

NO. 101594

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON  
\_\_\_\_\_

GARY W. STREET,  
DOROTHY GAIL STREET,

Plaintiffs,

v.

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

ERIE INSURANCE PROPERTY &  
CASUALTY COMPANY and RONNIE  
ADKINS,

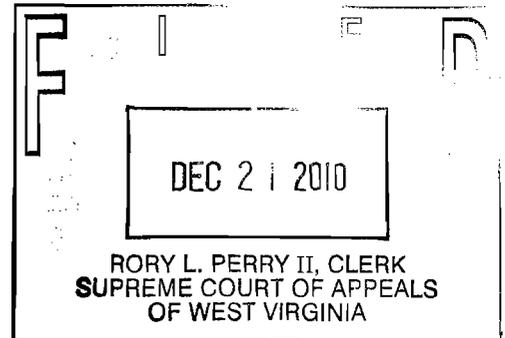
Defendants.

FROM THE CIRCUIT COURT OF  
CABELL COUNTY, WEST VIRGINIA

\_\_\_\_\_  
RESPONSE TO PETITION  
FOR APPEAL  
\_\_\_\_\_

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## **I. KIND OF PROCEEDING AND RULING IN THE LOWER COURT**

The Petitioners, Gary Street and Dorothy Street, seek an appeal to this Honorable Court from an Order granting summary judgment to the Respondent, Erie Insurance Property & Casualty Company, in connection with a declaratory judgment action concerning the availability of underinsured motorists coverage through a commercial auto policy issued to Dirtbusters Janitorial Services, Inc. The underinsured motorists claim, which is at the focus of this appeal, arises from a motor vehicle accident that occurred on April 21, 2006, involving the Petitioner, Gary Street. At the time of the accident, Mr. Street was operating the personal vehicle of John Perry, II, the president and shareholder of Dirtbusters Janitorial Services, Inc. The Circuit Court of Cabell County determined that Mr. Perry's personal vehicle did not qualify as an insured vehicle under the Dirtbuster's commercial auto policy for underinsured motorists coverage and therefore granted summary judgment in favor of the Respondent. Specifically, the Circuit Court of Cabell County determined that the personal vehicle of Mr. Perry, a 1998 Dodge Caravan, which was not a listed vehicle under the Dirtbuster's insurance policy, did not qualify for underinsured motorists coverage because the vehicle was classified as a Non-Owned Auto under the policy and underinsured motorists coverage was not available for that category of vehicle.

## II. STATEMENT OF FACTS

The facts of this case for purposes of the declaratory judgment action and this appeal are largely undisputed. This case arises out of a motor vehicle accident which occurred on April 21, 2006. The motor vehicle accident occurred between Gary Street, an employee and supervisor with Dirtbusters Janitorial Services Inc. (“Dirtbusters”), and Kyle Brandon Neal. The accident occurred on U. S. Route 60, near Milton, Cabell County, West Virginia. According to the police report, Mr. Neal was turning onto U. S. Route 60 and struck the vehicle operated by Mr. Street.

At the time of the accident, Gary Street was operating a 1998 Dodge Caravan, a personal vehicle owned by John Perry, II, President of Dirtbusters. Mr. Street was acting in the course of scope of his employment with Dirtbusters at the time of the accident. Dirtbusters is a company that provides janitorial services to its customers. However, while Dirtbusters maintained a fleet of vehicles for use by its employees, the 1998 Dodge Caravan was not a vehicle owned by the company. The evidence in this case established that, when John Perry had left for a vacation in Florida, the 1998 Dodge Caravan was left at the Dirtbuster’s location in the event it was needed by the company’s employees. It was during that time period that Gary Street utilized the Dodge Caravan and when the resulting motor vehicle accident occurred.

As a result of the motor vehicle accident, Gary Street suffered bodily injuries. The Petitioners asserted a claim against Mr. Neal for negligence arising out of the motor vehicle accident. Thereafter, the Petitioners reached a settlement with Mr. Neal’s liability insurance carrier and then sought underinsured motorists coverage, alleging that Mr. Neal was underinsured to fully compensate the Petitioners.

At the time of the motor vehicle accident, the 1998 Dodge Caravan was insured under a policy of insurance issued to John Perry and Linda Perry, a Pioneer Family Auto Policy, Policy

No. Q04 6604791 (the “Personal Auto Policy”). However, John Perry and Linda Perry did not purchase underinsured motorists coverage through the Personal Auto Policy. As a result, when the Petitioners sought underinsured motorists coverage under the Personal Auto Policy, the claim was denied on the basis that no such coverage existed.

