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

PHILADELPHIA INDEMNITY
INSURANCE COMPANY, INC.

and

ENCOMPASS INDEMNITY COMPANY APPELLANTS

BRIEF FOR APPELLEE, RICHARD R. TRYON

RICHARD R. TRYON APPELLEE

* * * * *

CERTIFICATE OF SERVICE PURSUANT TO CR 76.12 (6)

It is hereby certified that a true and accurate copy of this document was mailed, first class mail, postage prepaid, this 25 day of June, 2015 to: **Robert E. Stopher**, Boehl Stopher & Graves, LLP, 400 West Market Street, Suite 2300, Louisville, KY 40202; **William B. Orberson**, Phillips Parker Orberson & Barnett, PLC, 716 West Main Street, Suite 300, Louisville, KY 40202; **Clerk of the Supreme Court of Kentucky**, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; **Clerk of the Kentucky Court of Appeals**, 360 Democrat Drive, Frankfort, KY 40601; and **Circuit Judge Charles Cunningham**, Division Four, Jefferson Circuit Court, Judicial Center, 700 West Jefferson Street, Louisville, KY 40202.

The record on appeal was not withdrawn by Appellant.

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STATEMENT CONCERNING ORAL ARGUMENT

I believe that oral argument would be helpful to understand the issues in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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ARGUMENT II

ARGUMENT V

If the Kentucky Supreme Court should decide that injuries suffered when riding a motorcycle owned by an insured are excluded from the benefits of "stacking" other UIM policies purchased by the insured as to other vehicles, such a ruling should be applied only *prospectively.* Such a decision should only be applied to cases filed after the date finalizing such a decision by the Court of last resort. . 25

COUNTERSTATEMENT OF THE CASE

The Appellee (hereafter "Tryon") accepts the Statement of the Case rendered by both Appellants (hereafter "Philadelphia" or "Encompass" as the context requires) but does *not* agree with their statements that UIM exclusions for motor vehicles "owned but not scheduled for coverage" are enforceable either in light of (a) controlling case law or (b) the language of the policies as a whole. In fact the UIM exclusions are *not* enforceable pursuant to (a) controlling case law *and* (b) the language of the policies as a whole.

The facts are not complicated. The insurance coverages and payments are adequately set out as Exhibits in the Appellants' briefs. The tortfeasor in this case, Logan Hopkins, was a young (then 17) driver operating a car owned by his parents. In the car with Hopkins were three other young passengers of about the same age. Tryon was on his motorcycle taking an after-dinner leisurely ride along the river. Tryon, who is now 55, works for the Jefferson County Property Valuation Administrator.

Both Tryon and Hopkins were proceeding in the same direction on River Road in Louisville which is a four lane road, two lanes in each direction. Hopkins was in the right lane and Tryon was in the left lane. Hopkins was ahead of Tryon. Hopkins and his friends spotted a parking spot on the *opposite side* of the four-lane road and abruptly turned from the right lane (i.e., the "wrong" lane) across the left lane directly into the path of Tryon on his motorcycle. The motorcycle collided violently into the driver's side of the car causing the injuries to Tryon. No one else was injured.

Tryon suffered a broken leg in two places. His medical bills to date total to approximately $100,000.00.

ARGUMENTS

Appellee incorporates by reference the points and arguments raised by Amicus Curiae Kentucky Justice Association. Additionally, The Appellee highlights the following arguments that warrant affirming the opinion of the Court of Appeals.

ARGUMENT I

This Court should reaffirm and enforce the long-standing rule and policy of this State that "anti-stacking" provisions pertaining to UIM coverage in policies of motor vehicle insurance are invalid.

* * * * * * * * * *

This argument was raised below in the Responses to the Motions for Summary Judgment filed by Encompass and by Philadelphia (RA, pp. 288-296; 398-405 and its Appellant Brief to the Kentucky Court of Appeals at pp. 4-12.)

Tryon had previously purchased, and had in full force and effect, three separate insurance policies, one for each vehicle that he owned, each with underinsured motorist coverage (hereafter "UIM") for which he paid three separate additional premiums.

The Encompass policy contains, deep in its verbiage, an "anti-stacking" provision, sometimes referred to[1] as an "owned but not scheduled for coverage provision." It is substantially similar to almost all such provisions cited by our courts in dealing with this issue in recent years. Here is the language:

> We do not provide Underinsured Motorists
> Coverage for bodily injury sustained by any covered

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[1]See, for example, Hamilton v. United States Fidelity & Guaranty Company, 926 S.W. 2d 466 (Ky. App. 1996) where the phrases are used interchangeably throughout the opinion.

person:....

> c. While that covered person is operating or occupying a motor vehicle owned by, leased by, furnished to, or available for the regular use of a covered person if the motor vehicle is not specifically identified in this policy under which a claim is made.

The Philadelphia policy does not seem to contain that language in its UIM provisions[2]. However its Uninsured Motorist coverage states and I include this simply to show the similarity with the language above:

> We do not provide Uninsured Motorists Coverage for "bodily injury" sustained:
>
> 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.

The Kentucky Supreme Court has addressed the validity of these anti-stacking provisions many times over the years. It has held that such provisions are void as against public policy when applied against the purchasers of the policies. The holdings actually originated from cases involving uninsured motorist ("UM") anti-stacking provisions which were held to be void as against public policy in Hamilton v. Allstate Ins. Co., 789 S.W. 2d 751 (Ky. 1990) and Chaffin v. Kentucky Farm Bureau Ins. Co., 789 S.W. 2d 754 (Ky. 1990).

Allstate Insurance Company v. Dicke, 862 S.W. 2d 327 (Ky. 1993) borrowed the

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[2]In fact, I could not find any UIM provisions in the Philadelphia policy at all. I am not even sure I understand its declarations page. On that basis alone, as I argued at p. 5 of my Appellant brief to the Kentucky Court of Appeals, I believe its case should be dismissed and it ordered to pay its UIM limits should Tryon prove his damages. Philadelphia simply has *no* UIM anti-stacking provision at all.

reasoning from those cases and applied it to void, as against public policy, anti-stacking provisions relating to UIM coverage. In Dicke, the injured person died in an automobile accident in which he was riding as a guest passenger in a motor vehicle owned and operated by someone else. He had two UIM policies covering vehicles which he owned---as to which the Court allowed coverage to be "stacked."

That Court stated at 862 S.W. 2d at 329:

> ...The public policy of this jurisdiction with respect to stacking was first enunciated in Meridian Mutual Ins. Co. v. Siddons, Ky., 451 S.W.2d 831 (1970) and followed in various cases thereafter which include Ohio Casualty Ins. Co. V. Stanfield, 581 S.W. 2d 555 (1970), Hamilton v. Allstate (*supra*) and Chaffin v. Farm Bureau Ins. Co. (*supra*). We have consistently held that when separate items of "personal" insurance are bought and paid for, there is a reasonable expectation that the coverage will be provided. As such, we have held that it is contrary to public policy for it to be denied. While the distinctions between the statutes which govern uninsured and underinsured motorist have been duly considered, none of such distinctions is sufficiently meaningful to permit a different result.

In Chaffin v. Farm Bureau Ins. Co., 789 S.W. 2d 754 (Ky 1990), cited by the Dicke Court above, the Court set out the "other vehicle exclusion" provision that it ultimately held void:

> ....appellant's policies contained a provision commonly known as the "other vehicle exclusion" which is as follows:
>
> "A. We do not provide Uninsured Motorist coverage for bodily injury sustained by any person:

> 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."

This language is for all practical purposes identical to Encompass's UIM policy language.

In Chaffin, the injured person had purchased an uninsured motorist policy on the vehicle in which she was injured from the same company from which she had purchased two other uninsured motorist policies covering two other vehicles. Here is some of the language from that decision which holds that this item of insurance protection is personal to the insured and the reasons why this is so and why "antistacking" provisions are against public policy and not just a ""rule of insurance-policy construction":

> ...an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded; and that it is contrary to public policy to deprive an insured of purchased coverage, particularly when the offer of such is mandated by statute.....
>
> If appellant had been injured by an uninsured motorist while riding in the vehicle of a friend or while walking across a street, uninsured motorist coverage would have been available from all three of her uninsured motorist policies....By its own terms, the other vehicle exclusion in appellant's policy would not be applicable to such facts.....It is always possible to exclude coverage to such an extent that only in the rarest of circumstances would a claim ever arise. Such, of course, defeats the underlying purpose of insurance. Appellee's argument that such an exclusion is necessary for prevention of fraud is simply insufficient to overcome the other relevant

> considerations and the exclusion is therefore unreasonable.

789 S.W. 2d at 756, 757 (emphasis added).

In Hamilton v. United States Fidelity & Guaranty Company, 926 S.W. 2d 466 (Ky. App. 1996) two family members were injured in one of three cars owned by the family. Each of the three vehicles was insured by different insurance companies and the family purchased UIM on each one of those policies, exactly the situation at bar. Here is the language from the USAA policy:

> Exclusions.
> A. We do not provide Uninsured or Underinsured Motorists Coverage for "bodily injury" sustained by any person:
> 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.

Again, this language is for all practical purposes identical to Encompass's UIM policy language.

This Court stated in holding these anti–stacking provisions unenforceable:

> ...Although we are presented with a situation in which three separate carriers insured the three vehicles for UIM as well as UM, the foregoing rationale applies as forcefully in this case as it did it Chaffin. Quite simply, had the Gibsons been injured while riding as a passenger in another's vehicle, there would be no dispute that coverage would be available from all three carriers. We must conclude that the "owned but not scheduled for coverage" provisions in Hamilton's and USAA's policies are unreasonable as well.

926 S.W. 2d at 469.

In short, a Kentucky purchaser has a reasonable expectation when purchasing UIM, which expectation was created and subsequently reenforced by this Court's decisions, and has had that reasonable expectation for decades, that coverage will be provided for injuries suffered in a motor vehicle wreck with an underinsured motorist, and that UIM coverage is not "tied to" the vehicle, or type of vehicle, or *any* vehicle (in the case of a pedestrian) from which the UIM premium is originally generated *despite* such anti-stacking language in its policy.

The fact that many insurance companies (including especially Encompass in this case) refrain from changing the anti-stacking language in their policies is mystifying. The language is misleading and confusing at best and against the law at worst.

It is just not right that an auto insurance company should be able to sell a customer UIM—and then hope and try to bury its effectiveness in verbiage long held invalid by this Kentucky Supreme Court.

Moreover, KRS 304.39-320, the "UIM statute," states in pertinent part:

> ...(1) As used in this section, "underinsured motorist" means a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to *a motor vehicle accident*.
>
> (2) Every insurer shall make available upon request to its insureds underinsured motorist coverage, whereby subject to the terms and conditions of such coverage *not inconsistent with this section* the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to *a motor*

> *vehicle accident* because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering. (my emphasis)

That statute specifically states "a motor vehicle accident." It does not limit coverage to the type of vehicle involved, whether the insured owns a number of different vehicles insured by different companies or even whether the injured party is *in* a vehicle. The statute specifically states that coverage terms and conditions must "not be inconsistent with this section." It is "inconsistent with this section" for an insurance company to sell UIM to a person like Tryon and then try to dodge paying the UIM policy purchaser by rolling out anti-stacking language which it never removed from the language of the policy despite decades of decisions by this Court holding that such language is invalid and unenforceable.

