

CHARLESTON

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ADELL CHANDLER, CIRCUIT CLERK  
By CDP Deputy

GARY W. STREET  
DOROTHY GAIL STREET

Plaintiffs Below/Petitioners.

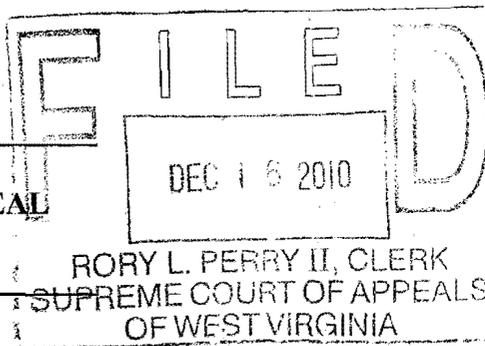
vs.

ERIE INSURANCE PROPERTY &  
CASUALTY COMPANY

Underlying proceeding  
No. 08-C-345  
Circuit Court of Cabell County

Defendant Below/Respondent.

PETITION FOR APPEAL



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**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Gary Street and Dorothy Street appeal from an Order entered the 26<sup>th</sup> day of July, 2010 from the Circuit Court of Cabell County, West Virginia, Judge David M. Pancake presiding, granting Defendant Erie Insurance Company's Motion for Summary Judgment (Declaratory Judgment) below. (Exhibit A)

## II STATEMENT OF FACTS IN EVIDENCE

The underlying facts of this case are largely undisputed. Gary Street was an employee of Dirtbusters Janitorial Services. On April 21, 2006, Mr. Street was involved in a motor vehicle collision with a Third Party Tort Feasor while Mr. Street was in the course and scope of his employment with Dirtbuster s. As a result of the accident, Mr. Street sustained serious, permanent, and disabling injuries. Mr. Street subsequently settled a personal injury claim with the tort feasor, but the tort feasor's liability insurance was insufficient to redress Mr. Street's injuries, and Mr. Street claimed against John Perry, II's personal insurance policy and Dirtbuster's Commercial Insurance Policies.

At the the time of the accident, Mr. Street was driving a 1998 Dodge Caravan, VIN 1B4GT44L3WB740366. John Perry, II owns Dirtbusters Janitorial Services. (See, Deposition of John Perry, II p. 6, attached hereto as "Exhibit B"). The Caravan that was involved in the accident was Mr. Perry's personal vehicle (Id. at 10). At the time of the accident, Mr. Perry was looking for a new personal vehicle and intended to move the Caravan to his company fleet. (Id. at 25).

On the week that the accident at issue occurred, Mr. Perry was on vacation in Florida. (See, Deposition of John E. Perry, II, p. 9). He left his Caravan at the office. (Id. at 12). He did this so it can be used if a company vehicle broke down or was in the shop. (Id. at p. 12, 28). He did not know if the company was going to need to use it or not. (Id. at 28). Mr. Street was driving the Caravan on that day because another vehicle was in the shop that week. (Id. at 28).

Mr. Perry is familiar with Uninsured and Underinsured Motorist coverages. (See, Deposition of John E. Perry, II, p. 15). He did have underinsured motorist coverage on the

business policies, but not his personal policies (Id). He elected to have underinsured coverage on the business policies due to the higher risk presented because of the employees use of the vehicles. (Id. at 20). He understood that underinsured coverage was also provided to his employees for hired and non-owned autos, such as if the employees used one of their vehicles for company business (Id.). He was never told that there would not be underinsured motorist coverage for a hired or non-owned auto. (Id. at 21). He was never provided a waiver advising him that certain autos would not be covered for underinsured motorist protection (Id. at 23). He bought the underinsured motorist coverage to protect both the company and the employees. (Id. at 23).

The matter pending before the Court is a Declaratory Judgment Action, whereby the Streets are seeking a determination as to their entitlement to underinsured (UIM) proceeds under a policy of insurance issued by Erie Insurance Company to Dirstbuster's Janitorial Services. Plaintiffs originally asserted three (3) counts relative to their Declaratory Judgment Action. Count II, for UIM coverage under Defendant John Perry, II's personal policy; Count III, for UIM coverage under Defendant Dirstbuster's Fleet (Commercial) policy; and Count IV, for UIM coverage under Dirstbuster's General Liability Policy (Ultraflex policy). After discovery, the Plaintiffs acknowledged that there was a valid waiver of UIM coverage by Mr. Perry for his personal policy, and voluntarily withdrew Count II. They also acknowledged that there is no UIM coverage available under the Dirstbusters Ultraflex policy, and thus voluntarily withdrew Count IV. The Plaintiffs contend that there is UIM coverage under the commercial policy as alleged in Count III.

