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IN THE CIRCUIT COURT OF ~~CABELL~~ <sup>FAYETTE</sup> COUNTY, WEST VIRGINIA

GARY W. STREET,  
DOROTHY GAIL STREET,

2010 JUL 26 P 1:36

Plaintiffs,

ADJELL CHANDLER  
CIRCUIT CLERK  
CABELL WV

v.

Civil Action No: 08-C-345  
Judge David M. Pancake

ERIE INSURANCE PROPERTY &  
CASUALTY COMPANY and RONNIE  
ADKINS,

Defendants.

**ORDER GRANTING ERIE'S  
MOTION FOR SUMMARY JUDGMENT**

On the 12<sup>th</sup> day of May, 2010, came the parties, Plaintiffs Gary W. Street and Dorothy Gail Street, by and through counsel, Amy Crossan, Esquire and Victor Navy, Esquire, Defendant Erie Insurance Property & Casualty Company ("Erie"), by and through counsel, Matthew Perry, Esquire, and Defendant Ronnie Adkins, by and through counsel, Thomas Sweeney, Esquire, for hearing on the Motion for Summary Judgment filed by Erie and the Cross Motion for Summary Judgment filed by Gary and Dorothy Street. These motions were filed relative to Counts II, III and IV of the Complaint in this case, which seeks a declaration from this Court concerning the availability of underinsured motorists coverage for Gary Street and Dorothy Street as a result of a motor vehicle accident which occurred on April 21, 2006. The Court has reviewed the briefs filed in this matter and has considered the oral argument of the parties. Based on the foregoing, the Court finds that Erie is entitled to judgment as a matter of law.

**EXHIBIT A**



The Complaint filed in this matter seeks a declaration concerning the availability of underinsured motorists coverage under three separate policies: a Pioneer Family Auto Insurance Policy, policy number Q04-6604791 (the "Personal Auto Policy"), a Pioneer Commercial Auto Insurance Policy, policy number Q09-8030100 (the "Commercial Auto Policy"), and Ultraflex Package Policy, policy number Q45-8050027, which provided commercial property coverage and commercial general liability coverage, as well as stop gap liability coverage (the "Commercial Package Policy"). The Plaintiffs in this matter concede that underinsured motorists coverage is unavailable under the Personal Auto Policy and the Commercial Package Policy and have voluntarily withdrawn those claims, contained in Count II and Count IV of the Complaint. Accordingly, the only remaining claim is whether insurance coverage is available under Count III of the Complaint concerning the Commercial Auto Policy.

With regard to Count III, the Court makes the following Findings of Fact:

1. Gary Street, while an employee and in the course of his employment with Dirtbuster's Janitorial Services, Inc. ("Dirtbusters"), was involved in a motor vehicle accident on April 21, 2006 on U.S. Route 60 near Milton, Cabell County, West Virginia.
2. The motor vehicle accident occurred when a vehicle operated by Kyle Brandon Neal collided with the vehicle operated by Mr. Street.
3. At the time of the accident, Gary Street was operating a 1998 Dodge Caravan which was owned by John Perry, II, the president and owner of Dirtbusters.
4. During the week in which the accident occurred, John Perry was on vacation in Florida and had left the 1998 Dodge Caravan, his personal vehicle, at Dirtbusters for use by employees in case it was needed.

5. As a result of the motor vehicle accident, the Streets initiated the present lawsuit against Kyle Brandon Neal, Erie Insurance Property & Casualty Company and its independent insurance agent, Ronnie Adkins.

6. In connection with the claims against Kyle Brandon Neal, Mr. Neal's liability carrier has paid its liability coverage policy limits. As a result, Gary Street now seeks underinsured motorists coverage through the Erie policies issued to Dirtbusters and / or John Perry.

7. The 1998 Dodge Caravan was not a listed vehicle under the Commercial Auto Policy issued to Dirtbusters, but was instead insured under John Perry's Personal Auto Policy.