As a result of the lack of underinsured motorists coverage under the Personal Auto Policy, the Petitioners also sought coverage under policies of insurance issued to Dirtbusters. At the time of the motor vehicle accident, Dirtbusters maintained two policies of insurance with Erie. First, Dirtbusters maintained a commercial auto policy, a Pioneer Commercial Auto Insurance Policy, policy number Q09-8030100 (the “Commercial Auto Policy”). A certified copy of the Pioneer Commercial Auto Insurance Policy is attached hereto and incorporated herein as “Exhibit 1”. Additionally, Dirtbusters maintained an 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”).<sup>1</sup>

When presented with a claim for coverage under the Commercial Auto Policy, Erie determined that there was no underinsured motorists coverage available. The 1998 Dodge Caravan was not a listed vehicle under Dirtbuster’s Commercial Auto Policy. As a result, it was determined that the 1998 Dodge Caravan qualified as a Non-Owned Auto under the Commercial Auto Policy. While Dirtbuster’s had purchased underinsured motorists coverage for its fleet vehicles through the Commercial Auto Policy, underinsured motorists coverage was not extended to Non-Owned Autos. The claim for underinsured motorists coverage under the Commercial Auto Policy was accordingly denied.

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<sup>1</sup> The Petitioners initially alleged in Count IV of the Complaint for declaratory judgment that coverage was available under the Commercial Package Policy. As with the Personal Auto Policy, however, the Petitioners also voluntarily dismissed that claim.

The Petitioners also sought coverage under the Commercial Package Policy. The Commercial Package Policy provided two general categories of coverage: commercial property coverage and commercial general liability coverage. Additionally, the Commercial Package Policy provided stop gap liability coverage. However, the stop gap liability coverage was clearly inapplicable given the lack of any deliberate intent claims against Dirtbusters. With regard to the commercial property and commercial general liability portions of the policy, coverage was not available to Gary Street because underinsured motorists coverage was not provided and because bodily injuries arising out of the ownership, maintenance, use or entrustment of an automobile were clearly excluded from coverage. The claim for coverage under the Commercial Package Policy was accordingly also denied.

As a result of a determination that no underinsured motorists coverage existed for Mr. Street's claims under the three separate policies of insurance issued by Erie, the Petitioners filed a Petition for Declaratory Judgment and Complaint, naming Dirtbusters, John Perry, and Kyle Brandon Neal as Defendants.<sup>2</sup> The Petition for Declaratory Judgment and Complaint also named Erie as a Respondent for purposes of the portion of the pleading seeking a declaratory judgment. Relative to the Petition for Declaratory Judgment portion of the pleading, Count II asserted coverage under the Personal Auto Policy, Count III asserted coverage under the Commercial Auto Policy, and Count IV asserted coverage under the Commercial Package Policy.<sup>3</sup>

At the conclusion of discovery in the case, Erie sought summary judgment on all three counts requesting declaratory relief. As a result of the voluntary dismissal of two of those

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<sup>2</sup> Subsequently, the Petitioners amended their Petition for Declaratory Judgment and Complaint to assert claims against Ronnie Adkins, the independent insurance agent who sold the Erie policies to John Perry and Dirtbusters. Also, during the course of the litigation, Kyle Brandon Neal, John Perry and Dirtbusters were voluntarily dismissed. The claims against Ronnie Adkins are still pending, but were stayed by the Circuit Court of Cabell County pending resolution of the coverage issues.

<sup>3</sup> When Erie sought summary judgment on Counts II and IV, the Petitioners voluntarily dismissed those claims, acknowledging that the Perrys had properly rejected underinsured motorists coverage under the Personal Auto Policy, and acknowledging that the Commercial Package Policy excluded coverage for the Petitioner's claims.

counts, the only count to be determined by the Circuit Court of Cabell County was whether underinsured motorists coverage was available for the Petitioners through the Commercial Auto Policy issued to Dirtbusters. After receiving briefs from both parties, and after having heard oral argument on the claims, the Circuit Court of Cabell County granted Erie's Motion for Summary Judgment, concluding that underinsured motorists coverage was not available for the 1998 Dodge Caravan under the Commercial Auto Policy. The Circuit Court's determination was set forth fully in an Order Granting Erie's Motion for Summary Judgment, entered on July 26, 2010. *Exhibit A, Petition for Appeal.* It is from that Order that the Petitioners now appeal to this Court.

### III. STANDARD OF REVIEW

The sole issue before this Court is the grant of summary judgment to the Respondent in connection with a declaratory judgment involving the interpretation of the provisions of an insurance policy. The Court's review of the grant of summary judgment is *de novo*. *Mylan Laboratories, Inc. v. American Motorists Insurance Co.*, 700 S.E.2d 518 (W. Va. 2010) *citing* Syllabus Point 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). Further, the interpretation of an insurance contract is a question of law and is reviewed *de novo*. *Mylan Laboratories, Inc. v. American Motorists Insurance Co.*, 700 S.E.2d 518, *citing* Syllabus Point 2, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999).