The Erie Pioneer Commercial Auto Policy, in relevant part, provides as follows:

## **Definitions**

-“autos we insure” means autos that are defined in the AUTOS WE INSURE section of this policy.

-“You”, “Your” and “Named Insured” mean the person(s) or organization(s) named in item 1 on the Declarations.

## **Autos We Insure**

-The declarations show which of the following are autos we insure under this policy:

1. Hired Autos. These are autos you, or your employees while on your business, hire, rent or borrow for use in your business, but only for coverage for which a premium charge is shown. They cannot be owned by your employees or partners, or members of their households
2. 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.

Although not shown on the Declarations, the following are autos we insure:

3. 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 break down, repair, servicing, loss or destruction.
4. 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.

Endorsement AHWU01 (Ed. 3/04) EF-8812, titled *Uninsured/Underinsured Motorist*

*Coverage Endorsement – West Virginia*, provides as follows:

“Underinsured Motor Vehicle” means a motor vehicle for which the limits of available liability bonds or insurance or self-insurance at the time of the accident are insufficient to pay losses or damages.

#### LIMITS OF PROTECTION

##### Limitation of Payment

If anyone we protect insures more than one auto and none of the autos are involved in the accident, the highest limit of Uninsured/Underinsured Motorist Coverage applicable to any one auto will apply.

(See, Endorsement AHWU01 (Ed. 3/04) EF-8812 attached hereto as “Exhibit C”)

UIM coverage is available to Street under this Commercial Policy, and, hence, Summary Judgment to Erie should be denied and granted to the Streets.

### III. POINTS AND AUTHORITIES

1. West Virginia Code Chapter 33, Article 6
2. Adkins v. Meador, 201 W.Va. 148, 498 S.E.2nd 915 (1997)
3. State Auto Mut. Ins. Co. V. Youler, 183 W.Va. 556, 564, 396 S.E.2nd 737, 745 (1990)
4. Jenkins v. State Farm Mut. Auto Ins. Co. 219 W.Va. 190, 632 S.E.2nd 346, 350 ( W.Va. 2006)
5. Blacks Law Dictionary

#### IV. ASSIGNMENTS OF ERROR

1. The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Temporary Substitute Auto" under the policy
2. The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Hired Auto" under the policy.
3. The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Non-Owned Auto" under the policy.
4. The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Newly Acquired Auto" under the policy.

## V. DISCUSSION OF LAW AND ARGUMENT

### **There is UIM Coverage Under the Commercial Auto Policy**

There is UIM coverage available to the Streets under numerous provisions of the Dirtbuster's Commercial Policy. The Caravan meets at least one or more of the definitions to be considered an Auto to which UIM coverage applies. The definitions and the alternative arguments for each assignment of error are as follows:

- i. **The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Temporary Substitute Auto" under the policy**

#### **Temporary Substitute Autos:**

The Dirtbuster's Commercial Auto Policy defines a Temporary Substitute Auto as follows:

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 break down, repair, servicing, loss or destruction.

The Caravan meets the definition of a Temporary Substitute Auto. For the Caravan to meet this definition, there are two requirements: 1) the vehicle is not owned by Dirtbusters, and 2) the vehicle is being used in place of a Dirtbuster's vehicle that is out of service. Erie acknowledges that the auto was not owned by Dirtbusters. However, Erie contends that the Caravan does not meet the second prong of the definition as there is no evidence that the vehicle

was being used to replace a fleet vehicle that was broken down, being repaired or serviced, or had been lost or destroyed. This contention is plainly wrong! In fact, Mr. Perry testified that this Caravan was being used temporarily in the place of an auto in the company fleet that had broken down. (Transcript page 28). Mr. Perry testified that he left the Caravan at the office while he was away on vacation to be used in the event that a company vehicle broke down or went in the shop for repairs. A vehicle went out of service while he was away, and, pursuant to his directives, the Caravan was provided as a temporary replacement. Undoubtedly, the Caravan was being used in place of a vehicle that was out of service, and thus the vehicle meets the definition of "Temporary Substitute Auto".