Further, KRS 304.39, the Motor Vehicle Reparations Statute, does not exclude motorcycles. It excludes mopeds. But not motorcycles. KRS 304.39-020:

> Definitions for Subtitle:
>
> .....(7) "Motor vehicle" means any vehicle which transports persons or property upon the public highways of the Commonwealth, propelled by other than muscular power except road rollers, road graders, farm tractors, vehicles on which power shovels are mounted, such other construction equipment customarily used only on the site of construction and which is not practical for the transportation of persons or property upon the highways, such vehicles as travel exclusively upon rails, and such vehicles as are propelled by electrical power obtained from overhead wires while being

> operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the said limits of any municipality. Motor vehicle shall not mean moped as defined in this section.
>
> (8) "Moped" means either a motorized bicycle whose frame design may include one (1) or more horizontal crossbars supporting a fuel tank so long as it also has pedals, or a motorized bicycle with a step-through type frame which may or may not have pedals rated no more than two (2) brake horsepower, a cylinder capacity not exceeding fifty (50) cubic centimeters, an automatic transmission not requiring clutching or shifting by the operator after the drive system is engaged, and capable of a maximum speed of not more than thirty (30) miles per hour.

This point was specifically recognized in Troxell v. Trammell, 730 S.W. 2d 525 (Ky. 1987) in which the Court held that the Motor Vehicle Reparations Act applies to motorcycles, in the same manner and to the same extent, except where the Act specifies otherwise[3].

The trial court in the case at bar made its ruling against Tryon based on Motorists Mutual Insurance Company v. Hartley, 2010-CA-00202-MR, a case ordered *depublished* by the Kentucky Supreme Court at 2011-SC-000146-D. The facts of that case are almost identical to Tryon's case here at bar.

The effect of the holding of the "depublished" Hartley can be summarized as follows: It is a clear departure from decades of Kentucky insurance law mandating that

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[3]For example, KRS 304.39-040(4) specifically makes basic reparations benefits optional coverage for a motorcyclist and KRS 304.39-(060) (2)(c) does not limit tort liability for injuries occurring on a motorcycle. Both sections treat motorcycles differently from other vehicles.

two cardinal principles apply in construing insurance policy contracts:

(a) Insurance contracts should be liberally construed and all doubts resolved in favor of insureds; and

(b) Exceptions and exclusions should be strictly construed to make insurance effective. Kentucky Farm Bureau Mut. Ins. Co. v. McKinney, 831 SW 2d 164,166 (Ky.1992) citing Grimes v. Nationwide Mutual Ins. Co., 705 S.W.2d 926 (Ky. App. 1985); Davis v. American States Ins. Co.,562 S.W.2d 653, 655 (Ky. App. 1977), Wolford v. Wolford, 662 S.W.2d 835 (Ky. 1984); and Tankersley v. Gilkey, 414 S.W.2d 589 (Ky. 1967).

Hartley did the very opposite. In carving out an exception for injuries occurring on Hartley's own motorcycle, it *liberally* construed *exceptions* and resolved all *doubts* about coverage *against* the insureds, so as to make the UIM coverage *ineffective.*

Here is the basis on which the Hartley decision was made:

> ...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.

Third to last paragraph of the decision.

With all due respect to Judge Thompson.....how does he know this? I have looked in vain for case or industry studies that report anything like this. No case cited by anyone involved in the case at bar, including *amicus* Kentucky Defense Counsel, Inc., has cited a single one. And Kentucky has had decades of experience with motor vehicle accidents

involving motorcycles.

The Appellants' briefs are for all practical purposes built on this speculative principle. The argument concerning possible rate increases runs pretty much throughout the entirety of their briefs. A bit of hyperbole (for which I forgive my zealous colleague and friend because I know I am often guilty of the same) occurs at page 14 of Encompass's where it is stated that nullifying its limitation of UIM coverage in the case at bar would "effectively hobble insurers' ability to assess risk" and that "rates for all Kentucky motorists would necessarily increase" if such were allowed. It goes on: "all motorists in Kentucky would be forced to bankroll the driving habits of those who do not wish to pay for the insurance benefits they receive." Just exactly where is the evidence for this?

This outright statistico-economic speculation is the basis on which both Appellants argue that making an *ex post facto* UIM exemption from case law invalidating anti-stacking provisions for the motorcycle in this case is a reasonable contract construction "not inconsistent with this section" (KRS 304.39-320).

It may be true that injuries occurring on a particular motorcycle in a particular motor vehicle accident are more severe than injuries that a person might suffer in a Camry in the same wreck. I would venture to say that all of us have heard this first from our parents when we were very young.

But I personally have no idea about the numbers of motor vehicle accidents which involve motorcycles as opposed to cars. Or whether the proportion of motorcycle accidents is increasing or decreasing given the age of the riders and how the bikes are

ridden today as opposed to thirty years ago. Are the injuries to be expected from a motor vehicle accident in a Smartcar less severe than a motorcycle? Not that many persons own and ride motorcycles at least in comparison with cars, and of those, I would *guess* that not that many motorcycle riders are involved in wrecks at least in comparison with car wrecks. I have no idea about the numbers. Are the numbers of motorcycle wrecks so small, in comparison to motor vehicle accidents in general between cars and trucks, so as not to make a difference even given that a number of those motorcycle accidents are catastrophic? How do the total damages (personal injuries) of all motorcycle wrecks, in the aggregate in any one year, compare to the total damages of all car wrecks? The Court and counsel can surely see many more similar or related questions. We simply are not equipped, or at least I am not, to argue one way or the other about these accidents and their possible impact on auto insurance rates.

Thus it seems to me there are two issues here:.

First, I think that without empirical studies there is no way a court can make a good, fair and reasonable decision in a case where the basis of the decision is the "affordability" of insurance premiums. This is especially true when the case before the Court involves a person who has paid insurance premiums for UIM in good faith[4], and

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[4]We are not dealing in this case with a person who chose not to buy insurance on his motorcycle at all as in Larkin v. United Services Automobile Association, 2011 WL 6260361 (Ky. App.) (unpublished but cited by Appellant Encompass). Nor are we dealing in this case with a UIM policy provision which *specifically* excluded motorcycles as in Baxter v. Safeco Ins. Company of America, 46 S.W. 3d 577 (Ky. App. 2001) or as in Preferred Risk Mut. Ins. Co. v. Oliver, 551 S.W. 2d 574 (Ky. 1977).

has suffered injuries which, in accordance with decades of Kentucky case law[5], should be covered by that UIM even if the injuries are not tied to the particular vehicle from which is derived that UIM benefit. We, all of us, are just sewing buttons on clouds, in arguing one way or the other about what the ultimate affect on insurance premiums might be by exempting this motorcycle from the unenforceability of the anti-stacking policy provision. That is *not* a good way to decide a case, much less depart from or overrule long-standing case law. And it does not seem right to do it *ex post facto*-----after Tryon has suffered the injuries.

Second, this is certainly the type of issue with which legislative subcommittees deal when they are considering insurance company legislation. That is the majority of their work: empirical (actuarial) study. If the Appellants in this case truly believe there is an insurance premium crisis looming because of persons like Tryon making UIM claims on policies not covering an owned motorcycle, they should contact their local legislators. That is the place where this issue should be considered. Not here.

ARGUMENT II

Given the reasonable expectations that a person in Tryon's position would have that the UIM coverage he purchased on his automobiles would apply to his

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[5]Again, given the passage of years one would think that *some* sort of economic analysis would be cited for this statistico-economic argument. Has there even been a newspaper article dealing with it?

motorcycle, expectations created by prior decisions of this Court, any change involving "stacking" of UIM benefits is better left to the state legislature which has a greater ability than the courts to study the nature and implication of risks of injuries vis a vis insurance coverage costs.

Alternatively, auto insurance companies who write the insurance contracts should state within their contracts that any UIM they provide does not apply to any motorcycle owned by their insured unless they insure it.

* * * * * * * * * *

This argument was raised below in the Response to the Motions for Summary Judgment (RA, pp. 398-405) and Tryon's Appellant Brief to the Kentucky Court of Appeals (pp. 13-16).

