage does not exist under the definition of “bodily injury.” The only difference is that the case was subsequently presented on the correct definition of “bodily injury” – on the merits of the action. Notably, the correct definition of “bodily injury” is the definition that the Appellants had in their possession prior to the commencement of this declaratory judgment action. Certainly, one can hardly argue against the proposition that a case should be determined upon its merits rather than taking advantage of a mutual mistake.

B. The Circuit Court was correct in granting summary judgment in favor of Erie, inasmuch as the Appellants’ claim is a derivative claim, not a separate and distinct claim for “bodily injury” suffered by the Appellants.

The West Virginia Supreme Court has directed that an insurance policy must “receive a practical and reasonable interpretation, consonant with the apparent object thereof and the intent of the parties.” Syl. Pt. 1, McGann v. Hobbs Lumber Co., 150 W.Va. 364, 145 S.E.2d 476 (1965). The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination. Payne v. Weston, 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995). In the absence of ambiguity or some other compelling reason, a court applies and does not interpret the plain and ordinary meaning of an insurance contract. Id., 195 W.Va. at 507, 466 S.E.2d at 166. “Ambiguity” is defined as language “reasonably susceptible of two different meanings” or language “of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]” Id. (quoting Shamblin v. Nationwide Mutual Ins. Co., Syl. pt. 1, 175 W.Va. 337, 332 S.E.2d 639

(1985)). “A court should read policy provisions to avoid ambiguities and not torture the language to create them.” Id.

1. The Appellants’ claim is deemed to be “derivative” for the purpose of construing the policy language limiting recovery to the per person policy limits.

a. **Parental Claims:** Under the law of West Virginia, the parents of an injured minor have a claim for consequential damages arising out of that minor’s injury. Glover v. Narick, 400 S.E.2d 816 (W.Va. 1991). Indeed, as explained by this Court in Glover, a personal 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.

Id., at 821. This Court further explained that “[a]lthough it is based upon and arises out of the negligence causing injury to the child, the parent’s right of action for consequential damages is separate and distinct from the child’s right of action for his or her injuries.”

Thus, in the case at hand, both Ms. Adkins and her parents have a right to be compensated under Ms. Johnstone’s insurance policy. The legal dispute in this case, though, is whether the Appellants are entitled to a separate, per-person policy limits where it is undisputed that they were not directly involved in the motor vehicle accident and received no physical injury to their own bodies as a result of the crash.

b. **Available Policy Limits:** The primary question in this case is whether, under the policy at issue, the policy limits are governed by the per person limit or the per occurrence limit? The answer to this question is found in the plain language insurance policy itself, which provides as follows:

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.

See Exhibit A at 7 (emphasis added). In the past, the West Virginia Supreme Court has enforced similar language that limited the recovery of derivative claims to the per person policy limits of a policy. See, e.g., Davis v. Foley, 193 W.Va. 595, 457 S.E.2d 532 (1995) (holding under the applicable policy language that “per person”, rather than “per occurrence”, limits apply to wrongful death action for insured's surviving spouse and children), and Federal Kemper Insurance Company v. Karlet, 189 W.Va. 79, 428 S.E.2d 60 (1993) (holding under the applicable policy language that minor children claiming loss of consortium were not to be treated as separate injured persons subject to separate “per person” and “per occurrence” liability limits).

Although this Court apparently has not specifically addressed the language contained in Erie's insurance policy, identical language was the focus of Erie Insurance Property & Casualty Company v. Keneda, 142 F.Supp.2d 756 (2001). In Keneda, the United States District Court for the Southern District of West Virginia was confronted with the question of whether, in a wrongful death case, the “per person” limit or the “per occurrence” limit applies to derivative claims made under an Erie insurance policy that contained the same language at issue in this matter. In holding that the language would be applied as written, the Court found that “[t]he policy language at issue clearly and unambiguously limits damages for derivative claims to the per PERSON limit available to the person injured or killed in the accident.” Consequently, based upon this case-law, the policy limits available to Ms. Adkins' and her parents should, as a matter of law, be limited to the per person limit.