Erie further contends that, even if the Caravan did meet the definition of a Temporary Substitute Auto, there is nothing to establish that UIM coverage is available for it. That is also incorrect. In fact, there is an endorsement that sets forth the available coverage on a Temporary Substitute Auto. The Declarations page references the endorsements that are applicable to the policy. "Policy Change Endorsement -West Virginia, ACWA01 (Ed. 3/04) UF-89977" provides as follows:

**Autos We Insure:**

The following sentence is added to Item 4, *Temporary Substitute Autos*:

Should a loss occur involving a temporary substitute auto, the temporary substitute auto will have the same coverage you have purchased on the owned auto it is temporarily replacing.

(See , Policy Change Endorsement, attached hereto as "Exhibit D")

As a Temporary Substitute Auto, the Caravan would be entitled to any coverage that is provided for any owned auto that it replaced. Every owned auto in the Dirtbuster's fleet had

UIM coverage. Thus, as a Temporary Substitute Auto was replacing an owned auto, it would have UIM coverage. It stands to reason that Erie intended to give the insured the benefit of the full array of protection that it had paid for when an insured auto was out of service. The insured has paid for the coverage and should not be denied the coverage that was paid for simply because the vehicle that was listed as being insured was temporarily out of service. In the event that an insured would suffer a loss while temporarily using a replacement auto while the listed auto was out of service, the insured would still receive the full array of insurance coverage that was contracted for. Thus, there is UIM coverage available for Mr. Street's use of Mr. Perry's Caravan as a replacement vehicle for a fleet vehicle that was temporarily out of service.

- ii. **The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Hired Auto" under the policy.**

**Hired Auto.**

The policy defines a *Hired Auto* as follows:

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.

In order to qualify as a Hired Auto, the following conditions must be met: 1) it must be an auto that the named insured (Dirtbusters) or an employee, hires, rents or a borrows, 2) for use in the Company's business, and 3) the borrowed vehicle cannot be owned by Dirtbuster's

employees or a partner of the company, or members of their household. The Caravan meets these conditions. The Caravan was borrowed from John Perry, II. The Caravan was used to conduct Dirtbuster's business. (Perry's Depo., p. 10). The vehicle was not owned by an employee of Dirtbusters or their family. The vehicle was owned by John Perry II., the owner of Dirtbusters. There is no evidence that Mr. Perry was an "employee" of the company. The vehicle also was not owned by a partner of John Perry. "Partner" is defined in Black's Law Dictionary as a "member of a partnership or firm." A "partnership" is defined in Black's Law Dictionary as "a business owned by two or more persons that is not organized as a corporation." Dirtbusters is a corporation. (Perry's Depo., p. 7). As such, there are no "partners". Thus, the Caravan meets the definition of a "Hired Auto".

Erie contends that, even if the Caravan meets the definition of a Hired Auto, then there is not any UIM coverage, as it is excluded. The *Uninsured/Underinsured Motorist Coverage Endorsement – West Virginia* contains "Our Promise", which states:

*"If Underinsured Motorists Coverage is indicated on the Declarations, we will pay damages for bodily injury and property damage that you or your legal representative are legally entitled to recover from the owner or operator of an underinsured vehicle."*

The Declarations page contains 9 items. For instance, Item 1 contains the Named Insured and Address, Item 2 sets forth the Policy Period, Item 3 sets for the Other Interest, Item 4 sets forth Autos Covered, and Item 5 shows coverages. Item 6 on the Declarations page is titled "*Applicable Policy, Endorsements, Exceptions to Declaration Items*". Under this item, it lists the endorsements that apply and the vehicles that the Endorsement applies to. Item 6 first sets out the endorsements that apply to ALL AUTOS. The Declaration page states that "All Autos"

contain endorsement AHWU01, the *Uninsured/Underinsured Motorists Coverage Endorsement – West Virginia* ( See, Declarations page in Record). This means that **any and all autos** listed under Item 4- *Autos Covered* – contain the UIM endorsement.

The fact that Item 6 affords a UIM coverage to ALL AUTOS is clear when you examine the remainder of the item 6 . Item 6 further delineates specific endorsements that apply only to the enumerated autos. For instance, it limits Endorsement ABBB01, titled *Auto Medical Payments and Death Benefit Coverage*, to Autos 12-20. Had Erie intended to limit the UIM endorsement to autos 12-20, it certainly would have set that out in the policy, as it did for this endorsement. Autos 10(hired) and 11(non-owned) were not excepted from the *All Auto* provision that carries the UIM endorsement. As such, those autos are privy to the UIM endorsement.

