No. 23-ICA-338

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

AMY REYNOLDS, as Next Friend and Legal Guardian of M.R., a minor, SHAUN and JENNIFER LOPEZ, individually, and as Next Friends and Legal Guardians of S.L., G.L., AND J.L., minors, and KEITH and MELISSA CHAPMAN, individually, and as Next Friends and Legal Guardians of H.C., a minor,

Plaintiffs Below, Petitioners,

v.

ERIE INSURANCE and HORACE MANN INSURANCE COMPANY,

Defendants Below, Respondents

From the Circuit Court of Kanawha County, West Virginia
The Honorable Joanna Tabit
Civil Action No. 21-C-827

PETITIONERS' BRIEF

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ASSIGNMENT OF ERRORS

ASSIGNMENT OF ERROR NO. 1: THE CIRCUIT COURT ERRED BY APPLYING THE WRONG POLICY DEFINITION OF AN UNDERINSURED MOTOR VEHICLE.

The Erie Insurance ("Erie") policy at issue contained separate definitions of a "motor vehicle" and an "underinsured motor vehicle." Erie itself created a policy ambiguity by asking the Circuit Court to look to the definition of "motor vehicle" under the "*GENERAL DEFINITIONS*"/liability portion of the policy rather than solely applying the controlling definition of an "underinsured motor vehicle" contained within the underinsured motorist ("UIM") Endorsement. The Circuit Court erred by applying the first of those policy definitions, which does not relate to this claim.

The Circuit Court's ruling contravened black letter holdings: "But where the policy's terms are found to be ambiguous, the ambiguities are strictly construed against the insurance company and all doubts are resolved in favor of coverage." Syl. Pt. 3, Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (1998). "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 insured." Syl. Pt. 4, Nat'l. Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987).

While Erie's own argument created a policy conflict, the sole language that should have been applied, contained within the UIM endorsement, was itself clear and unambiguous. "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl. Pt. 7, Certain Underwriters v. Pinnoak Resources, 223 W.Va. 336, 674 S.E.2d 197 (2008)(per curiam); Syl., Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714 (1970); Syl. Pt. 2, West Virginia Fire & Casualty Co. v. Stanley, 216 W.Va. 40, 602 S.E.2d 483 (2004).

ASSIGNMENT OF ERROR NO. 2: THE CIRCUIT COURT ERRED IN ITS ANALYSIS OF DISTINGUISHABLE PRECEDENT.

The Circuit Court ignored the factual distinctions within Boniey v. Kuchinski, 223 W.Va. 486, 677 S.E.2d 922 (2009), which involved the *off-road* use of an all-terrain vehicle ("ATV") in an uninsured motorist claim for which no UIM Endorsement was at issue. In that case the Supreme Court of Appeals of West Virginia ("Supreme Court") found that no coverage existed when an ATV did not meet the definition of an uninsured motor vehicle under the relevant policy provisions. However, that case involved the use of a vehicle designed mainly for use off-of public roads and a crash that also occurred off of public roads. The Circuit Court below disregarded the fact that the crash in this case occurred *on a public road* and that the relevant UIM Endorsement solely defined an "underinsured motor vehicle" with no corresponding exclusion. Regardless of the type of vehicle (ATV, UTV or otherwise), Erie's policy language expressly covers UIM claims that arise *on public roads*

STATEMENT OF THE CASE

This appeal arises from the Circuit Court of Kanawha County's grant of summary judgment to Erie Insurance Company ("Erie"). The Circuit Court erred by misapplying Erie's policy language in addition to misapplying precedent. This Court should reverse the Circuit Court and enter an Order finding coverage consistent with Petitioners' position below. Otherwise, affirming the Circuit Court will create a legally absurd result in contravention of existing authority.

Petitioners are the parents of children who were injured in a November 2, 2019 motor vehicle crash while they were participating in a Veteran's Day parade in St. Albans, West Virginia. Appendix Record or AR at 21. It is undisputed that the crash occurred in the City of St. Albans, on the public roads of that municipality. Petitioners' children were passengers in a trailer that was being pulled behind a motor vehicle owned and operated by Greg Cox. Mr. Cox's truck was

insured by Erie. AR at 46. Petitioners are the parents of those children and include first party bystanders who saw the crash occur.[1]

The crash occurred after a utility terrain vehicle ("UTV") owned and operated by John Kidd drove into the back of the trailer towed behind Mr. Cox's Erie insured vehicle. AR at 21. Mr. Kidd's UTV drove up onto the back of the trailer, injuring multiple small children who were parade participants. Id.

Petitioners eventually reached a settlement with Mr. Kidd's liability insurer, Foremost Insurance Company ("Foremost"). The Foremost policy provided liability protection, but the amount of liability limits was insufficient to compensate all of the injured parties involved in the crash. AR at 35. Petitioners thereafter made a claim for UIM benefits under Mr. Cox's Erie policy, since they were lawful passengers of his vehicle. It is undisputed that this would otherwise be a valid UIM claim but for Erie's purported exclusionary language.

Erie denied coverage for the Petitioners' UIM claims by alleging that Mr. Kidd's UTV did not qualify as a "motor vehicle" under Mr. Cox's Erie policy. Petitioners thereafter filed suit seeking a declaratory judgment affirming coverage. AR at 132. Throughout the underlying litigation Erie continued to deny coverage and filed a Motion for Summary Judgment on February 24, 2023. Id.

On June 12, 2023 the parties appeared at hearing before the Circuit Court of Kanawha County pursuant to Erie's Motion for Summary Judgment. AR at 114. During that hearing the Circuit Court ruled in Erie's favor by finding that Mr. Kidd's UTV did not meet the definition of a motor vehicle under Mr. Cox's policy. The Circuit Court further ruled that coverage was excluded under West Virginia case law. AR at 132.

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[1] The crash was significant and there was evidence produced below that bystanders thought some of the children were killed. Fortunately, no deaths occurred, but some of the children were seriously hurt.

The Petitioners thereafter timely filed a Notice of Appeal to this Court. In this appeal the Petitioners ask this Court to reverse the Circuit Court's ruling and remand this matter with a finding of coverage under Mr. Cox's policy.

SUMMARY OF THE ARGUMENT

Petitioners first allege that the Circuit Court erred in its finding that Mr. Cox's vehicle did not meet the definition of a "motor vehicle" under his Erie policy. The Circuit Court's error arises from the fact that it erroneously applied the definition of a "motor vehicle" under the "*GENERAL DEFINITIONS*"/liability section of Erie's policy rather than the controlling definition of an "underinsured motor vehicle" contained within Erie's UIM endorsement. At all relevant times, the Petitioners presented a UIM claim for which a specific definition of an "underinsured motor vehicle" was contained within Erie's UIM endorsement. Erie created an ambiguous conflict within its own policy by pointing the Circuit Court to the "*GENERAL DEFINITION*" of a "motor vehicle" to assert an exclusion that does not apply to UIM claims. Had the Circuit Court correctly applied the controlling definition of an "underinsured motor vehicle" then the plain wording of Erie's policy would have triggered coverage.

The Circuit Court furthermore committed error when it misapplied Boniey v. Kuchinski, 223 W.Va. 486, 677 S.E.2d 922 (2009) in support of Erie's purported exclusionary language. The Boniey decision involved an ATV crash that occurred off-of public roads. Relevant policy language in that case excluded off road crashes. For reasons that are unclear, the Circuit Court did not acknowledge the critical distinction in this case, i.e. - a crash that occurred on public roads. It is undisputed that Erie's plainly worded policy language covers crashes that occur on public roads, regardless of the type of "underinsured motor vehicle" involved.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners believe oral argument will aid the Court in its decision-making process pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure. At the same time, Petitioners recognize the Court's discretion on this issue and leave the question of oral argument solely to the Court's judgment.

ARGUMENT

I. STANDARD OF REVIEW

A circuit court's granting of summary judgment is subject to *de novo* review. Syl. Pt. 1, Painter v. Peavey, 192 W.Va. 189, 451 S.E.2d 755 (1994). Petitioners do not contend that the form of the Circuit Court's Order granting summary judgment was erroneous, or that summary judgment was otherwise erroneously applied in this case, such as due to factual disputes. Rather, Petitioners only allege that the Court erred in its application of the relevant insurance contract language along with a misapplication of existing law. Petitioners therefore contend that this Court may exercise its *de novo* standard of review in a plenary critique of the lower court's ruling.

II. ERIE'S ARGUMENT CREATED A POLICY AMBIGUITY AND THE CIRCUIT COURT THEREAFTER ERRED BY APPLYING THE WRONG POLICY DEFINITION OF AN UNDERINSURED MOTOR VEHICLE.

The Petitioners will describe the specific policy provisions at issue in more detail below. However, at the outset, the way in which Erie sought to exclude coverage created a policy ambiguity and conflict when none should have existed. It is well-settled law that any such conflict must be resolved in favor of coverage for the Petitioners' claims. "But where the policy's terms are found to be ambiguous, the ambiguities are strictly construed against the insurance company and all doubts are resolved in favor of coverage." Syl. Pt. 3, Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (1998). "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 insured." Syl. Pt. 4, Nat'l. Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987). "When reasonable people can differ about the meaning of an insurance contract, the contract is ambiguous, and all ambiguities will be construed in favor of the insured." Syl. pt. 1, D'Annunzio v. Security-Connecticut Life Ins. Co., 186 W.Va. 39, 41 S.E.2d 275 (1991).

The relevant Erie policy is titled "Auto Insurance Policy West Virginia." AR at 51. The Table of Contents reads, in relevant part, "Where To Look In Your Policy" and contains a section titled "GENERAL POLICY DEFINITIONS." Id. The definition of a motor vehicle that was relied upon by Erie and the Circuit Court, reads, in relevant part, "any vehicle that is self-propelled and is required to be registered under the laws of the state in which "**you**" reside at the time the policy is issued."[2] AR at 53 (emphasis in original). The policy then excludes the following types of vehicles from the definition of a "motor vehicle:"

> ... vehicles "1) propelled solely by human power; 2) propelled by electric power obtained from overhead wires; 3) operated on rails or crawler treads; 4) located for use as a residence or premises; or 5) which is a lawn and garden tractor or mower or similar vehicle...

AR at 53. The "*GENERAL DEFINITION*" of "motor vehicle" relied upon by Erie and erroneously applied by the Circuit Court therefore requires in-state registration, but does not excluding the type of vehicle, a UTV, that crashed into the Petitioners' children.

The Erie policy contained a separate (and what should have been controlling) section titled "UNINSURED/UNDERINSURED MOTORISTS COVERAGE ENDORSMENT – WEST VIRGINIA." AR at 70. That endorsement reads, in relevant part, "THIS ENDORSEMENT

[2] The person identified as "**you**" in this definition would have been Mr. Cox, the owner of the truck towing Petitioners' children in the parade. Mr. Cox was the named policyholder of the Erie policy at issue. It is undisputed that he maintained UIM coverage at the time of the crash at issue.

CHANGES THE POLICY. PLEASE READ IT CAREFULLY." Id. The endorsement goes on to note:

> *This endorsement contains provisions applicable to Uninsured/Underinsured Motorists Bodily Injury and Property Damage Coverage and* ***changes provisions in your policy to the extent that the provisions in this endorsement are different from those in your policy.***

Id. (italics in original; bold added for emphasis). Under the "**DEFINITIONS**" heading the policy reads:

> *Words and phrases in bold type and quotations are used as defined in this endorsement. If a word or phrase in bold type and quotations is not defined in this endorsement, then the word or phrase is defined in the GENERAL POLICY DEFINITIONS section of the policy.*

Id.

In other words, a plain reading of the UIM Endorsement makes clear that any "words and phrases" within that section governed Petitioners' UIM claims. Conversely, Petitioners' UIM claims were not governed by the "*GENERAL DEFINITIONS*" section of the Erie policy so long as a relevant policy definition existed within Erie's UIM Endorsement. In this case, an "underinsured motor vehicle" was expressly defined within the UIM Endorsement. That, by Erie's own policy wording, made the "*GENERAL DEFINITION*" of a "motor vehicle" inapplicable to the facts of this case. The Circuit Court erroneously ignored the qualifying language in Erie's UIM Endorsement, adopted Erie's argument and erroneously relied upon the policy's "*GENERAL DEFINITIONS.*"

The Erie policy defines an "underinsured motor vehicle" as "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 and damages." AR at 70. Importantly for this case, the Erie UIM Endorsement then lists the following exclusion from its definition of an underinsured motor vehicle:

> "... 3) 'motor vehicles' designed for use mainly off public roads while not on public roads..."

AR at 71. In other words, even if Mr. Kidd's UTV was arguably designed for use mainly off public roads, it is undisputed that this crash occurred on public roads. Mr. Kidd's UTV was therefore defined as an "underinsured motor vehicle" for which no other controlling exclusion applied.[3]

It is undisputed that the definition of an "underinsured motor vehicle" is contained solely within Erie's UIM Endorsement. No such "words or phrases" regarding "underinsured motor vehicles" exist in the "*GENERAL DEFINITIONS*" section of Erie's policy. Therefore, by the plain terms of the UIM Endorsement, neither Erie nor the Circuit Court should have looked to the definition of a "motor vehicle" within the "*GENERAL POLICY DEFINITIONS*" section of Erie's policy. However, that is exactly what Erie argued and what the Circuit Court did. The Circuit Court's error arose despite the clear conflict that exists between the inapplicable "*GENERAL DEFINITION*" of a "motor vehicle" and the UIM Endorsement's controlling definition of an "underinsured motor vehicle."

As this Court will see from the June 12, 2023 hearing transcript related to Erie's Motion for Summary Judgment, the Circuit Court immediately zeroed in on the wrong definition in its coverage analysis. The Circuit Court first asked, "So we've got one real legal issue here. And that legal issue is whether or not this vehicle – this Kidd Rhino meets the definition of a motor

[3] Mr. Kidd's UTV was a vehicle that could be made street legal under W.Va. Code Section 17A-13-1. Ultimately, however, it does not matter whether his UTV was designed mainly for use off-of or on public roads. This is because the relevant Erie policy language only excludes an off-road vehicle from the definition of an underinsured motor vehicle when a crash occurs off-of public roads. Again, it is undisputed that this crash occurred on public roads. This is a critical distinction when the Petitioners later discuss the Circuit Court's erroneous reliance upon Boniey.

vehicle such that it's going to trigger UIM coverage under the Erie policy; correct?" Erie's counsel responded in the affirmative. AR at 116,117 (Transcript pages 3, 4).

However, the Circuit Court's opening question foretold its eventual error, when it asked if the "Kidd Rhino" met the definition of a "motor vehicle." As noted earlier, a "motor vehicle" is defined within the "*GENERAL DEFINITIONS*" section of Erie's policy. The Circuit Court's question should have been whether the "Kidd Rhino" met the definition of an "underinsured motor vehicle." An "underinsured motor vehicle" is defined in only one place: Erie's UIM Endorsement.

The Circuit Court then went on to stress the importance of the "*GENERAL DEFINITION*" of a "motor vehicle" when it concluded that the "Kidd Rhino" was not required to be registered in the State of West Virginia.[4] AR at 120. As they had in their Response in Opposition to Erie's Motion for Summary Judgment, Petitioners argued at hearing that the controlling definition was contained solely within Erie's UIM Endorsement. AR at 121, 124, 125, 126. Moreover, Petitioners noted that the registration requirement contained within the "*GENERAL DEFINITIONS*" section of Erie's policy could only rationally apply to liability coverage but never to an "underinsured motor vehicle."

Based upon the Circuit Court's rationale, Erie's "*GENERAL DEFINITION*" of a "motor vehicle" would exclude from coverage any out-of-state uninsured or underinsured motor vehicle that was not required to be registered in West Virginia. The in-state registration requirement in the "*GENERAL DEFINITION*" of a "motor vehicle" was airtight proof that the Petitioners' position was correct. Conversely, the in-state registration requirement conclusively proved that Erie's position was fatally flawed.

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[4] As Petitioners pointed out in their Response Brief below, the "Kidd Rhino" could have been registered and qualified as a street legal "motor vehicle." AR at 95. That issue is ultimately unimportant for this Court's decision. Petitioners only point it out here to the extent that this Court questions what type of vehicle the "Kidd Rhino" was and whether it was one that was anticipated to operate on this State's roadways. It was.

However, the Circuit Court surprisingly referred to the in-state registration requirement as a "red herring." AR at 126. The Circuit Court made this finding since Mr. Kidd, the tortfeasor, was a West Virginia resident. Petitioners respectfully contend that Mr. Kidd's residency was irrelevant and should not have been considered by the Circuit Court in any way, shape or form. This is because the tortfeasor's vehicle could have been a regular "motor vehicle" from anywhere, say, a Toyota Camry from Ohio. There would have been no in-state registration requirement if the owner of that Toyota Camry was an Ohio resident.

Under the Circuit Court's erroneous analysis, the otherwise properly licensed and registered Toyota Camry from Ohio would not qualify as a "motor vehicle" under the Erie policy definitions. This can only mean that the in-state registration requirement in Erie's "*GENERAL DEFINITION*" of a "motor vehicle" applied to Mr. Cox's personal liability coverage, but not to Mr. Kidd's status as an underinsured driver. As this Court will see, the Circuit Court relied heavily upon the in-state registration requirement in its Order granting summary judgment. AR at 120, 125, 127, 128, 129. This means the Circuit Court's findings and conclusions would exclude every out-of-state driver of an uninsured or underinsured motor vehicle who injures a West Virginia resident covered by a policy of Erie Insurance. This Court's affirmance of the Circuit Court's erroneous Order would do the same, on a statewide scale.

Erie's in-state registration requirement could only rationally apply as an underwriting precursor to liability coverage for Mr. Cox's vehicle. It makes sense that Erie required Mr. Cox's vehicle to be registered in the State of West Virginia in conjunction with its West Virginia issued policy. However, the in-state registration requirement the Circuit Court relied upon should never have been applied to a third-party tortfeasor's vehicle after an otherwise valid UM or UIM claim. A third-party tortfeasor could be driving a vehicle registered in a different state or even a different

country. Pursuant to Erie's rationale, no out-of-state vehicle would ever qualify as a "motor vehicle" under its policy and its UM/UIM coverage would never apply to any vehicle that was not registered in West Virginia. That is, quite simply, a legally absurd result.

The only proper definition of a "motor vehicle" that should apply in this case is that of an "underinsured motor vehicle" contained within Erie's controlling UIM Endorsement. That Endorsement was erroneously disregarded by the Circuit Court in favor of the liability "*GENERAL DEFINITION*" of "motor vehicle." The plain wording of Erie's policy proves that the Circuit Court should have only looked to the UIM Endorsement for the controlling definitional language.

This leads to an additional problem with the Circuit Court's Order. Erie's argument created conflicting policy definitions. However, the relevant definition of an "underinsured motor vehicle" was actually crystal clear. "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl. Pt. 7, Certain Underwriters v. Pinnoak Resources, 223 W.Va. 336, 674 S.E.2d 197 (2008)(per curiam); Syl., Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714 (1970); Syl. Pt. 2, West Virginia Fire & Casualty Co. v. Stanley, 216 W.Va. 40, 602 S.E.2d 483 (2004). Erie convinced the Circuit Court to foist the "*GENERAL DEFINITION*" of "motor vehicle" onto the clearly worded definition of an "underinsured motor vehicle." Had the Circuit Court had only focused on the controlling definitions contained within Erie's UIM Endorsement, that clear policy language would have afforded coverage.