**III. POINTS AND AUTHORITIES RELIED UPON**

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*Boggs v. Camden-Clark Memorial Hospital Corp.*, 693 S.E.2d 53 (W. Va. 2010) .... 24, 25, 26

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## IV. DISCUSSION OF LAW

### *I. Temporary Substitute Auto*

Contrary to the assertions presented in the Petition for Appeal, the 1998 Dodge Caravan (“Caravan”) does not qualify as a Temporary Substitute Auto under the Dirtbusters’ Commercial Auto Policy, which defines Temporary Substitute Autos as, “**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.” *See Exhibit 1, page 5.* Although the Plaintiffs assert that there are only two requirements to qualify as a Temporary Substitute Auto, there are in fact at least three. In addition to the requirement that the vehicle cannot be owned by the insured, Dirtbusters, and the requirement that the vehicle is being used in place of an owned auto that is broke down, being repaired or serviced, or has been lost or destroyed, the Temporary Substitute Auto must only be used on a temporary basis. While the parties can agree that the vehicle does not qualify as an owned auto, the evidence fails to establish that the Dodge Caravan was replacing an owned auto that was broke down, being repaired or serviced, or was lost or destroyed. Further, the evidence in this case establishes that the Dodge Caravan was not used on a temporary basis, but was used frequently by John Perry in his business. For both reasons, the Dodge Caravan does not qualify as a Temporary Substitute Auto.

### *A. No Evidence Fleet Vehicle Was Out Of Service*

The Petitioners takes issue with Erie’s position in this case that there is no evidence to establish that the 1998 Dodge Caravan was used in replacement of a fleet vehicle that was broken down, being repaired or serviced, or had been lost or destroyed. In asserting that Erie’s position is “plainly wrong,” the Petitioners simply mischaracterize the deposition testimony and completely fail to acknowledge the affidavit signed by John Perry, which was attached to the

Petitioner's reply brief in support of its Motion for Summary Judgment. That affidavit completely contradicts the position taken by the Petitioners in this appeal.

In their assertion that the Dodge Caravan was being used in place of a Dirtbusters vehicle that was out of service, the Plaintiffs rely on a portion of John Perry's deposition testimony wherein he states that he left the Caravan at Dirtbusters while he went on vacation in the event it was needed because a fleet vehicle was out of service. However, contrary to the representations of the Petitioners in their Petition, John Perry did not testify that his Dodge Caravan was being used as a replacement. In fact, the Petitioners are attempting to create conclusive facts on testimony that was, at best speculative. In fact, what John Perry actually stated in his deposition was as follows:

Q. How is it determined what vehicle that the employees will be using when they are going on their assignments?

A. Whatever one is available.

Q. There's no specific rhyme or reason to it, as far as you know?

A. More than one people (sic) drive the vehicles, because some of the day staff will drive them. We try to, like each supervisor has their own particular vehicle. That doesn't always happen. If one is in the shop, another one takes it, they bounce around a lot. I've been trying to buy more vehicles to even stop that, because I get tired of dirty cars.

Q. Okay.

A. If there's a rhyme or reason, I couldn't explain it.

Q. Okay. So was that a supervisor vehicle, or -----

A. That vehicle was left, because we were actually running a little bit short on company vehicles at that time-----

Q. Okay.

A. -----so I left it there in case something happened and they needed a vehicle, and evidently they did. *I don't know if another car broke down or got put in the shop, one of the company cars.* My intentions was (sic), we were actually looking for a car for me, at the time, and I was going to move that one, but I hadn't done that yet.

*See Exhibit B, Petition for Appeal, page 11-12 (emphasis added).*

At most, John Perry's deposition testimony establishes that Dirtbusters was "running a little bit short" on vehicles and that it was his intent to eventually move the Caravan over to the Dirtbuster's fleet once he had purchase a new personal car. John Perry provides no definitive explanation as to why Dirtbusters was running short.

At another point in his deposition, John Perry was asked if the employees, specifically the Plaintiff, Mr. Street, knew they were authorized to drive the Caravan, and he testified that his secretary had been made aware that the employees were authorized to drive it. *Exhibit B, Petition for Appeal, page 28.* He testified that "I left it in case...because like I said, that's why I was shopping for vehicles. So it was left for their use." *Id.* He further testified that "I didn't know it was going to be necessary. I *think* another one ended up in the shop that week is the problem." *Id.*

Based on the deposition testimony alone, it is clear that John Perry does not know the actual basis for why the Dodge Caravan was used instead of one of the Dirtbusters fleet vehicles, and only speculates as to the reason for its use. As that is the only evidence that the Plaintiffs rely on in establishing that the Dodge Caravan was being used because a fleet vehicle was out of service, the evidence is insufficient and simply not credible.

However, as part of the discovery in the underlying case, Erie sought to clarify this issue and, after the deposition, communicated with John Perry to further develop the reason for the Dodge Caravan's use. As a result, Erie secured an affidavit from John Perry which served to

clarify any ambiguities contained in his testimony. A copy of the Affidavit of John E. Perry, II is attached hereto and incorporated herein as “Exhibit 2”. As set forth in Mr. Perry’s affidavit, 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.” *Exhibit 2*, ¶ 4. Further, John Perry, as President of Dirtbusters, 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.” *Exhibit 2*, ¶ 5. John Perry concludes in his affidavit that he “does not know if the 1998 Dodge Caravan involved in the April 21, 2006 accident was being used as a temporary substitute vehicle due to break down, repair, servicing, loss or destruction of one of the company vehicles insured under the Erie Commercial Auto Policy.” *Exhibit 2*, ¶ 6.

If the deposition testimony by itself does not make clear that any basis for the use of the Dodge Caravan instead of a fleet vehicle on the date of the accident was speculative at best, the attached affidavit clearly establishes that fact. Accordingly, the only evidence on which the Plaintiffs purport to rely on in arguing that the Dodge Caravan qualifies as a Temporary Substitute Auto is legally insufficient and fails to establish the fact that the Plaintiffs seek to establish.

***B. Dodge Caravan Was Used More Than Temporarily***

In addition to the fact that there was no evidence to establish that the Dodge Caravan was being used in replacement to a fleet vehicle that was broken down, being repaired, undergoing servicing, lost or destroyed, it is clear from the testimony of John Perry that the Dodge Caravan, although a personal vehicle, was utilized as more than a Temporary Substitute Auto for Dirtbusters business use. As is expressly noted in both the title and its definition, a Temporary

Substitute Auto must be used only “temporarily” to qualify for this classification. While employees of Dirtbusters did not necessarily use it frequently, John Perry testified in his deposition that it was the vehicle he used in conducting Dirtbusters business. John Perry offered the following deposition testimony:

Q. But you would use it for company business, you personally, if you were going to meet a client?

A. I would, yes.

*See Petition for Appeal, Exhibit B, page 31.*

John Perry further testified:

Q. Okay. Had this vehicle been used for business purposes prior to that?

A. If it had, it was, it probably was me, because I was driving that vehicle mostly. It might have been used a little bit here and there from someone. I don’t really recall at that particular point, but I used it as, you know, running around myself.

*See Petition for Appeal, Exhibit B, page 12.*

The rationale for requiring any use of a non-owned auto only on a temporary basis is clear. To allow an insured to cover a vehicle under a commercial policy without listing the vehicle or paying any premium would allow an insured to only insure some of the business vehicles and thereby obtain coverage on all vehicles. Accordingly, the Temporary Substitute Auto category is very specifically limited to a narrow set of circumstances – a narrow set of circumstances that did not exist to allow the Dodge Caravan in this case to qualify as a Temporary Substitute Auto.

## ***II. Hired Autos***

The Petitioners also assert that the 1998 Dodge Caravan qualifies as a Hired Auto under the Commercial Auto Policy, making underinsured motorists coverage available. However, the

evidence before the trial court in this case established that the Dodge Caravan did not qualify for such a classification. Further, even if the Caravan qualified as a Hired Auto, the express language of both its definition and the UM/UIM Endorsement requires a premium charge for underinsured motorist's coverage for Hired Autos. The Declarations Page of the Commercial Auto Policy clearly indicates that there was no premium charge for that category for underinsured motorist's coverage. Accordingly, underinsured motorist's coverage is not extended to Hired Autos. For both reasons, coverage does not extend to the Dodge Caravan.

*A. The Dodge Caravan Was Owned By An Employee*

The Erie 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.

*See Exhibit 1, page 5.*

Put simply, the Dodge Caravan cannot be a Hired Auto because it was undisputedly owned by John Perry at the time of the motor vehicle accident, and John Perry was an officer and employee of Dirtbusters. The Petitioners attempt to refute Erie's argument by asserting that there is no evidence to suggest that John Perry was an employee of Dirtbusters, and because he does not qualify as a "partner" as defined by Blacks Law Dictionary. However, this attempt to distinguish John Perry's position as president of Dirtbusters from that of an employee must fail as a matter of law. Further, John Perry has stated under oath that he is an employee of Dirtbusters. For both reasons, the Dodge Caravan cannot qualify as a Hired Auto.

Dirtbusters, at the time of the April 21, 2006 accident, was a West Virginia corporation. *Exhibit 2, ¶ 1.* John Perry served as the President of the corporation at the time of the accident. *Id.* As such, he was an officer of the corporation. The WV Business Corporation Act, W. Va.

Code § 31D-1-1, et seq. defines an “employee” of a corporation as including, “an officer and may include a director: Provided, that the director has accepted duties that make him or her also an employee.” W.V. Code §31D-1-150(9) (emphasis added). Based on this statutory definition, not only is John Perry an officer of the corporation, he is also an employee as a matter of law. Since the Commercial Auto Policy expressly states that a Hired Auto cannot be owned by your employees, i.e. the employees of Dirtbusters, John Perry’s personal vehicle cannot qualify as a Hired Auto since he is an employee.