Erie asserts that there is no UIM coverage for a hired or non-owned auto, because there is no premium charge shown for such coverage. West Virginia Code Chapter 33, Article 6, Section 31 (b) mandates that all motor vehicle insurance policies provide an option to the insured to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an underinsured motor vehicle up to an amount not less than the limits of bodily injury liability insurance. Within this optional underinsured motorist coverage, there are no distinctions with regard to a non-owned or hired auto, as the UIM coverage is triggered by the **other vehicle** being underinsured. The purpose of the optional underinsured motorist coverage is to enable the insured to protect himself, if he chooses to do so, against losses occasioned by the negligence of **other drivers** who are underinsured. The purpose of the statute is obliterated if an insurance company is permitted to sell an insured UIM coverage, but then exclude and limit

coverage.

The underinsured motorist statute is remedial and it should be liberally construed. Adkins v. Meador, 201 W.Va. 148, 494 S.E.2d 915 (1997). The preeminent public policy of this state in uninsured and underinsured motorist cases is that the injured person be fully compensated for his or her damages not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage. *Id.*, citing State Auto Mut. Ins. Co. v. Youler, 183 W.Va. 556, 564, 396 S.E.2d 737, 745 (1990). Accordingly, if the language of Erie's policy does not comply with the broad terms of West Virginia Code § 33-6-31, then the policy language is void and the policy must be construed to contain the coverage provided for by statute. The policy language restricting UIM coverage from hired and non-owned autos is void as against public policy because it is more restrictive than the statutory language.

At a minimum, the Declarations page is inconsistent and ambiguous as to the UIM coverage applicable to a hired and non-owned auto. Whenever the language of an insurance policy provision is reasonably susceptible to 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 the 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 insurer. *Id.* at 351.

The Declarations page, under Item 5, appears not to provide UIM coverage for Autos 10 (Hired) and Autos 11 (Non-owned). However, Item 6 states that the UIM endorsement is applicable to ALL AUTOS, which would include Autos 10 and 11. The Declarations page is reasonably susceptible to the interpretation that Item 6 includes UIM endorsements on ALL AUTOS insured under the policy. If Item 5 can likewise be reasonably interpreted to take such coverage away, then the policy is ambiguous. This ambiguity must be resolved in favor of the insured.

The doctrine of reasonable expectations provides that objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of policy provisions would have negated those expectations. Jenkins, 219 W.Va. 190, 632 S.E.2d 346, 352. The doctrine of reasonable expectations is limited to those instances in which the policy language is ambiguous. *Id.*

Mr. Perry testified that he is familiar with uninsured and underinsured motorist coverage. He chose to purchase underinsured coverage on the business policies but not his personal policies. He purchased underinsured coverage on the business policies due to the higher risk presented because of the employees use of the vehicles. He bought the underinsured motorist coverage to protect both the company and the employees. He understood that underinsured coverage would be provided to his employees for hired and non-owned autos. He was never told that there would not be underinsured motorist coverage for hired or non-owned autos. When he

elected UIM coverage, he was never provided a waiver advising him that certain autos would not be covered for underinsured motorist protection.

Mr. Perry reasonably expected that the UIM coverage that he elected to purchase would protect his employees in the event of an accident like the one that Mr. Street was in while working for Dirtbusters. It was reasonable for him to believe that his agent sold him the protection that he was looking and paying for. Mr. Perry runs a janitorial business with 85-90 employees. He certainly does not have the time to conduct a painstaking analysis and review of his policy to make sure that his insurance covering matches what he asked for. The reasonable expectation was that there would be UIM coverage for all autos that his employees would be called upon to use in his business, including hired and non-owned autos. This expectation should be honored. Hence, the policy should be found to provide UIM coverage for hired and non-owned autos.

That there is UIM coverage for Hired and Non-Owned Autos is also apparent upon further examination of the UIM endorsement. The UIM Endorsement contains a *Limits of Protection General Clause*, stating as follows:

If anyone we protect insures more than one auto and **none of the autos** are involved in the accident, the highest limit of Uninsured/Underinsured Motorist coverage applicable to any one auto will apply. (Emphasis added).

This Clause grants UIM coverage to anyone in any auto that is in an accident, provided that more than one auto is insured. More than one auto was insured by Dirtbusters. Although none of the listed autos were involved in the accident, it is apparent that Erie extends UIM coverage to the use of not only hired and non-owned autos, but to ANY auto.

