SUPREME COURT OF KENTUCKY
NO. 2014-SC-000354-D
~~NO. 2014-SC-000357-D~~

PHILADELPHIA INDEMNITY
INSURANCE COMPANY, INC.,
ET AL. APPELLANTS

BRIEF FOR APPELLANT PHILADELPHIA INDEMNITY INSURANCE COMPANY

v.

RICHARD TRYON APPELLEE

Submitted by:

Robert E. Stopher
Robert D. Bobrow
400 West Market Street, Suite 2300
Louisville, KY 40202
Phone: (502) 589-5980
Fax: (502) 561-9400
COUNSEL FOR APPELLANT,
PHILADELPHIA INDEMNITY INSURANCE
COMPANY

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this Brief for Appellant was this 22nd day of May 2015 mailed to the following: Ms. Susan Stokley, Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Mr. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Charles Cunningham, Jefferson Circuit Court; Judicial Center, 700 West Jefferson Street, 7th Floor, Louisville, Kentucky, 40202; Mr. A. Thomas Johnson, 304 West Liberty Street, Louisville, KY 40202; Mr. William B. Orberson and Ms. Patricia C. Le Meur, Phillips Parker Orberson & Barnett, PLLC, 716 West Main Street, Suite 300, Louisville, KY 40202. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Jefferson Circuit Court by the appellant.

COUNSEL FOR APPELLANT

I. STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is unnecessary.

II. STATEMENT OF POINTS AND AUTHORITIES

III. STATEMENT OF THE CASE

A. INTRODUCTION

This insurance-coverage case arises out of a motorcycle accident. The material facts are undisputed. In July 2012, plaintiff Richard Tryon was riding his Yamaha motorcycle when Logan Hopkins hit him. The accident was Hopkins's fault. Hopkins's insurer paid his $100,000 policy limit to settle Tryon's claim against him.

B. TRYON'S INSURANCE COVERAGE

Tryon insured his motorcycle with Nationwide under a "Recreational Vehicle Policy." Tryon bought $100,000/300,000 in liability coverage and $25,000/50,000 in underinsured-motorists (UIM) coverage from Nationwide. Nationwide has paid Tryon his $25,000 UIM coverage limit.

Tryon had two other auto policies when Hopkins hit him. He had an ordinary auto policy with defendant Encompass Indemnity Company under which he insured a Lexus. He also had a special Collector Vehicle Policy with defendant Philadelphia Indemnity Insurance Company under which he insured a 1996 Firebird.[1]

Tryon's Encompass policy provided $100,000/300,000 in UIM coverage. His Philadelphia policy provided the "minimum req'd limit" in UIM coverage.[2] Tryon didn't insure his motorcycle under his Encompass or his Philadelphia policy.

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1 Collector Vehicle Policy GD20078102-1 (attached as Appendix Item 3).

2 *Id.* at Renewal Certificate.

C. TRYON'S CLAIMS HERE

Although Tryon only insured his motorcycle with Nationwide, he wants to collect UIM benefits from Philadelphia and Encompass as well. His argument is that Kentucky UIM coverage is personal and, therefore, that it doesn't matter that he didn't insure his motorcycle with Philadelphia or Encompass. Tryon is half right. Kentucky UIM coverage is personal. But because UIM coverage is optional, the Court allows insurers to place reasonable limits on it.[3] Philadelphia and Encompass both did that. They limited Tryon's UIM coverage to the vehicles listed in their policies. They did so by including owned-but-not-scheduled exclusions in their policies. Here's the owned-but-not-scheduled exclusion in Tryon's Collector Vehicle Policy with Philadelphia:

> A. We do not provide Uninsured Motorists Coverage for "bodily injury" sustained:
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> 1. By an "insured" while "occupying," or when struck by, any motor vehicle owned by that "insured" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.[4]

D. SUMMARY JUDGMENT FOR PHILADELPHIA AND ENCOMPASS

Philadelphia and Encompass both moved the Jefferson Circuit Court for summary judgment. They argued that Tryon's motorcycle was an owned-but-not-scheduled vehicle under their policies and, therefore, that UIM was excluded. The circuit court agreed and granted summary judgment. Tryon appealed.

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3 *E.g., State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013); *Motorists Mutual Ins. Co. v. Glass*, 996 S.W.2d 437, 450 (Ky. 1997).