If Tryon had been a pedestrian injured by an underinsured motorcyclist running a red light and made UIM claims on his motorcycle UIM (with Nationwide) and the other two companies in the case at bar, we wouldn't be going through this. Had Tryon been riding with someone else on that other person's motorcycle and been injured in a wreck with an at-fault underinsured motorcycle, or an at-fault underinsured car, and made UIM claims on his motorcycle UIM (with Nationwide) as well as the other two companies in the case at bar, we would not be here. Any anti-stacking provision would clearly be unenforceable. As the Court in Dupin v. American States Insurance Company, 17 S.W. 3d 538 (Ky. App. 2000) put it:

...By extension and application of

> case law pertaining to UM coverage, UIM coverage must apply to pedestrians. (Cases omitted)....Specifically, in Estate of Swartz v. Metropolitan Property & Casualty Co., Ky. App., 949 S.W. 2d 72 (1997), we stated that decisional law declares such coverage to be applicable whether the insured who is injured by an uninsured motorist is driving an insured vehicle, riding as a passenger in another vehicle, or traveling as a pedestrian. In short, uninsured motorist coverage applies whenever an insured person would be entitled to recover damages but for the uninsured status of the negligent motorist. *Id.*, at 74 (citations omitted). By analogy, UIM coverage must apply to persons injured while not in motor vehicles, including pedestrians and others utilizing non-motor vehicles. This is consistent with the UM and UIM case law of several other states. (citations omitted).

Dupin at 542-543.

A more conceptual treatment of the same principle: Kentucky law has consistently held that in situations like those, there is no question but that anti-stacking provisions in UIM insurance policies bought and paid for by the injured person are invalid. It is personal insurance and is not tied to the vehicle as is liability insurance, as expressly stated in Dicke, *supra,* at 329:

> ....We have consistently held that when separate items of "personal" insurance are bought and paid for, there is a reasonable expectation that the coverage will be provided. As such, we have held that it is contrary to public policy for it to be denied.

See also Snodgrass v. State Farm Mutual Auto. Ins. Co., 992 S.W. 2d 855 at 856-857

(Ky. App. 1998).

This means that Kentuckians, including Kentucky attorneys who advise insurance companies and draw insurance contract provisions, at least to this point in time, have a "reasonable expectation" that UIM coverage *will* apply, despite anti-stacking language which certain companies continue to place in those contracts. The UIM benefits will be available, despite the contract language, because our Courts have stated this.

My point is this. Given these expectations created by our own Courts, if insurance companies want to make an exception for situations in which a person like Rick Tryon, who owns a UIM policy that has anti-stacking language in it (like Encompass's), gets hurt riding on his own motorcycle, (or in a Smart car or Mini Cooper for that matter), the companies should simply do either of these:

(A) Ask about whether the prospective AUTOMOBILE insurance applicant owns a motorcycle; and, if he does own a motorcycle, and if he rides that motorcycle, and it is not insured by the company about to write the policy and accept the premium, have him sign a waiver specifically pertaining to the UIM coverage he purchases for the CAR to make it clear that the motorcycle isn't covered by it. How much simpler could it be? Why does this have to involve the Courts of this State?

(B) Another much less effective alternative (given the pages of verbiage in insurance contracts) would be for insurance companies to simply[6] place explicit language in the insurance contract under the UIM provisions, that clearly and specifically states that UIM coverage does not apply to injuries suffered by the insured on his own

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[6]And I do mean *simply*. How much simpler could *this* be?

motorcycle.

Set out below is an example from Baxter v. Safeco Insurance Company of America, 46 S.W. 3d 577 (Ky. App. 2001) which states in the Exclusions portion of the policy that it does:

> .....not provide Underinsured Motorists Coverage for bodily injury sustained by an insured ...while occupying or operating an owned motorcycle or moped.

Baxter, *supra*, at 578-579.

Here is an example of another which explicitly excludes uninsured motorists benefits in the same circumstance. The language clearly states that uninsured motorist benefits are not available for injuries due....