Further, this precise issue was presented to the West Virginia Supreme Court in Davis v. Foley, supra. In Davis, the decedent was killed in an automobile accident caused by an insured of Nationwide Mutual Insurance Company. The decedent's mother, in an action for wrongful death, asserted that under the Nationwide policy, and under her underinsurance coverage provided by the Westfield Insurance Company, she was entitled to recover upon a per occurrence, rather than upon a per person, basis. As identified by the Court in Davis, the issue presented was as follows:

[W]hether such a wrongful death action gives rise to a "per person claim of damages for each person having a claim thereunder up to the per occurrence limits of liability, underinsured, or uninsured coverages, or does only a single per person limit apply no matter how many individuals might have suffered damages as a result of a single death."

Davis, 193 W.Va. at 597, 457 S.E.2d at 534. In that case, this Court noted that the Nationwide and Westfield policies clearly limited coverage in the case of a single death or bodily injury "to per person limits for derivative claims." *Id.*, at 535. Thus, the Court held that, in the context of the insurance policy, the mother's wrongful death action *arose* from the death of the decedent. Consequently, the Court affirmed summary judgment in favor of Nationwide and Westfield.

Here, Erie's insurance policy provides language similar to that contained in the insurance policies at issue in Davis:

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.

Exhibit A at 7.

There is no dispute that the Appellants' claim in this case is a separate and distinct cause of action. This characterization is analogous to wrongful death claims. Indeed, it has long been held

under the law of West Virginia, that wrongful death claims create a new cause of action. See Wickline v. United States of America, 2005 WL 2897050 (S.D.W.Va. 2005) (citing Perry v. New River Coal Co., 74 W.Va. 122, 81 S.E. 844 (1914); Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co., 33 F.Supp. 580, 583 (S.D.W.Va. 1940), *a'ff'd* 115 F.2d 277 (4th Cir. 1940), *cert. denied*, 312 U.S. 702, 61 S.Ct. 807, 85 L.Ed. 1135 (1941); Burgess v. Gilchrest, 123 W.Va. 727, 729, 17 S.E.2d 804, 806 (1941); Panagopoulous v. Martin, 295 F.Supp. 220, 222 (S.D.W.Va. 1969)); see also Davis, at 535-536 (noting that the action is patterned after an English statute known as Lord Campbell's Act). Consequently, though not derivative as it is construed at common law, both wrongful death claims and a parental claim arising out of the injury to a child is derivative as construed under a policy of insurance containing the language at issue here.

As defined by the Court in Davis, the term "derivative" is defined as "[t]hat which has not its origin in itself, but owes its existence to something foregoing." Black's Law Dictionary 443 (6th ed. 1990). Thus, when this word is used in the context of construing an insurance policy, it goes to describing the relationship of the action to the bodily injury at issue, rather than the common law derivation of the action. This distinction is implicitly recognized by the Court in Glover v. Narick, 184 W.Va. 381, 400 S.E.2d. 816 (1990), wherein the court characterizes the category of damages recoverable by the parents of an injured minor as being "consequential" and as "arising out of" the negligence causing injury to the child.

Accordingly, there can be no dispute in this case that, despite the separate and distinct nature of the Appellants' cause of action, their claim for consequential damages "derive from, arise out of or otherwise result from bodily injury" to their daughter. Stated another way, for the purpose of construing the policy language at issue here, it cannot be refuted that, had Kayla Adkins never been injured in the collision, her parents would not have sustained consequential damages. As such, the

clear and unambiguous policy language limiting the parents' right to recovery to the single per person policy limits applies here, as was properly found by the Circuit Court.

2. The parents of Kayla Adkins did not sustain a "bodily injury" as that phrase is defined under the policy.

The West Virginia Supreme Court has directed that an insurance policy must "receive a practical and reasonable interpretation, consonant with the apparent object thereof and the intent of the parties." Syl. Pt. 1, McGann v. Hobbs Lumber Co., 150 W.Va. 364, 145 S.E.2d 476 (1965). In construing an insurance contract, the court should apply and not interpret the plain and ordinary meaning of the words used therein. Id., 195 W.Va. at 507, 466 S.E.2d at 166.