8. John Perry did not have underinsured motorist's coverage under the Personal Auto Policy.

The Court makes the following Conclusions of Law:

1. The Commercial Auto Policy, under the *Autos We Insure* provision, provides insurance coverage for nine listed vehicles (the "Fleet Vehicles"), and a number of categories of unlisted vehicles, including Owned Autos, Hired Autos, Non-Owned Autos, Temporary Substitute Autos and Newly Acquired Autos. The vehicle was not an Owned Auto. Each of the remaining categories will be addressed separately.

#### Hired Autos

2. The Commercial Auto Policy extends coverage to Hired Autos, which are defined in the Policy as,

Hired Autos. These are autos you, or your employee while on your business, hire, rent or borrow for use in your business, but only for coverages for which a premium charge is shown. They cannot be owned by your employees or partners, or members of their households.

3. In order to qualify as a Hired Auto, the auto cannot be owned by an employee.

4. Under West Virginia law, a corporate officer is deemed to be an employee of the corporation pursuant to W.Va. Code §31D-1-150(9).

5. Further, John Perry, II, in an affidavit attached to the Reply Brief filed by Erie in this matter, identifies himself as an employee of Dirtbusters.

6. Since John Perry, II is an employee of Dirtbusters as a matter of both law and fact, his personal auto cannot qualify as a Hired Auto.

7. In any event, the Commercial Auto Policy only provides coverage for Hired Autos for which a premium charge is shown on the Declarations.

8. On the Declarations, Hired Autos are listed as Auto 10 under Item 4 for purposes of identifying premium charges.

9. Item 5 of the Declarations Page of the Commercial Auto Policy provides that insurance is provided where a premium or "INCL" for included coverage is shown. This Item indicates that no premium was charged for Hired Autos for underinsured motorists coverage. Accordingly, underinsured motorists coverage is not available for Hired Autos, even if John Perry's personal vehicle could qualify as such.

#### **Non-Owned Autos**

10. Both Erie and the Streets concede that the 1998 Dodge Caravan at issue in this case could qualify as a Non-Owned Auto under the Commercial Auto Policy.

11. The Commercial Auto Policy extends coverage to Non-Owned Autos, which are defined in the Policy as,

**Non-Owned Autos (Employer's Non-Ownership Liability).** These are autos you do not own, hire, rent or borrow that are used in your business, but only for coverages for which a premium charge is shown. This includes autos owned by your partners, employees or members of their households, but only while used in your business or personal affairs.

12. The Court agrees with the parties that the 1998 Dodge Caravan would qualify as a Non-Owned Auto, since the Dodge Caravan was not owned by Dirtbusters and was used in the business.

13. However, like the Hired Auto provision, coverage for Non-Owned Autos is only extended to coverages for which a premium charge is shown. On the Declarations, Non-Owned Autos are listed as Auto 11 under Item 4 for purposes of identifying premium charges.

14. Item 5 of the Declarations Page of the Commercial Auto Policy provides that insurance is provided where a premium or included is shown. This Item indicates that no premium was charged for Non-Owned Autos for underinsured motorists coverage. Accordingly, underinsured motorists coverage is not available for Non-Owned Autos.

#### **Ambiguity and Public Policy Arguments**

15. The Plaintiffs assert that the Declarations Page is ambiguous because under Item 6 of the Declarations, it appears to state that the UM/UIM Endorsement, Form AHWU01, applies to "All Autos", and thus grants UIM coverage to all autos, including Hired and Non-Owned Autos.

16. The Court finds this argument unpersuasive. Item 6 identifies all of the policy forms and endorsements which apply to this policy. Item 6 includes CAP 04/96, which is the policy jacket itself.

17. Nothing in Item 6 of the Declarations indicates that it would negate the limitations and exclusions contained in the Commercial Auto Policy. Item 6 does not create any ambiguities with Item 5 which clearly indicates that premium charges were not charged for underinsured motorists coverage for Hired Autos and Non-Owned Autos.

18. The Court further finds that the limitations of underinsured motorists coverage in the Commercial Auto Policy in this case is not violative of any public policy.

