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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JAMES ADKINS AND MARLAINE ADKINS,
INDIVIDUALLY AND AS PARENTS OF
KAYLA ADKINS, AND KAYLA ADKINS,

PLAINTIFFS,

v.

ERIE INSURANCE,

DEFENDANT.

CIVIL ACTION NO. 06-C-0905
HONORABLE F. JANE HUSTEAD

FILED
MAY 27 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ORDER

On a prior date came Plaintiffs, James Adkins and Marlaime Adkins, individually and as parents of Kayla Adkins, by and through counsel, Amy C. Crossan and Bouchillon, Crossan & Colburn, L.C., and Defendant, Erie Insurance, by and through counsel, Christopher J. Sears and Shuman, McCuskey, & Slicer, PLLC, on the parties' cross-motions for summary judgment. This Court having reviewed the record, the evidence, arguments of counsel and being otherwise fully advised, makes the following Findings of Fact and Conclusions of Law:

1. The underlying declaratory judgment action arose out of a motor vehicle accident that occurred on April 9, 2005, involving Kayla Adkins, the minor child of James and Marlaime Adkins.
2. Kayla Adkins sustained multiple injuries in the accident, and incurred medical expenses in excess of One Hundred Thousand Dollars (\$100,000.00). Her parents, James Adkins and Marlene Adkins, were held responsible for the payment of the medical expenses
3. Her parents were not occupants of either of the motor vehicles involved in the collision and as such, neither suffered physical injury to their bodies as a result of the collision.
4. The tortfeasor, Nancy Johnstone, was insured by Erie Insurance Company.

5. Plaintiffs' alleged that the parents and the minor child had separate and distinct injuries subject to separate per person limits, including: the claim of Kayla Adkins for her pain and suffering, permanent injury and impairment of earning capacity after minority, which would have exhausted a single per person limit; and the claim of James and Marlaine Adkins for the medical expenses, which would have exhausted a single per person limit.

6. Erie tendered the single per person limits of One Hundred Thousand Dollars (\$100,000.00) to the Adkins, in satisfaction of the claim presented on behalf of Kayla Adkins. James and Marlaine Adkins consented to the payment to Kayla Adkins, and filed this Declaratory Judgment Action to determine if Erie had an obligation beyond the single per person limit.

7. The Erie policy provides in part:

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.

* * * *

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.

8. The Policy contains a per person policy limit of One Hundred Thousand Dollars (\$100,000.00) and a per accident policy limit of Three Hundred Thousand Dollars (\$300,000.00).

9. Plaintiffs argue that they are entitled to the separate per person liability limits for one of the three reasons: (1) they have suffered a separate and distinct cause of action as defined by West Virginia law, and hence, the claim is not derivative and not subject to a single per person limit nor a derivative limitation provision; (2) they meet the definition of bodily injury and have suffered a separate bodily injury; and (3) the definition of bodily injury is ambiguous and thus to be construed against Erie.

10. Defendant argues that the parents are subject to a single per person limit because they were not physically injured in the accident and their claim is derivative and subject to the limitation provision stating 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.

11. 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.*

12. When the facts are not in dispute, the determination of the proper coverage of an insurance contract 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*).

13. 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 35 (W.Va. 1998).

14. When 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).

15. In West Virginia, 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*, 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.* The liability of a defendant between the parent's and the minor's claim is entirely severable. *Id.*

16. This Court finds that the provision in the insurance policy, 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.

"limits damages for derivative claims to the per PERSON limit available to the person injured or killed in the accident." *See Erie Insurance Property & Casualty Company v. Keneda*, 142 F.Supp.2d 756 (2001).

17. Further this Court finds that the definition for "bodily injury" included in the insurance policy is not ambiguous.

18. Pursuant to the definition of "bodily injury" included in the insurance policy, this Court finds that if an individual has only suffered damages in the form of medical care expenses, but was not physically injured in the accident, then they have not suffered a bodily injury.

19. As such, this Court finds that the parents, James and Marlaine Adkins, have not suffered a bodily injury within the meaning of the policy, thus they are not entitled to separate per person limits.

20. As such, the Defendant has paid the per PERSON limit of \$100,000.00 to Kayla Adkins, thereby exhausting all monies available under the insurance policy and the Defendant is absolved of any further payment to either Kayla Adkins or her parents, James and Marlene Adkins, having satisfied such obligation in full by prior payment of the per PERSON limit of \$100,000.00 to Kayla Adkins.

21. Based on these findings, this Court finds that Plaintiffs' Motion for Summary Judgment is Denied and Defendant's Motion for Summary Judgment is Granted.

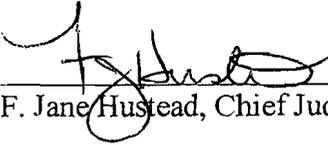
WHEREFORE, this Court ORDERS that the Plaintiffs' Motion for Summary Judgment is DENIED and Defendant's Motion for Summary is GRANTED.

The Clerk is directed to send certified copies of this Order to all counsel of record.

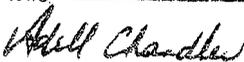
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Charleston, WV 25339-3953

Executed this 30 day of December 2009.


F. Jane Husted, Chief Judge

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No. 224 Page 510 this 6
JAN 00 2010

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON 1-6-10
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS 4-28-10
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA