

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JESSICA SATTERFIELD,

Plaintiff/Appellant,

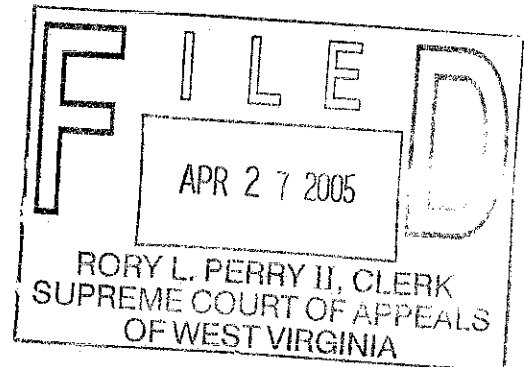
v.

Supreme Court No. 32511

**ERIE INSURANCE
PROPERTY AND CASUALTY COMPANY,**

Defendant/Appellee.

APPELLEE'S BRIEF



APPELLEE'S BRIEF IN SUPPORT OF AWARD OF SUMMARY
JUDGMENT TO APPELLEE BY CIRCUIT COURT OF
PLEASANTS COUNTY, WEST VIRGINIA, CIVIL ACTION
00-C-45

George M. Torres, Esq.
Counsel for Appellee
WV State Bar # 6256
Parkway Center
3901 Briscoe Road
Parkersburg, WV 26104
(304) 422-1337

Patrick E. McFarland, PLLC
Patrick E. McFarland
Counsel for Appellant
WV State Bar # 4854
3011 Murdoch Avenue
Parkersburg, WV 26101
(304) 424-6400

TABLE OF CONTENTS

Table of Authority.....	2
Appellee’s Statement of Facts of the Case.....	4
Appellee’s Statement in Relation to Appellant’s Assignment of Error.....	5
A. Circuit Court’s granting of Summary Judgment (nature of proceeding and ruling below).....	6
B. The Appellant’s alleged error in relation to the “newly acquired autos clause” in the Commercial Policy.....	8
Appellee’s Argument.....	13
A. The “newly acquired autos clause” in the Commercial Policy.....	13
B. Notification, Intention of the Insuring Parties and Conclusion.....	18

TABLE OF AUTHORITY

JURISPRUDENCE:

<i>Aetna Cas. & Co. v. Federal Ins. Co. of New York</i> , 148 W. Va. 160 (1963).....	7
<i>Bankers Ins. Co. v. Griffin</i> , 137 S.E.2d 785 (1964).....	17
<i>Beck v. Aetna Casualty & Surety Co.</i> , 553 P.2d 397 (1976).....	17
<i>Bramlett v. State Farm Mutual Automobile Insurance Company</i> , 468 P.2d 157 (1970).....	9,15
<i>Carey v. State Farm Mutual Insurance Company</i> , 367 F.2d 938 (4 th Cir 1966).....	15
<i>Christensen v. Mountain West Farm Bureau Mutual Insurance Company</i> , 22 P.3d 624 (2000).....	10,11,17,19
<i>Cook v. Suburban Casualty Company</i> , 203 N.E.2d 784 (1964).....	17
<i>D’Annunzio v. Security-Connecticut Life Insurance Company</i> , 186 W. Va. 39 (1991).....	19

<i>Dawson v. Norfolk and Western Ry. Co.</i> , 197 W. Va. 10 (1996).....	7,18,19
<i>Dolan v. Welch</i> , 462 N.E. sd 794 (1987).....	12
<i>Douglas v. Koontz</i> , 137 W. Va. 345 (1952).....	19
<i>Goodman v. Allstate Insurance Company</i> , 523 N.Y.S.2d 391 (1987).....	10
<i>Gorling v. Allstate Ins. Co.</i> , 188 S.E.2d 128 (1972).....	12
<i>Government Employees Ins. Co. v. State Farm Mut. Ins. Co.</i> , 382 So.2d 876 (1980).....	17
<i>Green v. Farm Bureau Mut. Ins. Co.</i> , 139 W. Va. 425 (1956).....	19
<i>Hastings Mutual Casualty Company v. Clyne</i> , 134 F. Supp. 307 (USDC, W.D. Ark. 1952).....	15
<i>Horace Mann Mutual Casualty Company v. Bell</i> , 134 F. Supp. 307 (1955).....	11
<i>Key v. Allstate Insurance Company</i> , 90 F.3d 1354 (11 th Cir. 1966).....	9
<i>Liberty Mutual Ins. Co., v. State Farm</i> , 277 A.2d 603 (1971).....	17
<i>McElwain v. Wells</i> , 179 W. Va. 379 (1988).....	7
<i>Michel v. Aetna Casualty & Surety Co.</i> , 252 F.2d 40 (1958).....	17
<i>Morey v. Richardson</i> , 236 S.E. 2d 571 (1977).....	17
<i>Mulledy v. West Virginia Ins. Co.</i> , 201 W. Va. 191 (1997).....	19
<i>Northern Assurance Company of America v. Farm Bureau Mutual Insurance Company</i> , 822 P.2d 45 (1991).....	16
<i>Painter v. Peavy</i> , 192 W. Va. (1994).....	7,15
<i>Payne v. Weston</i> , 195 W. Va. 502 (1995).....	19
<i>Pennsylvania Nat. Mut. Ins. Co. v. Ritz</i> , 284 So. 2d 474 (1973).....	17
<i>Russell v. State Farm Auto. Mut. Ins. Co.</i> , 188 W. Va. 81 (1992).....	6

<i>Shelter Mutual Insurance Company v. Ritz</i> , 753 S.W.2d 646 (1988).....	15
<i>State Farm v. Carpenter</i> , 307 A.2d 609 (1976).....	11
<i>State Farm Insurance Co., v. Thompson</i> , 215 F.2d 291 (5 th Cir. 1987).....	11
<i>St. Paul Mercury Ins. Co. v. Pennsylvania Lumbermen's M.I.C.</i> , 378 P.2d 312 (1967).....	10

TREATISE:

7 Am Jur. 2d, Automobile Insurance, section 205.....	15
Blasfield Automobile Law and Practice, Third Edition (1965), Volume 7, Section 316(3), pages 656-657.....	15
Couch on Insurance 2d (1981), section, 45-184, pages 463-4.....	14
<i>James L. Isham</i> , Annotation, Construction and Application of "Automatic Insurance" or "Newly Acquired Vehicle" Clause ("Replacement", and "Blanket", or "Fleet" Provisions) Contained in Automobile Liability Policy, 39 ALR 4 th 239 (1985).....	15
<i>Lee R. Ross</i> , Couch on Insurance, 3rd Edition (1995), section 117:2, at 117-10.....	14

APPELLEE'S STATEMENT OF FACTS

The appellee includes the following undisputed facts to the Statement of Facts of the Case as identified in the appellant's brief:

1. That Dale R. Williamson purchased, a 1997 Pontiac Grand-Am SE, (hereinafter, SUBJECT VEHICLE) on September 15, 1999 and on September 20, 1999 included it on the declarations page of the Pioneer Family Auto Policy, # Q04 6504677 (hereinafter, FAMILY POLICY) as a described and covered vehicle for liability coverage purposes. (Exhibit A, Declarations Sheet, FAMILY POLICY)
2. That the aforementioned FAMILY POLICY and the Pioneer Commercial Auto Policy, # Q04 6530668 WO7 (hereinafter, COMMERCIAL POLICY), were in effect on the date of the subject accident, October 7, 1999, and the appellee insured all the vehicles owned by the Williamson family on that date. Both policies had effective dates of April 15, 1999 through April 15, 2000. (Exhibit B, Declarations Sheet, COMMERCIAL POLICY)
3. The appellee objects to the appellant's inclusion in her Statement of Facts of the Case of any comments concerning the appellant's injuries, award of damages and judgments. This inclusion is not pertinent to the matter before this Court and not part of the record in the trial court related to the appellant's appeal, nor designated as part of the record in this matter by any of the parties.

**APPELLEE'S STATEMENT IN RELATION
TO APPELLANT'S ASSIGNMENT OF ERROR**

**A. Circuit Court's granting of Summary Judgment to Appellee
(nature of proceeding and ruling below)**

By order entered on March 3, 2004 the Circuit Court of Pleasants County entered a Summary Judgment Order in favor of the appellee. The Circuit Court reviewed the whole record in the trial court including, the appellant's Complaint for Declaratory Relief and Jury Trial and Motion for Summary Judgment and Memorandum and the appellee's Answer to Declaratory Judgment, Motion for Summary Judgment and Reply to Summary Judgment and all the documents attached to these pleadings. In the appellant's Motion for Summary Judgment the appellant argued that the appellee, should extend coverage to the appellant, pursuant to the COMMERCIAL POLICY, for the total policy limits pursuant to the terms of the aforementioned policy in general and the "newly acquired auto" clause specifically.

The Circuit Court concluded that due to the fact that Dale R. Williamson purchased the SUBJECT VEHICLE and included it in the declarations sheet of the FAMILY POLICY on September 20, 1999, he did not contract with the appellee to include the subject vehicle on the declaration sheet of the COMMERCIAL POLICY. The Court concluded that, "the contractual intent of Mr. Williamson is clear and uncontested. He insured the subject vehicle under the provisions of the FAMILY POLICY and not the COMMERCIAL POLICY, and therefore, coverage may not be found under the provisions of the COMMERCIAL POLICY. Mr. Williamson received the benefit of what he bargained for and should not receive more". *Order*, pg. 5, citing, *Russell v. State Auto Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E. 2d 803 (1992).

This Court has stated that a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry as to the facts is not desirable to clarify the application of the law. Syl. pt. 3, *Aetna Cas. & Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160 (1963); Syl. pt. 2, *Dawson v. Norfolk and Western Ry. Co.*, 197 W. Va. 10 (1996).

Appellant argues that this Court should apply a *de novo* standard of review with regard to the Circuit Court's entry of summary judgment pursuant to Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E. 2d 755 (1994).

The appellee contends that the whole record as presented to the Circuit Court clearly established that no genuine issue of material fact was in controversy before the lower court and inquiry concerning the facts was not desirable to clarify the application of the law. From the totality of the whole record a rational trier of fact could not find in favor of the appellant and the appellant failed to make a sufficient showing on any essential element of the case. The Circuit Court faced with the undisputed facts as established by the parties in their briefs, documents, and pleadings, was within its authority and sound discretion to enter summary judgment in favor of the appellee and its ruling should not be disturbed. The appellee contends that it was entitled to a judgment as a matter of law. Syl. pt. 2, *Dawson, supra.*; *McElwain v. Wells*, 179 W. Va. 379, 380 (1988).

B. The Appellant's alleged errors in relation to the Newly Acquired Auto Clause of the Commercial Policy

The appellant argues that the Circuit Court erred by granting summary judgment in favor of the appellee (or failing to grant in favor of the appellant) because the liability coverage provided pursuant to the "newly acquired autos clause" of the COMMERCIAL POLICY automatically applied to the SUBJECT VEHICLE, regardless of the fact that said vehicle was specifically insured by another policy, to wit, the FAMILY POLICY, on a date prior to the subject accident. It is an undisputed fact that the insured, Dale R. Williamson, five days subsequent to the purchase of the vehicle and eighteen days prior to the subject accident, contracted with the appellee to include and designate the subject vehicle for liability coverage under the FAMILY POLICY and not under the COMMERCIAL POLICY.

The appellant argues that this controversy is a matter of first impression in West Virginia. The appellant further contends that "absent policy language to the contrary, (appellee's) commercial auto policy clearly and unambiguously provides automatic coverage to (appellant).....it does not matter that the 1993 Pontiac Grand-Am was specifically insured by another policy". *Appellant's Brief, pg. 11*. The appellant's argument disregards the intent of the insuring parties in their contractual relationship and the reasonable and rational basis for the existence of the "newly acquired auto clause" in automobile liability insurance policies. The appellant further requests that this Court afford new and additional meaning to the COMMERCIAL POLICY, so that she can be afforded additional coverage for injuries she suffer in the accident of October 7, 1999.

In support of his arguments the appellant cites foreign case law. Without delving extensively into each of the cases cited by the appellant, the appellee avers that the majority of the case law cited by the appellant involved issues and material facts that distinguish the cited cases from the instant matter. The appellee contends that the case law cited by the appellant is not on point *vis a vis* the facts and issues presented by the instant case.

The case most cited to support the appellant's argument is *Carey v. State Farm Mutual Insurance Company*, 367 F. 2d 938 (4th Cir. 1966). The primordial issue in *Carey* as commented by that court is the definition of "owned automobile" as contained in the "other policy". "*This litigation grows out of a dispute over the interpretation of the term "owned automobile" contained in another policy"*. *Carey, supra.*, pg. 940, 942. Also the factual scenario in *Carey*, included the existence of a provision for a premium adjustment on the family policy in the event of a new acquisition of an additional automobile and a subject vehicle which was a "replacement" vehicle. Without the benefit of reviewing the whole policy in *Carey*, it is impossible to conclusively analyze or compare this case with the instant case, although we will concede that this case, in general, supports the appellant's general contention.

Key v. Allstate Insurance Company, 90 F 3rd 1354 (11th Cir. 1966) can also be differentiated from the instant matter in that *Key* involved two insurance companies and a "replacement vehicle". Also the subject accident occurred before the newly acquired vehicle was added to the "other policy". The dissenting opinion in *Key* found that the insured had demonstrated an intent not to insure the subject vehicle with an insurer A, but rather with insurer B, and that the court should have held that such intent was controlling under the facts of the case and Florida law. *Key*, pg. 1551.

In *St. Paul Mercury Ins. Co. v. Pennsylvania Lumbermen's M.I.C.*, 378 P. 2d 312 (1967) both vehicles at issue were insured under one policy (Lumbermen's) and State Farm through their insured sought indemnification from Lumbermen's. Disputes over the ownership of the subject vehicle, the negotiations of lower premiums, the alleged failure to purchase new coverage and the election of coverage agreement were essential to the court's analysis.

Goodman v. Allstate, 523 N.Y. S.2d 391 (1987) was a case of apparent first impression in New York at that time. However, the first impression issue was, "*can an insured combine "stack" the liability coverage provided in two separate policies to the same insured, by the same insurer when the insurer insisted upon two policies not one*". (emphasis added) *Goodman*, pg. 964. The court found under the facts of the case both (policies) provided coverage for the injuries of the plaintiff.....recovery under each policy is to be pro-rated". *Goodman.*, pg 111.

Christensen v. Mountain West Farm Bureau Mutual Insurance Company, 22 P. 3rd 624 (2000), like *Goodman*, also presented the issue whether, two policies issued by insurer (*Mountain*) could be stacked to provide maximum coverage available under each (policy). The court relied on the policy language and Montana case law, honoring an insured's reasonable expectations and narrowly construing limitations in insurance coverage. The appellee contends that the reasoning in the dissenting opinion in *Christensen*, should be adopted by this Court,

"Briefly stated, my disagreement with the Court's decision stems from its total failure to recognize the purpose of "after acquired vehicle " provisions in automobile insurance policies. That purpose, which we previously have recognized, is to broaden the coverage available under an existing automobile policy to provide at the earliest possible time needed by the insured....Taking that purpose

together with the plain language of the (Fitzpatrick) policy at issue here, it is clear that the Ford Escort is not an "after acquired vehicle" because coverage was not sought under the (Fitzpatrick) policy....How acquiring--and paying--for--separate insurance for the Ford Escort under policy No. 2 can result in coverage for the vehicle under policy No. 1, with no premium having been paid for that coverage, defies imagination, not to mention legal principles". (emphasis added) Christensen, pg. 631.

The principal issues in *State Farm v. Insurance Company v. Thompson*, 214 F. 2d 291 (5th Cir. 1957) (a page and a half *per curiam decision*) are the issues of the right of substitution under the policy provisions and the disputed error of the insurer's agent in failing to strike out certain policy limits on the new insuring contract.

In *State Farm v. Carpenter*, 307 A.2d 609 (1976) the insured first sought recovery against another insurer during the grace period of the "newly acquired automobile" provision. The court found that said attempt at recovery (attempt to claim a right or pursue a remedy) did not deprive the insured to a claim to which he was entitled.

The court in *Horace Mann Mutual Casualty Company v. Bell*, 134 F. Supp. 307 (USDC, W.D., Ark. 1955) held that where the insured's automobile was used for pleasure and business as defined in the policy and his new pickup truck was to be used for the same purpose, the pickup truck was not excluded from the automobile insurance provision on any theory that the truck was a commercial vehicle which insurer had no authority to insure in Arkansas. In this matter the insured was not involved in the purchase of the insurance of the "newly purchased" pickup vehicle. The transaction was handled exclusively by the motor vehicle dealer and an agent of the

second insurer, an agent who also handled all insurance on the dealer's sales. *Horace Mann*, pg. 308.

In *Gorling v. Allstate Ins. Co.*, 186 S.E.2d 128 (1972) the court found that the newly acquired automobile was covered under the automobile insurance provision of the insured's policy, notwithstanding the existence of another policy, as the "insured's agent, upon receipt of the requested notice under the automatic clause, had the insured complete an application for liability coverage on the newly acquired vehicle, rather than adjust the premium under the existing policy as specified by the automatic clause." (emphasis added)

In *Dolan v. Welch*, 462 N.E.2d 794 (1984) the court found that the term "ownership" was ambiguous in the newly acquired automobile provision and construed the clause in favor of the insured and against the insurer.

The appellant has assumed the position that coverage exists under the "newly acquired vehicle clause" in the subject COMMERCIAL POLICY, notwithstanding the undisputed facts of this matter. However, there is a multitude of case law across state lines and federal districts and circuits, that indicates that said "automatic" clause is operative depending upon the wording of the policy and the particular facts of the case.

APPELLEE’S ARGUMENT

A. The “newly acquired autos” clause in the COMMERCIAL POLICY

It is an undisputed fact that within five days of the purchase of the SUBJECT VEHICLE and on a date prior to the subject accident, the insured, Dale R. Williamson included and designated the SUBJECT VEHICLE, as a “covered vehicle”, in the declarations page of the FAMILY POLICY. On the dates of the purchase and the subject accident Mr. Williamson was also a named insured in the COMMERCIAL POLICY, issued by the appellee.

Prior to the purchase of SUBJECT VEHICLE Mr. Williamson designated three vehicles in the FAMILY POLICY and two vehicles in the COMMERCIAL POLICY. It is the contention of the appellee that by designating the SUBJECT VEHICLE as a covered vehicle in the FAMILY POLICY, Mr. Williamson showed clear and specific intent to include the SUBJECT VEHICLE in the FAMILY POLICY and not the COMMERCIAL POLICY. Therefore, there is no coverage under the “newly acquired autos clause” of the COMMERCIAL POLICY.

The subject clause in the COMMERCIAL POLICY read as follow:

“The **Declarations** show which of following are **autos we insure under this policy:**

.....
.....

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

.....

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**.

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

It is generally established that the “newly acquired auto clause” serves the general purpose of guaranteeing that the insured receive coverage for replacement or newly purchased vehicles under issued liability insurance policies, for a period of time, under an assortment of policy conditions.

“The automatic insurance” clause in standard automobile policies is intended to meet the necessity for maintaining coverage in the situation arising from recognized custom among insured owners acquiring other cars by replacement and new purchases during the life of their policies, and to provide coverage for the newly acquired car at the earliest time the insured needs protection” Couch on Insurance 2d (1981), section, 45-184, pages 463-4; 8 Lee R. Ross, Couch on Insurance (1995) section 117:2, at 117-10.

“An automatic insurance provision is for the benefit of the insured, and its purpose is extend coverage to the person already insured with the company in question with respect to the operation or maintenance of another automobile acquired by him, as a replacement for the automobile originally covered or

as an additional automobile when the company insures all the automobiles of insured. Once specific insurance is purchased and the automobile becomes described in the policy, it is no longer a "newly acquired automobile" but a "described automobile" and the terms and provisions under the "automobile insurance" or "newly acquired automobile" clause are no longer applicable" (emphasis added) Blasfield Automobile Law and Practice, Third Edition (1965), Volume 7, Section 316(3), pages 656-657; See also, *Hastings Mutual Insurance Company v. Clyne*, 621 N.E. 2d 1355, at page 1358(1993); *James L. Isham*, Annotation, Construction and Application of "Automatic Insurance" ("Replacement", and "Blanket", or "Fleet" Provisions) Contained in Automobile Liability Policy, 39 ALR 4th 239 (1985); 7 Am. Jur 2d, Automobile Insurance, section 205.

Cases that discuss the purpose, basis and public policy considerations of the "newly acquired auto clause" include, *Hastings, supra.*, at pag. 1359 and *Shelter Mutual Insurance Company*, 753 S.W.2d. 646, at page 648-649 (1988).

The appellee contends that once the "newly acquired vehicle" was expressly included in the FAMILY POLICY, it no longer was a "newly acquired auto" in the COMMERCIAL POLICY. The following cases support the appellee argument in relation to the "newly acquired clause".

The reasoning in *Carey, supra.*, the case most cited by litigants promoting the appellant's position has been criticized. The court in *Bramlett v. State Farm Mutual Automobile Insurance Company*, 468 P.2d 157 (1970) at page 160 discussing *Carey*, stated:

“..the court’s (Carey) reasoning is difficult to follow. The court begins by assuming the insurance company did not intend to afford the coverage. It indicates the insured did not intend to purchase the double liability coverage. Then, to arrive at its ultimate decision the court finds the intention of the parties was clear, no ambiguity existed, and the coverage was intended and purchased. It is difficult to see how the result reached by the court in that decision could have been influenced by any consideration of the intention of the parties. If the language in the policy is clear and unambiguous it should be taken in its plain, ordinary and popular sense.....The purpose of the “automatic insurance clause” or “newly acquired automobile clause” in an automobile policy is to provide coverage when an owned automobile is not described in a policy. When specific insurance is purchased and a separate policy is issued on the automobile it becomes an automobile described in a new policy. At that time the terms and provisions of the “automatic insurance clause” or “newly acquired automobile clause” are no longer applicable to the automobile.”

The court in *Northern Assurance Company of America v. Farm Bureau Mutual Insurance Company*, 822 P.2d 45(1991), (where the two insurers held differing views as to the court’s holding in *Bramlett*) held that newly acquired vehicle coverage under insured’s four previously owned policies terminated when insured purchased specific insurance coverage for newly acquired vehicle from another insurer, and since accident occurred after purchase of additional policy, first insurer could not be held liable for pro rata contribution.

In *Beck v. Aetna Casualty & Surety Co.*, 553 P.2d 397 (1976), the court held that where an insured obtained a second policy from her insurer specifically insuring a second automobile, the right to elect coverage under the first policy no longer existed and the second policy with its lower limits of liability applied to the accident involving the second automobile. (See also, *Cook v. Suburban Casualty Company*, 203 N.E.2d 748 (1964).

In *Pennsylvania Nat. Mut. Casualty Ins. Co. v. Ritz*, 284 So.2d 474 (1973) the court held that the (insured's) son obtaining liability insurance specifically covering a newly purchased Plymouth automobile barred coverage of said vehicle under an automatic insurance clause contained on the insured's (father) Pontiac automobile. The court found that under the evidence and circumstances presented (the son operated and controlled vehicle; the father signed the conditional sales agreement due to his son's minor age, registered it under his (father's) name and later insured the vehicle under another policy with another insurance carrier) the parties clearly intended not to include the Plymouth (newly acquired vehicle) in the insured's policy, and that to hold otherwise would afford double recovery for the accident involving the Plymouth.

In *Government Employees Ins. Co. v. State Farm Mut. Ins. Co.*, 382 So. 2d 876 (1980) an action between insurance companies to determine the extent of their coverage obligations, the court held that the insured's request for liability insurance covering a newly acquired vehicle negated an automatic insurance clause in another policy covering the insured's already owned vehicle. Other cases that involve the "newly acquired vehicle clause", where it was found that obtaining liability insurance specifically describing a newly acquired vehicle, barred recovery under that insurance clause, see, *Morey v. Richardson*, 236 S.E.2d 871 (1977); *Liberty Mutual Ins. Co. v. State Farm*, 277 A.2d 603 (1971); *Michel v. Aetna Casualty & Surety Co.*, 252 F.2d

40 (1958); and *Bankers Ins. Co. v. Griffin*, 137 S.E.2d 785 (1964).

There exists persuasive and illustrative jurisprudence to support the appellee's contention that once the SUBJECT VEHICLE was included and designated for liability coverage under the FAMILY POLICY, the vehicle was no longer a "newly acquired vehicle" under the COMMERCIAL POLICY. The appellant's contention would afford the appellant double recovery, and recovery under a policy for which the insured paid no premium and sought no coverage.

NOTIFICATION, INTENTION OF THE INSURING PARTIES AND CONCLUSION

The appellant requests that this Court disregard the clear meaning and intent of the insuring parties and the generally accepted basis for the existence of the "newly acquired vehicle" clause. The appellant further requests that the Court transfer, by judicial *fiat*, the insured's specific notification for coverage of the SUBJECT VEHICLE under the FAMILY POLICY, to the COMMERCIAL POLICY, so that she can be afforded additional coverage under a policy, where no premium has been paid, where no coverage has been sought by the insured and where the SUBJECT VEHICLE does not exist as a covered vehicle in any provision of the policy.

The appellant argues that the "newly acquired clause" of the COMMERCIAL POLICY is unambiguous and clear, yet she prays that this court afford new and additional meanings to the COMMERCIAL POLICY.

The notification provision of the "newly acquired clause" of the COMMERCIAL POLICY states,

“You must tell us about the newly acquired autos
during the policy period in which the acquisition takes place

.....”

The clear meaning of the mandatory “You must tell us” is that the insured has the duty to notify the appellee of the acquisition of the newly purchased vehicle under the COMMERCIAL POLICY. After all, “ the provision means what it says!” To equate the insured’s notification of the SUBJECT VEHICLE to the appellee for liability coverage under the FAMILY POLICY to a notification for liability under the COMMERCIAL POLICY, “*defies imagination, not to mention legal principles*”, *Christensen, supra.*, dissenting opinion, pg. 631

This court has stated that an insurance contract is a contract and it is to be governed by the same principles and rules that govern other contracts. *Douglas v. Koontz*, 137 W. Va. 345 (1952); *Green v. Farm Bureau Mut. Ins. Co.* 139 W. Va. 475 (1954); *Payne v. Weston*, 195 W. Va. 502, 507 (1995). An insurance contract should never be interpreted as to create an absurd result, but instead should receive a reasonable interpretation consistent with the intent of the parties, *Mulledy v. West Virginia Ins. Co.*, 201 W. Va. 191, 197 (1997) citing, *syl. pt. 2*, *D’Annunzio v. Security-Connecticut Life Insurance Company*, ,186 W.Va. 39 (1991); and it (the insurance contract) should be afforded the plain and ordinary meaning in the absence of ambiguity or some other compelling reason. *Payne, supra.*, pg. 507. It is not the right or province of a court, to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make new or different contracts for them. *Syl. pt. 4, Dawson, supra.* pg. 17.

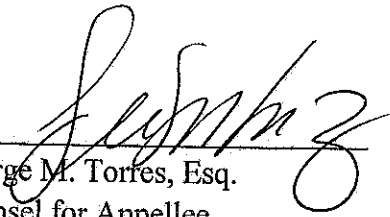
In conclusion, the appellee contends that there are no genuine issues of fact or law and the appellee is entitled to summary judgment as a matter of law in the Circuit Court.

The appellee further contends that to afford the appellant a second recovery under the terms of the COMMERCIAL POLICY would be tantamount to permitting the modification and re-interpretation of the insuring contract. A decision in favor the appellant would permit the appellant to recover from an insurance policy for which no premium was paid, no coverage sought by the insured and which did not specifically designate the SUBJECT VEHICLE for liability coverage pursuant to the terms and conditions of the policy.

To afford the appellant recovery under the COMMERCIAL POLICY, would prejudice the appellee in its rights and duties under the terms and conditions of the COMMERCIAL POLICY *vis a vis* the particular facts of the instant case.

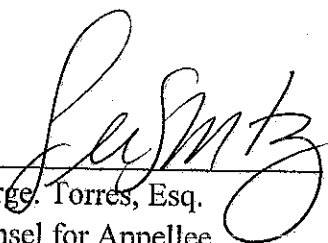
WHEREFORE, the appellee most respectfully prays that the Petition for Appeal filed by the appellant be dismissed and rejected, and the Order of the Circuit Court of Pleasants County, entered on March 3, 2004 in case number 00-C-45, be sustained.

Respectfully submitted, this 22nd day of April, 2005 in Parkersburg, Wood County, West Virginia.


George M. Torres, Esq.
Counsel for Appellee
WV State Bar # 6256
Parkway Center
3901 Brisco Road
Parkersburg, WV 26104,
(304) 422-1337

CERTIFICATE OF SERVICE

The undersigned counsel for appellee hereby certifies that on April 22, 2005 he served a true and accurate copy of the foregoing APPELLEE'S BRIEF, *via* ordinary first class United States mail, upon Patrick E. McFarland, Esq., 3011 Murdoch Avenue, Parkersburg, WV 26101.


George M. Torres, Esq.
Counsel for Appellee
Parkway Center
3901 Briscoe Road
Parkersburg, WV 26104
(304) 422-1337