19. Pursuant to the West Virginia Supreme Court's ruling in *Deel v. Sweeney*, 181 W. Va. 460, 463, 383 S.E.2d 92, 95 (1989), limitations and exclusions are not prohibited when they are consistent with the premium charged. In this case, no premium was charged.

#### Doctrine of Reasonable Expectations

20. The Plaintiffs argue that underinsured motorists coverage should be extended to them for a Hired or Non-Owned Auto on the basis of the Doctrine of Reasonable Expectations.

21. However, the Court finds that the Doctrine of Reasonable Expectations is not applicable in this case, as John Perry has testified that he had no expectation that Gary Street had underinsured motorists coverage available for this accident.

22. Specifically, Mr. Perry testified in his deposition about his expectations of coverage for the Plaintiff in this case:

Q. Okay. Did you believe that there was underinsured motorist's coverage that was available for Mr. Street, while driving your vehicle?

A. No, not necessarily.

23. Given that Mr. Perry had no expectation of coverage, this argument must fail.

#### **Temporary Substitute Autos**

24. The Commercial Auto Policy also extends coverage for Temporary Substitute Autos, which is defined in the Policy as,

**Temporary Substitute Autos.** These are autos not owned by you being temporarily used in place of owned autos. The latter must be unable to be driven for normal use due to breakdown, repair, servicing, loss or destruction.

25. The 1998 Dodge Caravan meets the first prong for the definition of a Temporary Substitute Auto, in that it is a vehicle not owned by Dirtbusters.

26. However, the 1998 Dodge Caravan does not meet the requirement that it was substituted for an owned auto that was unable to be driven for normal use due to breakdown, repair, servicing, loss or destruction.

27. Specifically, John Perry has offered the only testimony concerning that issue. In his deposition, Mr. Perry states that, "I don't know if another car broke down or got put in the shop, one of the company cars." This is further confirmed in Mr. Perry's affidavit, attached to Erie's Reply Brief, where he affirms that he has no knowledge as to "whether or not any of the company vehicles were broken down, being repaired, undergoing servicing, lost or destroyed on April 21, 2006." The affidavit also establishes a lack of any documentation to that effect, when Mr. Perry states that he is not aware of, "any documentation which would indicate whether or not any of the company vehicles were broken down, being repaired, undergoing servicing, lost or destroyed on April 21, 2006."

28. Based on the record before the Court, there is no evidence to meet the second prong for the 1998 Dodge Caravan to qualify as a Temporary Substitute Auto. Accordingly, Plaintiff's argument must fail in that regard.

#### **Newly Acquired Autos**

29. The Commercial Auto Policy also extends coverage for Newly Acquired Autos, which is defined in the Policy as,

**Newly Acquired Autos.** These are autos you acquired during the policy period. They may:

- a. replace an owned auto; or
- b. be additional autos we insure, if, on the day such autos are acquired, we insure all autos you own.

30. The express language of the Policy requires that the subject auto to have been acquired in order to qualify as a Newly Acquired Auto.

31. In deposition testimony, John Perry, II testified that, on the day of the motor vehicle accident, the 1998 Dodge Caravan was his personal vehicle and was owned by him individually.

32. The 1998 Dodge Caravan was not owned by Dirtbusters and therefore cannot qualify as a Newly Acquired Auto.

Based upon the foregoing Findings of Fact and Conclusions of Law, this Court **ORDERS, ADJUDGES and DECREES** that there is no genuine issue of material fact and Erie is entitled to judgment as a matter of law. The Court hereby **GRANTS** Erie's Motion for Summary Judgment and **DENIES** the Plaintiffs' Cross Motion for Summary Judgment. Accordingly, it is further **ORDERED** that Erie is dismissed from this case, with prejudice.

The Plaintiffs' objections and exceptions to this Order are noted.

This is a final determination on the merits of this Declaratory Judgment action and is there is no reason for delay for entry of judgment.

The Clerk is requested to provide certified copies of this Order to the following:

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Dated this 26<sup>th</sup> day of July, 2010.



JUDGE DAVID M. PANCAKE

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