4 Collector Vehicle Policy, page 6 of 13 (Appendix Item 3).

E. THE COURT OF APPEALS REVERSES

On appeal, Tryon conceded that Philadelphia and Encompass's owned-but-not-scheduled exclusions are unambiguous. But he argued that the exclusions are unenforceable as a matter of public policy under Kentucky's reasonable-expectations doctrine. Thus, the issue on appeal was whether the exclusions were enforceable.

The court of appeals sided with Tryon on the enforceability issue and reversed the circuit court. The court of appeals held that that Philadelphia and Encompass's owned-but-not-scheduled exclusions are unenforceable as a matter of public policy. The court relied on *Chaffin v. Ky. Farm Bureau Ins. Co.*[5] The court refused to apply *Motorists Mut. Ins. Co. v. Hartley* despite acknowledging that *Hartley* was directly on point.[6] The court of appeals wrote:

> [T]he trial court in the case at hand relied on this Court's opinion in *Hartley* when it granted summary judgment in favor of the appellees. *Hartley* is almost identical to this case. Mr. Hartley was injured while riding his motorcycle. He received insurance benefits from the company that covered his motorcycle, but he also sought UIM benefits from Motorists Mutual Insurance Company, which covered another automobile. . . . The [Motorists] policy at issue had the "owned but not scheduled for coverage" exclusion. The trial court found the exclusion unenforceable. On appeal, . . . this Court reversed . . . and found the exclusion enforceable.
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> The Court found that the public policy holding in *Chaffin* was distinguishable from the facts as they applied to Mr. Hartley because he specifically rejected Motorists Mutual's offer to insure his motorcycle. In addition, the Court distinguished its case from *Chaffin* because motorcycles are inherently more dangerous. The Court also found as persuasive the case of *Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577 (Ky. App. 2001), which found that provisions

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5 789 S.W.2d 754 (Ky. 1990).

6 2011 Ky. App. Unpub. LEXIS 938 (attached as Appendix Item 4).

> that specifically exclude motorcycles from UIM coverage are enforceable.
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> In the case *sub judice*, we find that the trial court erred in relying on *Hartley* because that is an unpublished opinion and is not binding precedent. We are bound by the *Chaffin* and *Dicke* opinions which hold that the "owned but not scheduled for coverage" exclusion is unenforceable as against public policy.[7]

F. THE COURT OF APPEALS' ERROR

The court of appeals erred in relying on *Chaffin* for at least two reasons. First, *Hartley* convincingly distinguished *Chaffin* on facts identical to those here. The court of appeals conceded that *Hartley* is directly on point in this case. Nevertheless, the court refused to follow *Hartley*. That was error. The Court can reverse the court of appeals by doing nothing more than adopting *Hartley*'s analysis as its own.

The second reason the court of appeals erred in relying on *Chaffin* is that the Court has undermined *Chaffin* since deciding the case 25 years ago. The two cases that most significantly undercut *Chaffin* are *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick* and *Motorists Mutual Ins. Co. v. Glass*. In both, the Court held that insurers are allowed to limit optional auto coverages like UIM coverage with coverage exclusions. The Court's only caveat was that the exclusions must be unambiguous and reasonable. Applying this rule, the *Hodgkiss-Warrick* and *Glass* Courts enforced UIM exclusions analogous to the owned-but-not-scheduled exclusions at issue here. Thus, the Court can reverse the court of appeals under cases like *Hodgkiss-Warrick* and *Glass*.

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7 *Tryon v. Encompass Ind. Co.*, 2014 Ky. App. LEXIS 90 **7-8 (attached as Appendix Item 5).

IV. ARGUMENT

A. PHILADELPHIA AND ENCOMPASS'S OWNED-BUT-NOT-SCHEDULED EXCLUSIONS ARE UNAMBIGUOUS AND REASONABLE. THE COURT SHOULD, THEREFORE, REVERSE THE COURT OF APPEALS' HOLDING THAT THE EXCLUSIONS ARE UNEFORCEABLE AS A MATTER OF PUBLIC POLICY.[8]

"Where the terms of an insurance policy are clear and unambiguous, the policy will be enforced as written."[9] This rule applies to coverage exclusions. Exclusions are disfavored because they limit coverage but unambiguous exclusions "must be construed without disregarding or inserting words or clauses."[10] "Unambiguous and clearly drafted exclusions which are not unreasonable are enforceable."[11] Furthermore, although coverage exclusions should be strictly construed, strict construction "should not overcome plain, clear language resulting in a strained or forced construction."[12]

The owned-but-not-scheduled exclusion in Tryon's Collector Vehicle Policy with Philadelphia provides:

> A. We do not provide Uninsured Motorists Coverage for "bodily injury" sustained:
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> 1. By an "insured" while "occupying," or when struck by, any motor vehicle owned by that "insured" which is not

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8 Philadelphia preserved this argument in its summary-judgment memorandum at pages 2-3 (attached as Appendix Item 6) and in its Appellee Brief in the court of appeals at pages 3-12 (attached as Appendix Item 7). Philadelphia's specific reliance on *State Farm v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013) was preserved when the court of appeals ordered that the parties could rely on *Hodgkiss-Warrick* at oral argument (Order attached as Appendix Item 8).

9 *Kemper National Ins. Co. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 873 (Ky. 2002).

10 *Id.* at 875-76.

11 *Id.* at 873.

12 *Id.* at 873-74.

> insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.[13]

This exclusion is unambiguous. Tryon hasn't argued otherwise. The exclusion plainly and reasonably excluded UIM coverage when Tryon was occupying a motor vehicle that he hadn't insured for UIM coverage under his Philadelphia policy. Nevertheless, the court of appeals refused to enforce the exclusion as a matter of public policy. As we explained above, the court relied on *Chaffin*. We'll look at *Chaffin* next.

Betty Chaffin was the plaintiff in *Chaffin*. Chaffin was driving her own car when she was hit by an uninsured motorist.[14] Chaffin insured her car with Kentucky Farm Bureau.[15] Chaffin was also a named insured on two other KFB policies. All three KFB policies provided $25,000 in UM coverage, and KFB had collected a separate UM premium under each policy.[16] Each policy included the following unambiguous owned-but-not-scheduled UM exclusion.

> A. We do not provide Uninsured Motorist Coverage for bodily injury sustained by any person:
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> 1. While occupying, or when struck, by any motor vehicle owned by you or any family member which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.[17]

Chaffin argued that KFB's owned-but-not-scheduled exclusion was unenforceable under Kentucky's reasonable-expectations doctrine. The Court agreed. It

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13 Collector Vehicle Policy, page 6 of 13 (Appendix Item 3).

14 *Chaffin v. Ky. Farm Bureau*, 789 S.W.2d 754, 755 (Ky. 1990).

15 *Id.*

16 *Id.*

17 *Id.*

held that, as Chaffin had paid three separate UM premiums, she had a reasonable expectation of coverage under all three KFB policies.[18]

Unfortunately, that was the extent of *Chaffin*'s analysis. The Court didn't explain how Chaffin could have had a reasonable expectation of UM coverage when KFB's unambiguous owned-but-not-scheduled exclusions excluded the coverage. The *Chaffin* dissent, Justice Gant, pointed this out. Justice Gant also pointed out that the Court had enforced owned-but-not-scheduled exclusions several times prior to *Chaffin*.[19] In Justice Gant's words:

> This court has ruled on the [owned-but-not-scheduled] in three cases since 1977, and on all three occasions has upheld the exclusion.
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> In those cases, this court unanimously held:
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> . . . that a clause in an automobile policy excluding from uninsured motorist coverage accidents arising out of the use of vehicles owned by an insured other than the automobile described in the liability portion of the policy was a reasonable exclusion and precluded the insured's recovery from the insurer for injuries sustained while occupying an automobile that was not described in the liability portion of the policy.
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> The majority opinion overrules these cases out of hand and without explaining, other than the change of personnel on the court, why this has suddenly become an unreasonable exclusion.[20]

When it comes to intellectual rigor, Justice Gant had the better of the argument in *Chaffin*. Unfortunately, he fell a vote short of writing for the majority.

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18 *Id.* at 756.

19 *Id.* at 758 (Gant, J. dissenting).

20 *Id.* (Gant, J. dissenting).

The next case we'll look at is *Hamilton Mutual Ins. Co. v. USF&G.*[21] Nancy and Rachel Gibson were the plaintiffs in that case. The Gibsons were hit by an underinsured motorist while riding in their Lincoln Town Car.[22] USF&G insured the Town Car. In addition to the Town Car, the Gibsons owned two other cars.[23] USAA insured one and Hamilton Mutual insured the other. The Gibsons purchased UIM coverage from all three of their insurers but only insured their Town Car with USF&G.[24]

The Gibsons' policies with USAA and Hamilton Mutual included owned-but-not-scheduled UIM exclusions. Therefore, both insurers argued that UIM coverage was excluded.[25] The court of appeals noted that USAA and Hamilton Mutual's owned-but-not-scheduled exclusions were materially the same as the exclusions in *Chaffin*. As a result, the court begrudgingly applied *Chaffin* and reluctantly held that the exclusions were unenforceable as a matter of public policy. In the court's words:

> Unfortunately, given the logic and reasoning thus espoused [in *Chaffin*], we are unable to conclude that the instant case presents a distinction with a difference. If a different result is to come . . . , our Supreme Court must direct it.[26]

The next case we'll look at is *Motorists Mutual Ins. Co. v. Hartley.*[27] Glen Hartley was the plaintiff in that case. He was riding his motorcycle when he was hit by

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21 926 S.W.2d 466 (Ky. App. 1996).

22 *Id.* at 467.

23 *Id.*

24 *Id.*

25 *Id.* at 468.

26 *Id.* at 469.

27 2011 Ky. App. Unpub. LEXIS 938 (Appendix Item 4).

an underinsured motorist. Hartley recovered his tortfeasor's liability limits plus $250,000 in UIM benefits from his motorcycle insurer.[28] Hartley then sued Motorists Mutual for additional UIM benefits. Motorists insured two trucks for Hartley but not his motorcycle. Motorists defended Hartley's UIM claim by asserting the following owned-but-not-scheduled exclusion:

> We do not provide Underinsured Motorists Coverage for bodily injury sustained by any insured:
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> 1. While occupying or when struck by, any motor vehicle owned by you or any family member who is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.[29]

The Woodford Circuit Court, relying on *Chaffin* and *Hamilton Mutual*, held that Motorists' owned-but-not-scheduled exclusion was unenforceable as a matter of public policy. The court of appeals disagreed and reversed. The court of appeals held that Motorists' owned-but-not-scheduled exclusion was unambiguous, reasonable, and enforceable.[30] The court explained that the exclusion "unequivocally states that UIM coverage is not afforded for motor vehicles not covered under the policy."[31] The court held that the exclusion "clearly excluded motor vehicles not listed as insured from UIM coverage."[32]

Hartley is a significant case because the owned-but-not-scheduled exclusion in the case was the same as the owned-but-not-scheduled exclusions in

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28 *Id.* at *2.

29 *Id.* at *3.

30 *Id.* at *5.

31 *Id.*

32 *Id.* at *3.

Chaffin and *Hamilton Mutual*. The difference in the *Hartley* court's approach to the exclusion was that the court properly applied the reasonable-expectations doctrine and refused to override the exclusion's unambiguous language. The distinction that the *Hartley* court drew to justify its break from *Chaffin* and *Hamilton Mutual* was that Hartley's owned-but-not-scheduled vehicle was a motorcycle. The *Hartley* court held that, in light of the increased risk involved in riding a motorcycle, Hartley couldn't have had a reasonable expectation of UIM coverage from Motorists while riding his motorcycle. Here's the *Hartley* court's explanation.

> Even under the broadest interpretation of *Chaffin*, the present facts do not warrant invalidation of the "owned but not scheduled for coverage" exclusion in the Motorists policy. . . . [I]t is recognized that motorcycles are more expensive to insure and, consequently, motorcycle exclusions are enforceable. . . . Motorcycle riders, as a class, are among the highest risk groups conceivable. . . . The exclusion of such a class from coverage is clearly reasonable where, as here, the assured has the option of avoiding the excluded peril. . . . An assured has no choice in selecting those uninsured motorists who may injure him, but he certainly does elect to ride a motorcycle. This volitional act triggers the exclusion and he accepts the consequences.
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> Our General Assembly has likewise recognized that motorcycles and their increased risk of injuries to an insured distinguish motorcycles from other motor vehicles. . . . [U]nlike an owner of all other motor vehicles who must opt out of uninsured/underinsured coverage pursuant to KRS 304.20-020, motorcycle owners must affirmatively purchase all optional coverage. The obvious purpose of such a distinction is to relieve insurance companies of being exposed to the financial risk of providing insurance benefits for motorcycles otherwise required for motor vehicles. . . .
>
> To afford UIM coverage to Hartley, who did not pay premiums to Motorists for coverage of his motorcycles and who expressly rejected such coverage, would be contrary to public policy because the insurance companies would ultimately raise premiums on all consumers to reflect the increased risk. Although Hartley now regrets his decision to

> not include his motorcycles on the Motorists policy, it remains that the Motorists policy unambiguously precludes coverage.[33]

In the end, *Hartley* justified enforcing Motorists' owned-but-not-scheduled exclusion because Hartley's owned-but-not-scheduled vehicle was a motorcycle. The court held that it would be unfair and so against public policy to saddle Motorists with the extreme risk involved in riding a motorcycle when Motorists included an exclusion in its policy to avoid assuming that risk.

Philadelphia agrees with the result in *Hartley* and agrees that *Hartley* is on point here.[34] But the lengths that the *Hartley* court went to to reconcile its opinion with *Chaffin* and *Hamilton Mutual* were unnecessary and undesirable. The obstacle that the *Hartley* court had to overcome was *Chaffin*'s misapplication of the reasonable-expectations doctrine. *Chaffin* used the reasonable-expectations doctrine to invalidate an unambiguous owned-but-not-scheduled exclusion on public-policy grounds.[35] That was error. The reasonable-expectations doctrine isn't a public-policy doctrine.[36] The reasonable-expectations doctrine is a rule of insurance-policy construction.[37] Under the reasonable-expectations doctrine, if a coverage exclusion is unambiguous, it's enforceable. As the Court explained in *Glass*:

> The gist of the [reasonable-expectations] doctrine is that the insured is entitled to all the coverage he may reasonably

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33 *Id.* at *9-10.

34 The court of appeals held that "*Hartley* is almost identical to this case." *Tryon*, 2014 Ky. App. LEXIS 90 *6 (Appendix Item 5).

35 *Chaffin*, 789 S.W.2d at 757-58.

36 *Glass*, 996 S.W.2d at 450.

37 *Id.*

> expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.
>
> The doctrine of reasonable expectations is used in conjunction with the principle that ambiguities should be resolved against the drafter in order to circumvent the technical, legalistic and complex contract terms which limit benefits to the insured.[38]

As this quote from *Glass* shows, the reasonable-expectations doctrine is an uncomplicated rule of policy construction. It's not a public-policy rule. Under the reasonable-expectations doctrine, an insured cannot have a reasonable expectation of coverage when an unambiguous exclusion excludes the coverage.[39]

Turning back to *Chaffin*, Farm Bureau's owned-but-not-scheduled exclusions in that case unambiguously excluded UM coverage for any person: "[w]hile occupying, or when struck, by any motor vehicle owned by you or any family member which is not insured for this coverage under this policy."[40] In light of the exclusions' clarity, *Chaffin* misapplied the reasonable-expectations doctrine to invalidate them as a matter of public policy.[41] The case that best illustrates this is the Court's recent decision in *State Farm v. Hodgkiss-Warrick*.[42]

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38 *Id.* (quoting *Simon v. Continental Ins. Co.*, 724 S.W.2d 201, 212-13 (Ky. 1986)).

39 *Id.*

40 *Chaffin*, 789 S.W.2d at 755.

41 *Id.*

42 413 S.W.3d 875 (Ky. 2013).

Hodgkiss-Warrick is a UIM case.[43] The plaintiff was Karen Hodgkiss-Warrick. The defendant was State Farm. Hodgkiss-Warrick was injured in a single-car accident while riding in her daughter's car.[44] Hodgkiss-Warrick sued her daughter and brought a UIM claim against her own insurer (State Farm).[45]

Hodgkiss-Warrick's State Farm policy included what's commonly referred to as a regular-use exclusion. The exclusion excluded any "land motor vehicle: . . . owned by, rented to, or furnished or available for the regular us of you or any resident relative" from the policy's definition of "underinsured motor vehicle"[46] As Hodgkiss-Warrick was living with her daughter at the time of her accident, her daughter's car fell within the plain language of the exclusion. Consequently, State Farm denied Hodgkiss-Warrick UIM benefits.

Hodgkiss-Warrick conceded that State Farm's regular-use exclusion unambiguously excluded her UIM coverage, but she argued that the exclusion violated "a Kentucky public policy against family or household exclusions and in favor of 'fully compensating' accident victims . . . ."[47] The Court disagreed.

The Court began its analysis by explaining that "[c]ourts will not disregard the plain terms of a contract between private parties on public policy grounds absent a clear and certain statement of strong public policy in controlling laws or judicial

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43 *Id.* at 876.

44 *Id.*

45 *Id.*

46 *Id.* at 878.

47 *Id.* at 878, 880.

precedent."[48] The Court emphasized that "public policy, . . . is not simply something courts establish from general considerations of supposed public interest, but rather something that must be found clearly expressed in the applicable law."[49]

Having established the prerequisites for abrogating a contract on public-policy grounds, the *Hodgkiss-Warrick* Court turned to Hodgkiss-Warrick's public-policy argument. Hodgkiss-Warrick argued that State Farm's regular-use exclusion violated the Kentucky Motor Vehicle Reparations Act's policy of fully compensating accident victims. The Court held that the MVRA's plain language and related case law proved otherwise.[50] The Court explained that the flaw in Hodgkiss-Warrick's argument stemmed from the optional nature of UIM coverage.[51] Insurers have to make UIM coverage available, but insureds can waive it.[52] "Thus, while the [UIM] statute serves the remedial purpose of protecting auto-accident victims from underinsured motorists who cannot adequately compensate them for their injuries, that purpose has not been raised to the level of a public policy overriding other purposes of the MVRA, such as guaranteeing the continued availability of affordable motor vehicle insurance, or overriding all other considerations of contract construction."[53]

To illustrate its point that the purpose of optional UIM and UM coverage isn't strong enough to override the other purposes of the MVRA, the *Hodgkiss-Warrick*

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48 *Id.* at 880.

49 *Id.*

50 *Id.* at 881.

51 *Id.*

52 *Id.*

53 *Id.*

Court cited *Preferred Risk Mut. Ins. Co. v. Oliver* and *Motorists Mutual v. Glass*.[54] In *Oliver*, the Court enforced a motorcycle exclusion that limited UM coverage.[55] In *Glass*, the Court enforced a regular-use exclusion that limited UIM coverage.[56] The purpose of optional UM and UIM coverage wasn't enough to override the UM and UIM exclusions in *Oliver* and *Glass*.

Two other cases that make *Hodgkiss-Warrick*'s point about the limited purpose of UM and UIM coverage are *Safeco Ins. Co. v. Hubbard* and *MFA Ins. Co. v. Whitlock*.[57] In both, the Court enforced owned-but-not-scheduled exclusions that limited UM coverage because the exclusions were unambiguous and reasonable.[58]

The bottom line in *Hodgkiss-Warrick* was that State Farm could reasonably limit Hodgkiss-Warrick's UIM coverage without violating public policy because UIM coverage is optional. Furthermore, the *Hodgkiss-Warrick* Court explained that, without State Farm's regular-use exclusion, "household members would have an incentive to minimize their liability coverage in reliance on less expensive UIM coverage, and because otherwise the insurer is apt to be exposed to substantial risks it was not paid to underwrite."[59]

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54 *Id.* (citing *Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky. 1977); *Glass*, 996 S.W.2d at 450).

55 *Id.* (citing *Oliver*, 551 S.W.2d at 574).

56 *Id.* (citing *Glass*, 996 S.W.2d at 450).

57 578 S.W.2d 49, 50 (Ky. 1979) (owned-but-not-scheduled exclusion was reasonable and so enforceable); 572 S.W.2d 856 (Ky. 1978) (owned-but-not-scheduled exclusion was reasonable and so enforceable).

58 *Hubbard*, 578 S.W.2d at 50; *Whitlock*, 572 S.W.2d at 856.

59 *Id.*

Philadelphia's owned-but-not-scheduled exclusion in this case isn't identical to State Farm's regular-use exclusion in *Hodgkiss-Warrick*. But Philadelphia's exclusion is equally clear and equally reasonable. The exclusion's purpose is to prevent Philadelphia from being exposed to unknown risks that Tryon didn't pay Philadelphia to underwrite. That's a reasonable purpose. The Court has held as much in cases like *Hubbard, Whitlock,* and *State Farm v. Christian.*[60] In the *Hubbard* Court's words: "[the owned-but-not-scheduled exclusion] [i]s a reasonable exclusion and preclude[s] the insured's recovery from the insurer for injuries sustained while occupying an automobile that was not described in the liability portion of the policy."[61]

The Court isn't alone in holding that owned-but-not-scheduled UIM exclusions are reasonable and enforceable. Courts outside of Kentucky have held the same.[62] The rationale that these courts have provided is the same as this Court's rationale in *Hodgkiss-Warrick*. Without an owned-but-not-scheduled exclusion, "the insurer is apt to be exposed to substantial risks it was not paid to underwrite."[63] In the words of the Iowa Supreme Court:

> If an insurer is required to insure against a risk of an undesignated but owned vehicle, or a different and more dangerous type of vehicle of which it has no knowledge, it is

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60 *Hubbard*, 578 S.W.2d at 50; *Whitlock*, 572 S.W.2d at 856; *State Farm v. Christian*, 555 S.W.2d 571 (Ky. 1977).

61 *Hubbard*, 578 S.W.2d at 50.

62 *E.g., Lefler v. General Cas. Co. of Wisconsin*, 260 F.3d 942, 945 (8th Cir. 2001) (Iowa law); *Maurice v. State Farm*, 235 F.3d 7, 9-10 (1st Cir. 2000) (Maine law); *American Economy Ins. Co. v. Tomlinson*, 12 F.3d 505, 509 (5th Cir. 1994) (Texas law); *Van Ert v. State Farm*, 758 S.W.2d 36, 41 (Neb. 2008); *Prudential Prop. & Cas. v. Colbert*, 813 A.2d 747, 754 (Pa. 2001).

63 *Hodgkiss-Warrick*, 413 S.W.3d at 882.

> thereby required to insure against risks of which it is unaware, unable to underwrite, and unable to charge a premium therefor.[64]

In Philadelphia's case, the risk that it contracted to assume for Tyron was the risk posed by a low-risk show car "maintained solely for use in exhibitions, parades, club activities, or other functions of public interest" and "not used for regular driving to work, school, errands, shopping, general transportation, secondary or back-up transportation, business or commercial purposes, except for limited pleasure use."[65] When Philadelphia agreed to assume that risk, it didn't contemplate providing UIM coverage for a motorcycle. In fact, Philadelphia expressly excluded UIM coverage for Tryon's motorcycle with its owned-but-not-scheduled exclusion. That was reasonable. If Tryon wanted more UIM coverage, he could have purchased it from his motorcycle insurer—Nationwide. He chose not to. Nevertheless, he now wants Philadelphia and Encompass to provide him additional UIM coverage under policies that plainly exclude the coverage. Neither Philadelphia nor Encompass contracted to assume that risk. The Court shouldn't force them to assume it as a matter of public policy.

In the end, as the court of appeals explained, this case is identical to *Hartley*. Therefore, the Court could adopt *Hartley*'s analysis and reverse the court of appeals on the basis of that analysis. That outcome would suit Philadelphia and Encompass just fine. But we don't believe it's the best solution. *Hartley* is too narrow. The Court should decide this case under *Hodgkiss-Warrick, Glass, Hubbard, Whitlock,*

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64 *Lefler*, 260 F.3d at 945 (quoting *Dessel v. Farm and City Ins. Co.*, 494 N.W.2d 662, 664 (Iowa 1993)).

65 Collector Vehicle Policy, Auto Usage Endorsement (Appendix Item 3).

and *Christian*. Under those cases, Philadelphia and Encompass's owned-but-not-scheduled exclusions are enforceable because they are unambiguous and reasonable.

V. CONCLUSION

Hartley is on point. Therefore, the Court could decide this case by borrowing *Hartley*'s analysis. But that's not the best option. The best option is for the Court to decide this case under *Hodgkiss-Warrick*, *Glass*, *Hubbard*, *Whitlock*, and *Christian*. Under those cases, Philadelphia and Encompass's owned-but-not-scheduled exclusions are enforceable because they are unambiguous and reasonable.

BOEHL STOPHER & GRAVES, LLP

Robert E. Stopher
Robert D. Bobrow
400 West Market Street, Suite 2300
Louisville, KY 40202
Phone: (502) 589-5980
Fax: (502) 561-9400
COUNSEL FOR PHILADELPHIA INDEMNITY INSURANCE COMPANY