Here, Erie's policy defines the phrase "bodily injury" as meaning "physical harm, sickness, disease, or resultant death to a person". While the Appellant originally brought this action based upon the mistaken belief that the policy's definition of "bodily injury" included "loss of services," the definition does not, in fact, include "loss of services." Thus, Erie's Motion for Summary Judgment demonstrated to the Circuit Court that no claim can be made by the Appellants for "bodily injury" under the applicable policy language. The definition of the term "bodily injury" does not encompass consequential economic damages sustained by the parents of a minor who is physically injured; certainly, not where the parents sustained no physical injury to themselves.

Here, under the correct version of the policy at issue, the policy defines the phrase "bodily injury" as meaning "physical harm, sickness, disease, or resultant death to a person[.]" See Exhibit A. The Appellants in this case are the parents of Kayla Adkins. It is undisputed that they were not directly involved in the motor vehicle accident and received no physical injury to their own bodies as a result of the crash. Instead, their only claim arises out of their capacity as parents of Kayla

Adkins for consequential damages arising out of that minor's injury. Glover v. Narick, 400 S.E.2d 816 (W.Va. 1991). As such, they can recover damages for "loss of services and earning during minority and expenses incurred for necessary medical treatment for the child's injury." However, because neither "care" nor "loss of services" is included under Erie's definition of "bodily injury," the Appellants are not able to assert a "bodily injury" claim. Consequently, the Circuit Court properly found, as a matter of law, that Erie owed no duty to pay the Appellants under the subject insurance policy.

3. The policy is not ambiguous.

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. Syl. Pt. 1, Christopher v. U.S. Life Ins. Co., 145 W.Va. 707, 116 S.E.2d 864 (1960). Further, language in an insurance policy should be given its plain, ordinary meaning. Syl. Pt. 1, Soliva v. Shand, Morahan & Co., Inc., 176 W.Va. 430, 345 S.E.2d 33 (1986), *overruled on other grounds* by Nationwide Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987).

As set forth above, the language at issue is found in Policy Change Endorsement AFWA02 (Ed. 6/04), which provides, in part, 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; . . .

...

See Exhibit A.

The Appellants have asked this Court to determine that the above language is ambiguous because it purportedly gives and then takes away. However, that is simply a mischaracterization of the policy language.

The definition of “bodily injury” is plainly set forth therein, and its meaning is clear. While the policy states that Erie will pay all sums the insured must legally pay as damages caused by a covered accident, the term “damages” is further clarified or explained in the same policy provision. That clarification does not render the policy reasonably susceptible of more than one meaning.

Similarly, the Appellants erroneously contend that the following language is ambiguous:

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.

See Exhibit A.

Inasmuch as the Appellants themselves were not parties to the motor vehicle accident, the damages of which they complain necessarily “derive from,” “arise out of,” or “otherwise result from” the bodily injury allegedly sustained by their daughter. Thus, the per person limit is clearly applicable. The policy provision is not ambiguous as it is not reasonably susceptible of more than one meaning.

IV. CONCLUSION

For the reasons set forth herein, the Circuit Court of Cabell County was correct in granting Rule 60 relief from judgment and, therefore, the Court's Order must be AFFIRMED. Further, the Circuit Court properly granted summary judgment in favor of the Appellee, Erie Insurance Property & Casualty Company, when the applicable, controlling policy language was before it. Therefore, the Court's Order granting the Appellee's Motion for Summary Judgment should likewise be AFFIRMED.

**ERIE INSURANCE PROPERTY &
CASUALTY COMPANY**
By Counsel.



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Appeal No. 35676
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES ADKINS AND MARLAINE ADKINS,

Appellants and Plaintiffs Below,

vs.

ERIE INSURANCE COMPANY,

Appellee and Defendant Below.

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellee, Erie Insurance, hereby certifies that on this 12th day of November, 2010, a copy of the foregoing "**BRIEF OF APPELLEE ERIE INSURANCE COMPANY**" was served upon counsel of record, by depositing a true and exact copy thereof in the U.S. mail, postage prepaid, in an envelope properly addressed and stamped as follows:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE