

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 23-ICA-338

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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

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This appeal arises from a decision by the Circuit Court of Kanawha County granting summary judgment in favor of the Respondent, Erie Insurance Property & Casualty Company (“Erie”), on the issue of whether an Erie Auto Insurance Policy issued to Greg Cox provided underinsured motorist coverage for claims by the Petitioners arising from an accident that occurred on November 2, 2019. (JA 132-147). At the time of the November 2, 2019 motor vehicle accident, Greg Cox was operating a 2019 Ford F150 truck with an attached utility trailer on Sixth Avenue in St. Albans, West Virginia. (JA 22). The utility trailer attached to the Ford F150 was transporting a number of minor children and adults as part of the Saint Albans Veterans Day Parade. *Id.* The parade traffic slowed and Mr. Cox likewise reduced the speed of his truck. *Id.* A 2007 Yamaha Rhino all-terrain vehicle (“ATV”) operated by John Kidd was traveling behind the Ford F150 and attached utility trailer. (JA 22 and 28). As the parade traffic slowed, Mr. Kidd attempted to slow the ATV but his foot became lodged in the accelerator, causing the ATV to accelerate. (JA 22). As a result, the ATV struck the ramp of the utility trailer attached to the Cox vehicle, causing the ramp to collapse and strike the occupants on the trailer, including the minor Petitioners, M.R., S.L., G.L., J.L. and H.C. *Id.*

At the time of the accident, the ATV operated by Mr. Kidd was insured through Foremost Insurance Company with per accident limits of liability coverage in the amount of \$50,000.00. (JA 39). As a result of the accident, Foremost Insurance Company tendered its liability limits of coverage in settlement of the claims of the minor Petitioners and a release of John Kidd. *Id.* These settlements were approved by the Circuit Court of Kanawha County by Order entered February 8, 2021. (JA 35-44).

The Ford F150 owned and operated by Greg Cox was insured through an Erie Auto Policy, identified as Policy No. Q11 6705664, with a policy period of November 17, 2018 to November 17, 2019 (the “Erie Policy”). (JA 47). The Erie Policy provided underinsured motorists coverage in the amount of \$100,000.00 per person and \$300,000.00 per accident, subject to its terms and conditions. *Id.* As a result of the settlement reached with Mr. Kidd and Foremost Insurance Company, the Petitioner, M.R., sought underinsured motorists coverage through the Erie Policy. Erie’s investigation concluded that the ATV operated by Mr. Kidd was not a vehicle subject to West Virginia’s registration requirements. (JA 28). As a result, Erie concluded that the ATV did not qualify as an underinsured motor vehicle in accordance with the terms and conditions of the Erie Policy and denied M.R.’s claim for underinsured motorist coverage by letter dated November 2, 2020. (JA 83-86).¹

The Petitioners filed Complaints against Erie seeking underinsured motorists coverage. Three separate civil actions were filed, designated as Civil Action Nos. 21-C-827, 21-C-977 and 21-C-978. (JA 2). By Order entered December 22, 2021, the three civil actions were consolidated into Civil Action No. 21-C-827. (JA 1). At the close of discovery, Erie filed its Motion for Summary Judgment on February 4, 2023, asserting that underinsured motorists coverage was not available in accordance with the terms and conditions of the Erie Policy because the ATV operated by John Kidd did not meet the definition of an underinsured motor vehicle. (JA 3-19). Specifically, Erie found that the ATV did not meet the definition of an underinsured motor vehicle because the Erie Policy required an underinsured motor vehicle to be a motor vehicle subject to registration requirements and the ATV was not required to be registered. *See id.* By Order entered June 29, 2023, the Circuit Court of Kanawha County agreed and granted Erie’s Motion for Summary

¹ Prior to the commencement of litigation of this matter, underinsured motorist claims were not presented to Erie on behalf of the remaining Petitioners.

Judgment, finding that the Erie Policy was unambiguous and did not provide underinsured motorists coverage to the Petitioners. (JA 132-147). This appeal follows.

SUMMARY OF THE ARGUMENT

This appeal centers on the primary question of whether a policy of insurance issued by Erie to its insured, Greg Cox, extends underinsured motorists coverage for an accident involving a vehicle that was not subject to registration under West Virginia law. By its terms, the Erie Policy in this case requires that bodily injury or property damage be caused by the owner or operator of an “underinsured motor vehicle”. The Erie Policy’s definition of “underinsured motor vehicle” incorporates within its definition the requirement that the “underinsured motor vehicle” be a “motor vehicle” as defined by the Erie Policy. However, in accordance with the terms of the Erie Policy, a “motor vehicle” does not include a vehicle that is not subject to registration under the laws of the state where the insured resides, in this case West Virginia.

The undisputed facts in this case establish that Petitioners’ claims for underinsured motorist coverage arise from an accident caused by an all-terrain vehicle (ATV) not subject to registration under the laws of West Virginia. Applying the Erie Policy as written, the Circuit Court correctly concluded that the Erie Policy’s underinsured motorist coverage provisions were not triggered because the ATV did not meet the definition of “motor vehicle” and thereby did not qualify as an “underinsured motor vehicle”.

By way of this appeal, the Petitioners are left to argue that the Circuit Court erred because it should have disregarded the definition of “motor vehicle” in determining whether the ATV qualified as an “underinsured motor vehicle”. This argument ignores the plain language of the Erie Policy and the fact that the defined term “motor vehicle” is expressly incorporated within the definition of “underinsured motor vehicle”. In other words, unless the vehicle at issue constitutes a “motor vehicle” as defined by the Erie Policy, it cannot under any circumstance constitute an “underinsured motor vehicle”. There is no ambiguity in the requirement that a vehicle meet the

definition of “motor vehicle” in order to qualify as an “underinsured motor vehicle” and Petitioners’ appeal fails on that basis alone.

Petitioners separately argue that the Erie Policy’s definition of “motor vehicle” is overly restrictive because it does not apply to vehicles that are principally garaged in other states. In accordance with the terms of the Erie Policy, whether a vehicle qualifies as a “motor vehicle” is based on whether that vehicle would be subject to registration in the state where the insured resides at the time the policy is issued. Petitioners’ argument on this point fails to realize that the registration requirement for a “motor vehicle” under the Erie Policy is designed to identify the types and classes of vehicles that are subject to West Virginia’s registration requirements regardless of where the vehicle is principally garaged. In other words, whether a vehicle qualifies as a “motor vehicle” is dependent on whether that vehicle would be subject to registration requirements under West Virginia law. The clear intent of this requirement is to define the vehicles that would be subject to the minimum financial responsibility requirements of W. Va. Code § 17D-4-2 and the corresponding insurance requirements of W. Va. Code § 33-6-31. To that end, the Erie Policy’s registration requirement in its definition of “motor vehicle” is designed to mirror the insurance requirements under West Virginia law, because insurance requirements under W. Va. Code § 33-6-31 do not extend to vehicles that are not subject to registration.

In the context of uninsured motorist coverage, which is subject to a much more restrictive public policy regiment in West Virginia than underinsured motorist coverage, the West Virginia Supreme Court of Appeals has previously held that a provision in an insurance policy excluding an off-road all-terrain vehicle from uninsured motorist coverage does not violate the intent and purpose of the uninsured motorist provisions of W. Va. Code § 33-6-31(b). *See* Syl. Pt. 8, *Boniley v. Kuchinski*, 223 W. Va. 486, 677 S.E.2d 922 (2009), *modified by Erie Insurance Company v.*

Dolly, 240 W. Va. 345, 811 S.E.2d 875 (2018). This holding was premised on the finding that a motor vehicle not required to be registered and licensed under West Virginia law is not subject to West Virginia's Motor Vehicle Safety Responsibility Law. *Id.*, Syl. Pt. 7.

In accordance with W. Va. Code § 33-6-31(k), the West Virginia Legislature recognized an insurer's ability to incorporate terms, conditions and exclusions as may be consistent with the premium charged. In interpreting this statutory provision, the West Virginia Supreme Court of Appeals has acknowledged that the Legislature does not view required uninsured motorist coverage the same as optional underinsured motorist coverage, and thereby recognized that the more stringent public policy surrounding uninsured motorists coverage emanates from its mandatory nature and public policy concerns involving an insurer's restriction of that coverage. *See Deel v. Sweeney*, 181 W. Va. 460, 463, 383 S.E.2d 92, 95 (1989). The fact that West Virginia has not extended the more restrictive public policy governing uninsured motorists coverage to vehicles that are not subject to registration requirements firmly establishes that West Virginia would not impose that type of extension to underinsured motorists coverage. As the Circuit Court recognized in this case, West Virginia precedent established that there were no public policy concerns with the Erie Policy's limitation of what constitutes a "motor vehicle" and correctly applied the plain and unambiguous definitions in the Erie Policy to conclude that underinsured motorists coverage was not available to the Petitioners in this case.

For these reasons, Erie Insurance Property & Casualty Company respectfully requests that this Court affirm the decision of the Circuit Court of Kanawha County, finding that underinsured motorists coverage does not extend to vehicles that are not subject to registration under West Virginia law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with Rule 18 of the West Virginia Rules of Appellate Procedure, Erie believes that oral argument is unnecessary because the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal. However, to the extent that the Court requests oral argument, Erie believes that this appeal is appropriate for argument in accordance with Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves assignments of error in the application of settled law.

ARGUMENT

I. Standard of Review

A circuit court's entry of summary judgment is reviewed *de novo*. Syl. Pt. 1, *Painter v. Peavey*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting its *de novo* review, the Court applies the same standard for granting summary judgment that is applied by the circuit court. *Merrill v. West Virginia Dept. of Health and Human Resources*, 219 W. Va. 151, 632 S.E.2d 307 (2006). Under that standard, summary judgment is appropriate "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter*, 192 W. Va. 189, 451 S.E.2d 755. For purposes of this appeal, the, "determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. Pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002).

II. The Circuit Court Correctly Applied The Policy Language

The Petitioners cite as their first Assignment of Error that the Erie Policy at issue created a policy ambiguity by requiring the Circuit Court to look to the definition of "motor vehicle" under the general definitions portion of the policy "rather than solely applying the controlling definition of an 'underinsured motor vehicle' contained within the Underinsured Motorist ("UIM") Endorsement." *Petitioner's Brief*, page 4. In making this assertion, the Petitioners ignore that the Erie Policy's definition of "underinsured motor vehicle" expressly requires that the vehicle first meet the Erie Policy's general definition of "motor vehicle". That fact is fatal to Petitioner's argument that the Circuit Court erred by applying the definition of "motor vehicle" in finding that the Kidd ATV does not qualify as an "underinsured motor vehicle" as defined by the Erie Policy.

Language in an insurance policy should be given its plain, ordinary meaning. Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986). Where the provisions of an insurance policy 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. 1, *Christopher v. United States Life Ins.*, 145 W. Va. 707, 116 S.E.2d 864 (1960). The contract should be read as a whole with all policy provisions given effect. *Soliva*, 176 W. Va. at 432 (citing 2 Couch on Insurance 2d § 15:29). If the policy as a whole is unambiguous, then the insured will not be allowed to create an ambiguity out of sections taken out of context. *Id.*

At the heart of this appeal is Erie's Uninsured/Underinsured Motorists Coverage Endorsement – West Virginia. (JA 70-73). This endorsement to the Erie Policy sets forth the terms and conditions for the extension of both uninsured and underinsured motorists coverage. The insuring provision contained in the endorsement provides as follows:

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE
READ IT CAREFULLY.**

**UNINSURED/UNDERINSURED MOTORISTS COVERAGE
ENDORSEMENT – WEST VIRGINIA**

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

OUR PROMISE

"We" will pay damages for bodily injury and property damage that the law entitles **"anyone we protect"** or the legal representative of **"anyone we protect"** to recover from the owner or operator of an **"uninsured motor vehicle."** If Underinsured Motorists Coverage is indicated on the **"Declarations,"** "we" will pay damages for bodily injury and property damage that the law entitles **"anyone we protect"** or the legal representative of **"anyone we protect"** from the owner or operator of an **"underinsured motor vehicle."**

Damages must result from a motor vehicle accident arising out of the ownership or use of the "**uninsured motor vehicle**" or "**underinsured motor vehicle**" as a motor vehicle and involve:

1. bodily injury to "**anyone we protect.**" Bodily injury means physical harm, sickness, disease or resultant death to a person; or
2. property damage, meaning destruction of or injury to:
 - a. an "**owned auto we insure**" and property owned by "**anyone we protect**" while contained in such "**auto;**"
 - b. property owned by "**you**" or a "**relative**" while contained in any "**auto we insure**" under this coverage; and
 - c. any other property, except a "**motor vehicle,**" owned by "**anyone we protect**" and located in West Virginia.

If loss results in an Uninsured or Underinsured Motorists Property Damage claim, "**we**" will pay "**you**" the greater of the fair market rental value of a like kind replacement vehicle or the amount to which you are entitled under Transportation Expenses Coverage, if purchased.

"**We**" will not be bound by a judgment against the owner or operator of the "**uninsured motor vehicle**" or "**underinsured motor vehicle**" on issues of liability or amount of damages unless it is obtained with "**our**" written consent.

(JA 71).

By its terms, the insuring provision for underinsured motorists coverage extends that coverage to "anyone we protect" for bodily injury or property damage that "anyone we protect" is entitled to recover from the owner or operator of an "underinsured motor vehicle".² *Id.* The Erie Policy further provides that damages must result from a motor vehicle accident arising out of the ownership or use of the "underinsured motor vehicle". *Id.* A necessary and express component of this insuring

² Erie does not dispute that the minor Petitioners in this appeal would qualify as "anyone we protect" under the terms of the UM/UIIM Endorsement because they were occupying an owned auto insured by the Erie Policy. (JA 70).

provision is the requirement that the recovery be from the owner or operator of an “underinsured motor vehicle”.

“Underinsured motor vehicle” is a defined term in the Erie UM/UIM Endorsement. Specifically, the Erie Policy provides the following definition of “underinsured motor vehicle” in the Endorsement:

DEFINITIONS

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.

"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 and damages.

"Underinsured motor vehicle" does not include:

1. **"motor vehicles"** insured for Liability Protection under this policy;
2. **"motor vehicles"** owned or leased by any governmental unit or agency;
3. **"motor vehicles"** designed for use mainly off public roads while not on public roads; or
4. **"motor vehicles"** owned, leased or rented by, furnished to or available for the use of **"you"** or a **"relative."**

(JA 70-71).

As noted in the opening paragraph providing definitions within the endorsement, “Words and phrases in bold type and quotations are used as defined in this endorsement.” (JA 70). Both “underinsured motor vehicle” and “motor vehicle”, which is within the definition of “underinsured motor vehicle” are defined terms. Critically, this section further provides that, “[i]f 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.* “Motor vehicle” is not defined in the endorsement and is therefore defined through the GENERAL POLICY DEFINITIONS section of the Erie Policy.

By its express terms, an “underinsured motor vehicle” must meet the separately defined term of a “motor vehicle”. If the vehicle involved does not meet the definition of “motor vehicle”, then the vehicle cannot meet the definition of “underinsured motor vehicle”. The Erie Policy defines “motor vehicle” in the GENERAL POLICY DEFINITIONS as follows:

GENERAL POLICY DEFINITIONS

Throughout this policy and its endorsements, the following words and phrases have a special meaning when they appear in bold type and quotations.

- **“Motor vehicle”** means 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 this policy is issued. **“Motor vehicle”** does not include a vehicle:
 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.

(JA 52-53).

There are two requirements for a vehicle to qualify as a “motor vehicle” under the Erie Policy. First, the vehicle must be self-propelled. Second, the vehicle must be subject to registration requirements in the state where the insured resides at the time the policy was issued. While Erie

would not dispute that the Kidd ATV in this case was self-propelled, it is not subject to registration requirements under West Virginia law. On that basis, the Kidd ATV cannot qualify as a “motor vehicle”. Because the Kidd ATV is not a “motor vehicle”, it cannot qualify as an “underinsured motor vehicle” since a vehicle must first be a “motor vehicle” before it can be an “underinsured motor vehicle”. Because the Kidd ATV is not an “underinsured motor vehicle”, the insuring provision in the UM/UIM Endorsement of the Erie Policy is not triggered. It is for that reason that Petitioners are not entitled to underinsured motorist coverage.

As the Traffic Crash Report prepared as a result of the November 2, 2019 motor vehicle accident confirms, the Kidd ATV was not required to be registered. (JA 28). This conclusion is wholly consistent with West Virginia’s statutory framework for registration of motor vehicles. Chapter 17A of the West Virginia Code identifies which vehicles are subject to its registration and certificate of title provisions. Specifically, W. Va. Code § 17A-3-2(a) provides that,

(a) Every motor vehicle, trailer, semitrailer, pole trailer and recreational vehicle when driven or moved upon a highway is subject to the registration and certificate of title provisions of this chapter except:

...

(6) The following recreational vehicles are exempt from the requirements of annual registration, license plates and fees, unless otherwise specified by law, but are subject to the certificate of title provisions of this chapter regardless of highway use: Motorboats, *all-terrain vehicles, utility terrain vehicles* and snowmobiles.

W. Va. Code § 17-A-3-2 (emphasis added). For purposes of Chapter 17A, a recreational vehicle is defined as a “motorboat, motorboat trailer, all-terrain vehicle, travel trailer, fold-down camping trailer, motor home, or snowmobile. W. Va. Code § 17A-1- 1 (nn). Further, for purposes of the same Chapter, all-terrain vehicle is defined as:

[A]ny motor vehicle designed for off-highway use and designed to travel on not less than three low-pressure or nonhighway tires, is 50 inches or less in width and intended by the manufacturer to be used by a single operator or is specifically designed by the manufacturer with seating for each passenger. “All-terrain vehicle” and “ATV” does not include mini trucks, golf carts, riding lawnmowers, electric bicycles as defined in § 17C-1-70 of this code, or tractors.

W. Va. Code § 17A-1-1(ii). Likewise, utility terrain vehicle is defined as “any motor vehicle with four or more low-pressure or nonhighway tires designed for off-highway use and is greater than 50 inches in width. ‘Utility terrain vehicle’ does not include mini trucks, golf carts, riding lawnmowers, or tractors.” W. Va. Code § 17A-1-1(vv).

The Kidd ATV falls within the definition of all-terrain vehicle and/or utility terrain vehicle for purposes of registration and certificate of title requirements in West Virginia. While the Kidd ATV must have a certificate of title, it is not subject registration in accordance with W. Va. Code § 17A-3-2(a). Because the Kidd ATV is not subject to registration requirements, the ATV is not a “motor vehicle” as defined by the Erie Policy.

Petitioners’ erroneously assert in this appeal that the Circuit Court improperly utilized the definition of “motor vehicle” in determining whether the Kidd ATV was an “underinsured motor vehicle”. *Petitioner’s Brief*, page 7. But that is exactly what the Erie Policy requires. If a vehicle does not meet the definition of “motor vehicle”, it cannot under the terms of the Erie Policy qualify as an “underinsured motor vehicle” because the definition of “underinsured motor vehicle” expressly incorporates the definition of “motor vehicle” within its definition.

Petitioners assert in this appeal that the definition of “underinsured motor vehicle” should have been applied and the definition of “motor vehicle” disregarded. To do so would require the Court to completely disregard the plain language of the Erie Policy and ignore the fact that “motor vehicle” is a clearly defined term within the definition of “underinsured motor vehicle”. There is

no ambiguity in applying both definitions for purposes of defining the scope of underinsured motorists coverage provided by the Erie Policy.

As a secondary argument in this appeal, the Petitioners assert that the Erie Policy's registration requirement in the definition of "motor vehicle" is overly restrictive because it could not apply to an out-of-state vehicle since those vehicles do not have to actually be registered in West Virginia. However, Petitioners' argument misconstrues the plain meaning and intent of the Erie Policy. The definition of "motor vehicle" in the Erie Policy requires the vehicle at issue to be subject to registration requirements "under the laws of the state in which 'you' reside at the time this policy is issued." (JA 53) That does not mean the vehicle actually has to be registered in West Virginia. Rather, the vehicle must fall within the class of vehicles that are subject to those registration requirements. Accordingly, the Erie Policy's definition of "motor vehicle" applies equally to vehicles principally garaged in West Virginia and vehicles principally garaged out of state. Irrespective of where the alleged underinsured motor vehicle is located, the test is whether the vehicle would be subject to registration in the state where the insured resides at the time of policy issuance.³ Petitioners assert that an "otherwise properly licensed and registered Toyota Camry from Ohio would not qualify as a 'motor vehicle' under the Erie policy definitions." *Petitioner's Brief*, page 13. However, the Camry would qualify as a "motor vehicle", even though

³ The Petitioners' failure to recognize this distinction is further demonstrated in footnote 4 of Petitioners' Brief. Petitioners suggest that the Kidd ATV *could* have been registered in West Virginia. That assertion would be irrelevant because the test is whether it would be *required* to be registered in West Virginia, regardless of whether it was actually registered. The Erie Policy does not qualify the definition of "motor vehicle" through a specific inquiry of the vehicle at issue, but rather whether the vehicle falls within a class of vehicles with *mandatory* registration requirements under the laws of the state where the insured resides at the time of policy inception. That is why the Circuit Court recognized this argument as a red herring. (JA 126).

it was from Ohio, because it would fall within the class of vehicles subject to registration in West Virginia, and therefore fall within the definition of “motor vehicle”.⁴

There can be no dispute that the Kidd ATV was not subject to registration requirements under West Virginia law. The record in this case establishes that a vehicle which is not within a class of vehicles subject to registration requirements under West Virginia law is not a “motor vehicle” as defined by the Erie Policy. The record in this case establishes that because the Kidd ATV cannot meet the definition of “motor vehicle”, it cannot qualify as an “underinsured motor vehicle”. Those facts demonstrate that the Circuit Court correctly ruled that Petitioners were not entitled to underinsured motorists coverage as a result of the November 2, 2019 accident based on the express terms of the Erie Policy. For those reasons, Erie respectfully requests that this Court affirm the conclusions of the Circuit Court on these issues.

III. The Circuit Court Correctly Applied Applicable Case Law

West Virginia has expressly recognized the right of an insurer to limit and exclude insurance coverage for claims of bodily injury caused by vehicles which are not subject to registration requirements. Two syllabus points of *Boniley v. Kuchinski*, 223 W. Va. 486, 677 S.E.2d 922 (2009) expressly make this point:

7. A motor vehicle that is not required to be registered and licensed pursuant to W. Va. Code §§ 17A-3-1, *et seq.* is excluded from the mandatory security provisions in the Motor Vehicle Safety Responsibilities law including motor vehicle liability coverage mandated by W. Va. Code § 17D-4-2.

8. A provision in a motor vehicle liability insurance policy excluding an off-road all-terrain vehicle or ATV from uninsured

⁴ The fact that the registration requirements are determined by the laws of the state where the insured resides, rather than where the alleged underinsured driver resides, further reinforces this point.

motorist coverage does not violate the intent and purpose of the uninsured motorist statutes at W. Va. Code § 33-6-31(b).⁵

Through this appeal, the Petitioners misapply the analysis in *Boniley* by claiming that the determinative factor in that case was that the ATV in *Boniley* was not being driven on a public road at the time the claims arose in that case. However, as the Court in *Boniley* noted,

Also, Ms. Boniley asserts that W. Va. Code 33-6-31(b) does not make the existence of uninsured motorist coverage dependent upon whether the motor vehicle in question was being operated off-road or on a public highway at the time of the accident. ***Because we do not base our decision herein on a finding that an ATV does not meet the definition of a “motor vehicle” or the fact that Mr. Kuchinski’s ATV was not being operated on a public highway at the time of the accident, we find it unnecessary to address these arguments.***

Boniley v. Kuchinski, 223, W. Va. 486, 677 S.E.2d 922, fn. 6 (emphasis added).

While Petitioners assert that the outcome in *Boniley* was wholly dependent on the fact that the ATV in *Boniley* was off-road at the time of the accident, they summarily ignore the fact that the West Virginia Supreme Court of Appeals expressly rejected the notion that the location of the accident was determinative. Rather, the focus of the Court’s decision in *Boniley* was whether West Virginia’s statutory framework and public policy surrounding uninsured motorists coverage conflicted with the insurance policy’s limitation excluding vehicles which were not subject to registration from the scope of uninsured motorists coverage. In this case, the Circuit Court correctly categorized this as a “nonissue” because “you don’t even get to that inquiry unless the vehicle is determined to be a motor vehicle. It is not a motor vehicle.” (JA 128).

⁵ In *Erie Insurance Company v. Dolly*, 240 W. Va. 345, 811 S.E.2d 875 (2018), the Court modified Syllabus Pt. 8 to read as follows: a provision in a motor vehicle liability insurance policy excluding an off-road all-terrain vehicle or ATV from being an uninsured motor vehicle does not violate the intent and purposes of the uninsured motorist statute at W. Va. Code § 33-6-31(b). This modification has no impact on Erie’s arguments herein.

Nevertheless, the Petitioners place particular importance on this distinction. Conspicuously absent from either of the two foregoing syllabus points in *Boniley*, however, is any reference to a requirement that the accident be off-road instead of on public roads.⁶ The focus of *Boniley* was the legislative scope of W. Va. Code § 33-6-31 and whether the insurance requirements provided by the Omnibus Statute were intended to include coverage for vehicles that are not subject to registration requirements. To that end, the Court in *Boniley* stated the following:

Based on the above, this Court determines that because an ATV is not required to have liability insurance coverage under the financial liability law, an ATV is not an “uninsured motor vehicle” for the purposes of W. Va. Code § 33-6-31(b). Accordingly, we conclude that an insurance policy provision excluding ATVs from the uninsured motorist coverage mandated by W. Va. Code § 33-6-31(b) does not violate the intent and purpose of the uninsured motorist statute.

Boniley, at 492, 928.

Given the fact that underinsured motorist coverage is governed by the same statutory framework in W. Va. Code 33-6-31(b), it is evident that an ATV is not an underinsured motor vehicle either for purposes of that statute.

There is no legal support under West Virginia law that public policy mandates an extension of underinsured motorist coverage to vehicles that are not subject to the requirements of W. Va. Code § 33-6-31. The West Virginia Supreme Court’s decision in *Baez v. Foremost Insurance Company*, 2018 WL 2175900 (W. Va. 2018) reinforces that fact. In *Baez*, plaintiffs sought to reform a liability policy insuring golf carts to include underinsured motorist coverage based on the assertion that the insurer was required to offer UIM coverage for those golf carts because of the

⁶ The issue of off-road use of an ATV was only addressed by the Court because the State Farm policy, unlike the Erie Policy, did not limit the definition of “motor vehicle” to vehicles subject to license and registration requirements, but excluded from the definition of “uninsured motor vehicle” vehicles designed for use mainly off public roads, except while on public roads.

requirements of W. Va. Code § 33-6-31(b). However, because the Court found that golf carts are exempt from vehicle registration requirements, the UIM offer provisions of W. Va. Code § 33-6-31(b) did not apply. Consistent with the decisions in *Bonney* and *Baez*, Erie was entitled to include provisions in its policy excluding unregistered vehicles from the scope of underinsured motorist coverage. It did so through its definition of “motor vehicle.” Due to the absence of any public policy concerns, the Erie Policy should be applied as written, as the Circuit Court did in this case in finding that underinsured motorists coverage was not triggered.

Petitioners mischaracterize Erie’s position on whether the UIM Endorsement provides coverage, stating “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.” Erie does not argue that its UIM Endorsement plainly provides coverage. In fact, Erie’s argument consistently has been that its UIM Endorsement unambiguously limits coverage to vehicles that qualify as a “motor vehicle” under the policy and that the Kidd ATV cannot meet that definition. .

Further, Erie does not “as[k] this court to ignore Erie’s plainly worded UIM Endorsement.” Erie in fact relies upon its UIM Endorsement, which states, “**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 and damages.” “Motor vehicle” is a defined term which clearly excludes the Kidd ATV from the scope coverage. The Circuit Court correctly granted Erie’s motion for summary judgment.

In granting Erie’s Motion for Summary Judgment in this matter, the Circuit Court appropriately identified the determinative issue in this case: “whether or not this vehicle – this Kidd UTV meets the definition of a motor vehicle such that it’s going to trigger UIM coverage under the Erie Policy...” (JA 116). The Petitioners argue that the Circuit Court erred in framing

the question, and the question should have been whether the Kidd ATV qualified as an “underinsured motor vehicle.” The UIM Endorsement upon which the Petitioners rely clearly sets forth that an “underinsured motor vehicle” must first qualify as a “motor vehicle” in order to trigger UIM coverage. As the Circuit Court correctly noted, whether the Kidd ATV was a “motor vehicle” was a first step in the analysis and because the Kidd ATV did not qualify as a “motor vehicle”, that issue was determinative as to whether underinsured motorist coverage extended to Petitioners.

CONCLUSION

The Petitioners are unable to overcome one fact that is fatal to their Appeal: the Kidd ATV is not subject to registration requirements under West Virginia law and therefore does not meet the definition of “motor vehicle” for purposes of underinsured motorist coverage provided by the Erie Policy. The Circuit Court correctly granted Erie’s motion for summary judgment because there are no genuine issues of material fact, and Erie was entitled to judgment as a matter of law. The Erie Policy contains no ambiguities, and this Court should give the language in the policy its plain, ordinary meaning. Public policy does not dictate otherwise. Erie respectfully requests that this Court enter an Order affirming the Circuit Court’s Order, along with any other relief deemed appropriate.

**ERIE INSURANCE PROPERTY
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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 23-ICA-338

**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**

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that a true and correct copy of the foregoing **RESPONDENT'S BRIEF** via electronic filing and via U.S. Mail upon the following counsel of record this 7th day of December, 2023:

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