- iii. **The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Non-Owned Auto" under the policy.**

**Non-Owned Auto**

The policy defines a *Non-Owned Auto* as follows:

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.

In order to qualify as a Non-Owned Auto, the following conditions must be met: 1) the vehicle cannot be owned by Dirtbusters, 2) the vehicle cannot be hired, rented or borrowed by Dirtbusters, and 3) the vehicle must be used in the business. This vehicle can be owned by an employee or partner of Dirtbusters.

Erie acknowledges that the Caravan meets this definition. This provision applies to any auto that is used for business purposes, regardless of ownership. The Caravan was not owned by Dirtbusters. The vehicle wasn't hired or rented. Erie contends that it was not borrowed. The Plaintiffs will accept this contention for the purpose of examining this definition. Rather, it appears that the vehicle was left at the business for use in the business. The vehicle was used in the business. This vehicle can be owned by anyone, including an employee, and presumably, an owner. Thus, the Caravan meets the definition of a non-owned auto.

In regards to the UIM coverage available for a non-owned auto, the Plaintiffs incorporate herein the arguments set forth under paragraph 2, Hired Autos.

- iv. **The Court erred in determining that there was no Underinsured Motorists coverage available to Plaintiff Gary Street under Defendant Dirtbuster's Commercial Auto Policy, specifically finding that the vehicle Street was driving was not a "Newly Acquired Auto" under the policy.**

**Newly Acquired Auto**

The policy defines a Newly Acquired Auto as follows:

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

- a. Replace and unowned auto; or
- b. Be additional autos we insure, if, on the day such autos are acquired, we insure all autos you own.

You must tell us about the newly acquired vehicle during the policy in which the acquisition takes place. If replacement or addition is made within 30 days prior to the end of the policy period, in which the acquisition takes place, you have 60 days after acquisition to tell us.

*"Policy Change Endorsement – West Virginia, ACWA01 (Ed. 3/04) UF- 8977"* adds to this provision: Should a loss occur involving a newly acquired auto prior to your notifying us, the newly acquired auto will have the broadest coverage you have purchased for any one auto listed on the Declarations.

The Caravan could also qualify as a newly acquired auto. Mr. Perry testified that he was going to move the Caravan to the fleet, but he had not done so yet. (Perry depo., p. 12). He was shopping for a personal vehicle and was going to add the Caravan to the company fleet. (Id. at p. 30). It would have been an additional auto that Erie would insure, and Erie did insure all autos that the company owned. Under the terms of the policy, Mr. Perry had until the end of the policy to tell Erie that he acquired this auto, apparently no matter when it was "acquired". The policy period was from September 30, 2005 to September 30, 2006. Any loss that occurred in the auto, even before Erie was notified that the auto should be added to the policy, qualified for the

broadest coverage that the policy provided. In this case, the policy provided UIM coverage.

Thus the newly acquired Caravan would qualify for UIM coverage.

## CONCLUSION

Plaintiffs contend that the Dodge Caravan Mr. Street was driving the night of this accident is a covered vehicle under at least one, if not all of the categories of insured vehicles enumerated above and as such, Mr. Street should be afforded coverage under the Underinsured Motorist coverage of Dirtbuster's Commercial Auto Policy.

**PRAYER**

WHEREFORE, for the reasons set forth herein, the Plaintiffs, Gary and Dorothy Street, pray that the Court enter an Order reversing the Judgment of the Circuit Court of Cabell County and determine that Plaintiffs are entitled to coverage under the Dirtbuster's Commercial Auto Policy or in the alternative, remand the case to the Circuit Court of Cabell County for further proceedings; and for such other, further and general relief as to this Honorable Court seems just and proper.

CERTIFICATE OF SERVICE

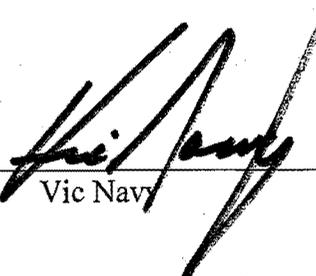
filed 11-24-10  
ABELL CHANDLER, CIRCUIT CLERK  
By *CDP*  
Deputy

I, Vic Navy, certify that I have served the foregoing PETITION FOR APPEAL by depositing a true and exact copy in the United State's Mail, Postage pre-paid, addressed to the following:

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Charleston, WV 25301

Done this 25<sup>th</sup> day of November, 2010.

  
\_\_\_\_\_  
Vic Navy

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**