III. THE CIRCUIT COURT ERRED BY IGNORING THE FACT THAT THIS CRASH WAS CAUSED BY A POLICY DEFINED UNDERINSURED MOTOR VEHICLE WHILE ON A PUBLIC ROAD.

Erie's chosen authority is not merely distinguishable, it is inapplicable on its face. Erie relied most heavily upon Boniey v. Kuchinski, 223 W. Va. 486, 677 S.E.2d 922 (2009) in which

an individual was injured while riding as passenger on an all-terrain vehicle (ATV) that was being driven *off road*.[5] The driver of the ATV had a liability policy on his personal automobile, but coverage was denied since the ATV was not an insured vehicle. The claimant then sought uninsured motorist coverage (UM) from her own auto insurer, State Farm. State Farm denied coverage after alleging the tortfeasor's ATV did not meet the definition of a "motor vehicle" under the policy. Id. at pp. 488-489, 676-677.

The Circuit Court erred in its analysis of Boniey in the same manner that it erred when analyzing Erie's policy language. That is, the Circuit Court focused on Boniey's discussion of whether UM coverage for that ATV was required under the statutory definitions of a "motor vehicle" and/or the insurability requirements of West Virginia's Omnibus Statute, W.Va. Code § 33-6-31 and Motor Vehicle Responsibility Law, W.Va. Code § 17D-4-2. The Circuit Court again foisted Erie's use of the "*GENERAL DEFINITION*" of a "motor vehicle" instead of what should have been the policy's controlling definition of an "underinsured motor vehicle" contained within UIM Endorsement. Since Mr. Kidd's UTV was not required to be registered pursuant to our Omnibus Statute or Motor Vehicle Responsibility Law, the Circuit Court ignored the plain wording of the UIM Endorsement and denied coverage.

In Boniey the issue was whether an ATV met the statutory definition of a "motor vehicle" and whether those statutory definitions conflicted with State Farm's policy definitions. The Boniey Court found that our relevant statutory scheme did not require insurance for "off road"

[5] Erie tangentially cited other cases in which vehicles other than passenger cars were excluded from coverage. However, those cases, such as Baez v. Foremost Ins. Co., 17-0473 (W.Va. May 11, 2018) (Memorandum Decision), are also inapposite. In Baez it was held that a golf cart was not subject to a mandatory offer of UIM coverage pursuant to W.Va. Code § 33-6-31. That is not the issue here. The only question in this case is whether the "Kidd Rhino" met the Erie policy definition of an "underinsured motor vehicle." It did.

vehicles that were not being operated on public roads. That is not and never was the issue here, and the Circuit Court erred by concluding otherwise.

Here the issue is whether Erie's plainly worded policy language defines Mr. Kidd's UTV as an "underinsured motor vehicle." For all the reasons stated above, it does. The next question is whether there is any other exclusion that should have applied. There was not. As noted, the Erie UIM Endorsement only excludes UIM coverage when the tortfeasor's vehicle is designed mainly for off-road use while *not* on public roads. Therefore, even if the "Kidd Rhino" was found to have been designed for use mainly for off-road use, Erie's UIM Endorsement exclusion does not apply to a crash that indisputably occurred on a public road.

In Boniey and related cases, ATV's and similar vehicles were excluded from coverage when policy exclusions did not conflict with our statutory scheme. However, in this case, unlike in Boniey, Petitioners are not alleging that Erie's policy is more restrictive of our statutory scheme. Rather, Erie's policy provides UIM coverage in this case even if it was not required by statute[6].

Petitioners do not allege that our statutory scheme forces Erie to provide coverage it did not include within its policy. Rather, Petitioners allege that Erie's UIM Endorsement provides broader coverage than our statutes require, based upon the plain wording of Erie's policy. Petitioners are not asking this Court to trump Erie's policy language with a statutory mandate, as the claimants in Boniey tried and failed to do. Rather, Petitioners are simply pointing out that Erie's UIM Endorsement plainly defines the "Kidd Rhino" as an "underinsured motor vehicle" and that no other exclusion applies since this was an accident on public roads. Coverage exists in

[6] Insurance companies sell innumerable products that are not required by statute. In the realm of automobile insurance, medical payments coverage (commonly referred to as "medpay") is a well-known example. In short, the fact that our statutory scheme does not require Erie to cover unregistered, underinsured motor vehicles is not proof that the Erie UIM Endorsement does not provide that coverage. It does.

this case due to the plain wording of Erie's UIM Endorsement, not because Petitioners are arguing that a statute requires it.

The "Kidd Rhino" would have been "uninsured" but not a qualifying motor vehicle under the Boniey analysis if this crash took place off public roads with no liability coverage on Mr. Cox's vehicle in place. Likewise, the "Kidd Rhino" arguably would have been "underinsured" but not a qualifying motor vehicle if this crash took place off public roads even with the existing Foremost liability policy in place. However, the "Kidd Rhino," per the terms of Erie's own UIM Endorsement, was both underinsured *and* on public roads, taking this case squarely out of the Boniey analysis.

Erie's position would result in a funhouse mirror reflection of cases like Boniey. In those decisions this Court did not force insurers to cover claims that our statutes did not otherwise mandate. Here, Erie argues that even though its UIM Endorsement plainly provides coverage, it is not obligated to pay since our statutes do not otherwise mandate it. Insurers usually argue that a claimant is ignoring statutory requirements when an insurer raises an exclusion. Here, Erie does the opposite. The insurer asks this Court to ignore Erie's plainly worded UIM Endorsement that provides coverage and instead only look to statues that do not require it. This would be a terrible precedent to set.

Mr. Cox voluntarily bought UIM coverage. The "Kidd Rhino" was underinsured and met Erie's UIM Endorsement definition of an "underinsured motor vehicle." The "Kidd Rhino" was on public roads when it crashed into and injured the Petitioners' children. Erie's policy only excludes UIM coverage when an "underinsured motor vehicle" such as the "Kidd Rhino" is not on public roads. The Circuit Court erred in concluding otherwise and that ruling should be reversed.

CONCLUSION

Erie's position, erroneously adopted by the Circuit Court, would result in binding precedent that excludes every out-of-state uninsured or underinsured vehicle from coverage since those vehicles are not required to be registered in West Virginia. Moreover, affirmance of the Circuit Court's Order would provide another absurd result - Erie gets a pass by arguing that it can now ignore its own plainly worded coverage since it wasn't required by law. Insurers may obviously offer coverage that exceeds our statutory minimums, and that is exactly what Erie's UIM Endorsement did in this case when an "underinsured motor vehicle" crashed on a public road. This Court should find that Erie's argument creates a policy ambiguity that should be strictly construed against the insurer and that the plainly worded terms of Erie's UIM Endorsement affords coverage. Petitioners request that this Court enter an Order reversing the Circuit Court's Order with instructions that a finding of UIM coverage is proper, along with any other relief deemed appropriate.

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and as Next Friends and Legal Guardians of
S.L., G.L., AND J.L., minors,
and
KEITH and MELISSA CHAPMAN, individually,
and as Next Friends and Legal Guardians of
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Civil Action No. 21-C-827

CERTIFICATE OF SERVICE

I, JB Akers, counsel for Petitioners, Shaun and Jennifer Lopez, and Keith and Melissa Chapman, do hereby certify that I have served a true copy of **"PETITIONER'S BRIEF"** via electronic filing and via U.S. Mail upon the following counsel of record this 25th day of October, 2023:

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