In addition to the fact that West Virginia law classifies John Perry as an employee of Dirtbusters, John Perry considers himself an employee of the corporation. In his affidavit, John Perry states, “I am the President and an employee of Dirtbusters Janitorial Services, Inc., which is a West Virginia corporation, and I was serving in this capacity on April 21, 2006.” *See Exhibit 2*, ¶ 1. Based on Mr. Perry’s own testimony, he is an employee of the corporation. Accordingly, and consistent with West Virginia law, as an employee of the corporation, his personal auto cannot qualify as a Hired Auto under the Commercial Auto Policy.

***B. UM Coverage Is Not Provided To Hired Autos***

Beyond the fact that the Dodge Caravan cannot qualify as a Hired Auto since it is owned by an employee, the vehicle does not qualify for underinsured motorist’s coverage in any event due to the absence of any such coverage for that classification of vehicle. The Commercial Auto Policy’s definition of Hired Autos includes the requirement that coverage is only extended to “coverages for which a premium charge is shown.” *Exhibit 1, page 5*. Additionally, the UM/UIM Endorsement expressly states that underinsured motorist’s coverage is only provided if “indicated on the Declarations.” *See Exhibit 1, UM/UIM Endorsement, page 1*.

The Declarations page for the Commercial Auto Policy clearly indicates that Dirtbusters did not pay any premiums for the purchase underinsured motorist coverage for Hired Autos. Hired Autos are designated as “Auto 10” on the Declarations page, for purposes of identifying premium charges. *Exhibit 1, Declarations*. Under Item 5, it indicates a \$34 premium charge for Hired Autos Liability, which is for liability coverage only. *Id.* Item 5 of the Declarations page includes a separate designation for underinsured motorist coverage, and it clearly reflects that no premium was charged for underinsured motorists coverage for Hired Autos.

Based on the definition of Hired Autos and the UM/UIM Endorsement itself, underinsured motorist’s coverage is not provided under the Commercial Auto Policy without a corresponding premium charge. That required premium was not charged in this case, and accordingly results in no coverage. This is consistent with the basic principle that an insured should not be provided insurance coverage for insurance in which no premium is paid.

### ***III. Non-Owned Autos***

In its Motion for Summary Judgment and in its argument before the trial court, Erie asserted that the Dodge Caravan in this case qualified as a Non-Owned Auto under the Commercial Auto Policy. The Erie Commercial Auto Policy defines Non-Owned Autos 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.

*See Exhibit 2, page 5.*

Unlike the definition for Hired Autos, Non-Owned Autos under the Commercial Auto Policy can be vehicles owned by employees , partners or members of their households. The only

requirement for qualification as a Non-Owned Auto is that the auto be used in the insured's business. In this case, the Dodge Caravan was undoubtedly owned by an employee, John Perry, and used in Dirtbuster's business at the time of the motor vehicle accident. However, for Non-Owned Autos, the coverage extended to that classification of vehicle is limited to "coverages for which a premium charge is shown."

Non-Owned Autos are designated as Auto 11 on the Declarations page for purposes of identifying the premium charged. *See Exhibit 2, Declarations.* Under Item 5, it indicates a \$128 premium charge for Employers Non-Owned Autos Liability. This charge is for liability coverage only. The designation for underinsured motorist coverage reveals that no premium was charged for underinsured motorist coverage for Non-Owned Autos. Based on the express limitations on coverage in the definition of Non-Owned Autos, no underinsured motorist's coverage is afforded for the Dodge Caravan.

#### ***IV. Newly Acquired Autos***

The final classification of vehicles that the Petitioners seek to fit the Dodge Caravan into is the classification of Newly Acquired Auto. The premise of this argument is the assertion that John Perry *was going to*, at some point in the future, switch the Dodge Caravan from his personal vehicle to a fleet vehicle for Dirtbusters. While there is no dispute that this was the testimony of Mr. Perry, the potential future actions of Mr. Perry are insufficient to qualify the Dodge Caravan as a New Acquired Auto as of the date of the motor vehicle accident. In fact, on the date of the accident of April 21, 2006, the undisputed evidence was that the Dodge Caravan was owned by John Perry, personally. Because the Caravan was destroyed in the accident, the fact is also clear that the vehicle was never acquired by Dirtbusters.

The Commercial Auto Policy defines Newly Acquired Autos in relevant part as:

5. **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.

*Exhibit 2, page 5.*

The express definition of Newly Acquired Autos requires the auto to have been “acquired” as of the date of loss or claim to qualify for this classification. By the use of the past tense of acquire, the Commercial Auto Policy makes clear that the acquisition of the subject vehicle after the date of loss would not qualify as a Newly Acquired Auto. By its plain and ordinary meaning, the Commercial Auto Policy forecloses the Plaintiffs’ attempts to argue otherwise.

Beyond this fact is the undisputed evidence that, despite what John Perry may have contemplated about doing with the Dodge Caravan in the future, the Dodge Caravan was never acquired by Dirtbusters because it was destroyed before the acquisition ever occurred, assuming that those actions would in fact have occurred in the future. As John Perry testified in his deposition:

- Q. Okay. Did you think that the, or at the time of the accident, did you consider your personal vehicle, the 1998 Dodge Grand Caravan, a hired vehicle under the commercial policy?
- A. No.
- Q. Okay.
- A. It wasn’t yet. I was going to move it to a company vehicle when I bought another vehicle, and I was shopping.
- Q. Okay. But at the time –
- A. But at the time, it wasn’t.

Q. Okay. Did you think it was a non-owned automobile under the policy?

A. Non-owned as far as to Dirtbusters, yes.

*See Petition for Appeal, Exhibit B, page 25.*

***V. The Declarations Page Is Not Ambiguous***

In an effort to get around the clear, unambiguous language of the Hired Auto and Non-Owned Auto definitions and the lack of any premium charge for underinsured motorist's coverage, the Petitioners seek to create an ambiguity by arguing that Item 6 of the Declarations indicates that the UM/UIM Endorsement applies to all autos, and accordingly creates underinsured motorist's coverage for any auto that has any type of coverage under the Commercial Auto Policy. This tortures the plain and simple meaning of the policy language. In fact, Item 6 of the Declarations simply identifies any and all policies and endorsements that are to be included in the policy of insurance issued to the insured. Item 6 is not the portion of the Declarations Page that indicates the levels or types of coverages, despite the Petitioners' attempt to argue otherwise.

To accept the Petitioners' argument would mean that underinsured motorist's coverage is provided without any corresponding premium charge, completely contrary to the principles of insurance coverage. Breaking the Petitioners' arguments down to a simple theme, the crux of this argument is that, since Item 6 contains the language "all autos", then all coverages apply to all vehicles without regard to the actual limitations and exclusions contained in the Commercial Auto Policy.

More importantly, the Plaintiffs' argument ignores the fact that Item 6 on the Declarations also incorporates and includes the CAP 04/96, which is the Commercial Auto Policy itself. It is the CAP 04/96 which requires a premium charge to be applied for any coverage made available

for Hired Autos or Non-Owned Autos. It is the CAP 04/96 which requires that a Hired Auto not be owned by an employee of the corporation. So, even if the Petitioners' tenuous argument held any merit, it is foreclosed by reference to the CAP 04/96, as by its reference, Item 6 incorporates and adopts all of the limitations and exclusions in the Commercial Auto Policy.

The same is true for the UM/UIM Endorsement, which is also specified in Item 6. The Plaintiffs contend that because Item 6 on the Declarations page indicates that the Uninsured / Underinsured Motorist Coverage Endorsement ("the Endorsement") is applicable to all autos, including Hired Autos and Non-Owned Autos, that Item 6 conflicts with Item 5, and therefore creates an ambiguity. However, there is no ambiguity. The Endorsement, like the Personal Auto Policy, limits underinsured motorists coverage to vehicles where such coverage "is indicated on the Declarations." *See Exhibit 1, UM/UIM Endorsement.* Item 6 correctly reflects that the Endorsement is available to all autos listed on the Declarations page, including Hired and Non-Owned Autos, in so far as there is a premium charge for such coverage as indicated in Item 5. However, Item 5 of the Declarations page clearly indicates that Dirtbusters did not purchase the optional underinsured motorist coverage for Hired Autos and Non-Owned Autos. For all of these reasons, underinsured motorist's coverage is not available for the Dodge Caravan.

#### ***VI. Excluding Or Limiting UIM Coverage Does Not Violate Public Policy***

As a final attempt at negating the clear and unambiguous language of the Commercial Auto Policy in this case, the Petitioners assert that the limitation of underinsured motorists coverage for Hired Autos and Non-Owned Autos violates public policy. This argument is asserted despite the fact that no premiums were ever charged for such coverage. The Plaintiffs' argument that W.Va. Code §33-6-31 is "obliterated if an insurance company is permitted to sell an insured UIM coverage, but then exclude and limit coverage" is misplaced. (*Petition for*

*Appeal, page 14*) In fact, the Petitioners' argument is inconsistent with West Virginia case law and the underinsured motorist statute itself.

W. Va. Code §33-6-31 expressly states that “[n]othing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged.” *W. Va. Code § 33-6-31(k)*. Accordingly, the statute which sets forth the specific mandates for the offer of underinsured motorists coverage expressly allows for its limitation, as consistent with the premium charged. Here, the limiting language is consistent with the statute because no premium amounts to no coverage.

The Court has applied W.Va. Code §33-6-31(b) as a public policy aimed at ensuring that the insured is fully indemnified, and thus prohibits offsets against UIM coverage. *State Auto Mutual Insurance Co. v. Youler*, 183 W. Va. 556, 564, 396 S.E.2d 737, 745 (1990). This Court upheld insurance provisions limiting underinsured motorist coverage, so long as the limiting language does not conflict with the statute. For example, in *Deel v. Sweeney* the Court ruled that “the insurer must offer underinsured motorist coverage; the insured has the option of taking it; and the terms, conditions, and exclusions can be included in the policy as may be consistent with the premiums charged. Clearly an insurer can limit its liability so long as limitations are not in conflict with the spirit and intent of the statute and the premium charged is consistent therewith.” *Deel v. Sweeney*, 181 W. Va. 460, 463, 383 S.E.2d 92, 95 (1989).<sup>4</sup>

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<sup>4</sup> The following cases are examples where this Court upheld limitations and exclusions within an insurance policy:

In *Thomas v. Nationwide Mutual Insurance Co.*, 188 W. Va. 640, 645-46, 425 S.E.2d 595, 600-01 (1992), this Court applied as valid Nationwide's “family use exclusion,” after a husband and wife were in a single car accident in which the husband was negligent. The wife was covered under her husband's liability coverage, but because of the “family use exception” she was not covered under the UIM coverage. Although the limitations served to completely exclude

The language in the Erie Commercial Auto Policy clearly does not violate the statutory regime governing underinsured motorist coverage, nor is it in conflict with any of this Court's opinions which outline the parameters of underinsured motorist provisions as defined by the statute. Public policy requires that the insured get the benefit of the coverage that the insured purchased. Here, the Commercial Auto Policy limits underinsured motorist coverage for Hired Autos and Non-Owned Autos by limiting that coverage to instances where a premium has been charged for it. In this case, Dirtbusters did not purchase underinsured motorist coverage for Hired Autos and Non-Owned Autos and, accordingly, did not pay any premiums for that coverage. Such limiting terms in the Hired Autos, Non-Owned Autos and the Uninsured/Underinsured Motorist Endorsement is "consistent with the premium charged" as prescribed by statute. Dirtbusters did not have underinsured motorist coverage for Hired Autos and Non-Owned Autos because it did not purchase those coverages. Public policy does not require otherwise.

***VII. The Doctrine Of Reasonable Expectations Is Inapplicable***

The Petitioners have also asserted that coverage should be extended to them under the commercial auto policy pursuant to the doctrine of reasonable expectations. This assertion is made, not based on their expectation, but the expectation of the insured, Dirtbusters. The flaw in this argument is the clear: John Perry testified that he did not believe that there was underinsured motorist's coverage available for the Plaintiff while he was operating the Dodge Caravan.

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UIM coverage, this Court ruled "such exclusion is valid and not against the public policy of this state." *Id.*, 188 W. Va. at, 646, 425 S.E.2d at 601

In *State ex rel. State Auto Insurance Co. v. Risovich*, 204 W. Va. 87, 93, 511 S.E.2d 498, 504 (1998), this Court found that provisions excluding punitive damages may be enforced. The Court disagreed with the Ohio County Circuit Court, and determined that so long as the insurer "expressly excludes" coverage for punitive damages, the exclusion of punitive damages is valid and does not violate either W.Va. Code §33-6-31(b) or public policy.

Further, this Court recently ruled in *Boggs v. Camden-Clark Memorial Hospital Corp.*, that it “has made clear that, as a general rule, “[i]n West Virginia, the doctrine of reasonable expectations is limited to those instances . . . in which the policy language is ambiguous.” *Boggs v. Camden-Clark Memorial Hospital Corp.*, 693 S.E.2d 53, 63 (W. Va. 2010), quoting *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 742, 356 S.E.2d 488, 496 (1987). So, before such an argument even exists, the general rule is that there must be a finding of ambiguity – something that does not exist in the Commercial Auto Policy.

The doctrine of reasonable expectations stands for the proposition that, “the 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 v. State Farm Mutual Automobile Insurance Company*, 219 W. Va. 190, 196, 632 S.E.2d 346, 352 (2006). However, for application of the doctrine to be considered, there must be an expectation on the part of the insured of the presence of coverage. Without a reasonable expectation of coverage, the doctrine cannot be applied. John 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.

*See Petition for Appeal, Exhibit B, page 21.*

As John Perry had no expectation of coverage for the Plaintiff in this case, the application of the reasonable expectations doctrine must fail. However, beyond that fact, the doctrine is inapplicable in this case because it requires the finding of ambiguities, which do not exist in the Commercial Auto Policy.

The *Boggs* case, *supra*, is instructive to the Petitioners' argument for the extension of coverage in this case. In *Boggs*, an attorney was sued by a Plaintiff claiming malicious prosecution by the attorney. The attorney's legal malpractice carrier denied coverage on the grounds that the commercial general liability ("CGL") policy did not provide coverage for the malicious prosecution claims.

The attorney argued that the policy was ambiguous because it excluded personal injury caused by professional services, "unless professional liability coverage has been endorsed hereon or stated in the Declarations," while at the same time it defined personal injury to include "malicious prosecution." The Attorney further argued that he had a "reasonable expectation" of coverage for a malicious prosecution claim because the policy defined a personal injury as including a claim for malicious prosecution." *Id.* at 30. This Court rejected the reasonable expectations argument and offered the following explanation:

This Court has made clear that, as a general rule, in West Virginia, the doctrine of reasonable expectations is limited to those instances . . . in which the policy language is ambiguous. The fact that the policy defined personal injury as including a claim for malicious prosecution did not make the policy ambiguous. It is clear, from the recitation of the pertinent language of the policy quoted in this opinion that the policy was designed to allow an insured, like Mr. Hayhurst, to pay an additional premium to obtain coverage for professional liability. As a consequence of this option, the policy included a provision that would provide coverage for a malicious prosecution claim for an insured who purchased professional liability coverage. The Declarations page of the policy clearly shows that Mr. Hayhurst did not purchase coverage for professional liability from CIC. Moreover, Mr. Hayhurst has not paid a premium for professional liability coverage under the policy.

*Boggs v. Camden-Clark Memorial Hospital Corp.*, 693 S.E.2d 53, 63 (*citations omitted*).

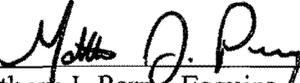
Just like in *Boggs*, the Erie Commercial Auto Policy issued to Dirtbusters in this case includes the requirement that a premium be charged for underinsured motorist's coverage for Hired Autos and Non-Owned Autos. The fact that Item 6 of the Declarations page includes Hired Autos and Non-Owned Autos as applicable to the Underinsured Motorist Endorsement simply means that those autos are eligible for underinsured motorist coverage if the insured chooses to purchase that coverage for that classification of vehicle. Item 5 clearly indicates that the insured, Dirtbusters, chose not to purchase underinsured motorist coverage for Hired Autos and Non-Owned Auto. As a result, underinsured motorist's coverage does not extend to the Dodge Caravan in this case.

## V. CONCLUSION AND RELIEF PRAYED FOR

All of the arguments before this Court in this appeal are arguments that were fully articulated and considered by the trial court in reaching the conclusion that underinsured motorists coverage was not available under the Commercial Auto Policy for the motor vehicle accident involving the 1998 Dodge Caravan. While the Petitioners seek to fit the Dodge Caravan into every classification of covered automobile when the vehicle is not specifically listed on the Declarations, the clear policy language leaves but one reasonable conclusion: the 1998 Dodge Caravan was a Non-Owned Auto under the Commercial Auto Policy. Reaching that conclusion, the next step becomes whether the Commercial Auto Policy provides underinsured motorists coverage to that classification of vehicle, as both the definition of Non-Owned Auto and the UM/UIM Endorsement specifically provide that coverages are only provided where a corresponding premium charge is indicated. This requirement is just the restatement of a simple principle: the only coverages for which you are entitled are those coverages for which you pay. In the case of underinsured motorists coverage for Non-Owned Autos, it is clear that no premium was charged for such coverage, and accordingly, no such coverage was provided. The clear, unambiguous language of the Commercial Auto Policy makes that fact clear. While the Petitioners' only chance at finding otherwise is to assert equitable arguments or public policy arguments, it is clear that equity does not apply and that Erie's limitations concerning underinsured motorists' coverage for Non-Owned Autos is consistent with W. Va. Code § 33-6-31, as well as *Deel v. Sweeney*, and its progeny. For these reasons, the Circuit Court of Cabell County reached the correct result, and this Petition for Appeal should be, respectfully, denied.

ERIE INSURANCE PROPERTY  
& CASUALTY COMPANY

By Counsel

  
Matthew J. Perry, Esquire  
WVSB # 8589

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON  
\_\_\_\_\_

GARY W. STREET,  
DOROTHY GAIL STREET,

Plaintiffs,

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

v.

ERIE INSURANCE PROPERTY &  
CASUALTY COMPANY and RONNIE  
ADKINS,

Defendants.

**CERTIFICATE OF SERVICE**

The undersigned counsel does hereby certify that I have served a true and correct copy of the foregoing RESPONSE TO PETITION FOR APPEAL by depositing a copy of same in the U.S. mail first class, postage prepaid, this 21st day of December 2010, addressed as follows:

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A handwritten signature in black ink, appearing to read "Matt J Perry", is written over a horizontal line.

Matthew J. Perry, Esquire

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**