> .....(d) to bodily injury sustained by any person while occupying any motorcycle, motorized scooter, motorized bicycle, snowmobile or any other similar motorized vehicle.

Preferred Risk Mutual Insurance Co. v. Oliver, 551 S.W. 2d 574, 577 (Ky. 1977).

We might add that both these cases were cited in Hartley, *supra*.

Such clearly stated exclusions would be at least be consonant with the mandate set out in Bidwell v. Shelter Mut. Ins. Co., 367 S.W. 3d 585 (Ky. 2012) at 588-589:

> To be enforceable, Kentucky law requires a limitation of insurance coverage...to be clearly stated in order to apprise the insured of such limitations. Not only is the exclusion to be carefully expressed, but...the operative terms clearly defined.

Either alternative (A) or (B) set out above would, *at least*, avoid the failure of expectations on the part of an insured that UIM coverage on his car would cover *all*

"motor vehicles" he might own, including his motorcyle, and apply to all "motor vehicle accidents" in which he might be involved. Those expectations have been created by (a) the Motor Vehicle Reparations Act which treats motorcycles exactly like cars except in two or three very limited situations, and (b) the history of case law in which the Kentucky Supreme Court has struck down anti-stacking provisions cited in insurance policies which are virtually word-for-word identical to anti-stacking language contained in the policies at bar.

The doctrine of reasonable expectations provides that "the insured is entitled to all the coverage he may reasonably expect to be provided under the policy." Motorist Mutual Insurance Company v. Glass, 996 S.W. 2d 437 (Ky. 1999) at 450. But one cannot try to read and understand a policy in a vacuum, outside all case law and statutory provisions. The anti-stacking policy provision contained in the Encompass insurance contract (again, Philadelphia's seems not to exist) creates ambiguity because it is in direct derogation of decades of case law invalidating it. The anti-stacking provision is basically identical to the one in Hamilton v. United States Fidelity & Guaranty Company, 926 S.W. 2d 466 (Ky. App. 1996) and Chaffin v. Kentucky Farm Bureau Ins. Co., 789 S.W. 2d 754 (Ky. 1990). This is the reason why we are here. I admit that the Encompass policy is clear enough on its face if one simply considers the grammar and syntax. The same can be said of the provisions in Chaffin and Hamilton. That is not the point. As Justice Cooper stated in Glass with regard to the doctrine of reasonable expectations:

> ....The gist of the (reasonable expectations) doctrine is that the insured is entitled to all the coverage he may reasonably 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.

Glass, 996 S.W. 2d at 450, quoting Simon v. Continental Ins. Co., 724 S.W. 2d 201, 212-213 (Ky. 1986).

The failure of reasonable expectations occurs in the case at bar because whoever drafted the UIM anti-stacking language contained in the contract------or whoever allowed it to remain in the contract------ purposely made it conflict with decades of anti-stacking case law. That conflict, if it does anything, creates a "technical, legalistic and complex" ambiguity in this contract provision. And for that reason the ambiguity, or outrightly misleading language, should be unenforceable. It defeats what a person should reasonably expect when he in good faith pays his UIM premiums. If the contract would specifically and explicitly state that an owned motorcycle is not covered that would go far to eliminate the ambiguity.

This is especially significant because the Encompass contract language also contains the following provision:

> 12. THE LAW. If anything in this policy conflicts with state or local laws, we agree to honor any claim or suit in

conformity with the law[7]....

But the Encompass language doesn't stop there with regard to "the law." Two pages later it states:

> 19. WHAT LAW WILL APPLY.
> This policy is issued in accordance with the laws of Kentucky and covers property or risks principally located in Kentucky. Subject to the follow paragraph (pertaining to extraterritoral coverage), any and all claims or disputes in any way related to this policy shall be governed by the laws of Kentucky[8].....

The law in effect when this policy was written was the law as set out by this very Court in Chaffin, Hamilton, and Dicke. How much clearer can this be?

But again. For a Court to exempt motorcycles or other vehicles (a Smartcar? Corvette? MiniCooper?) it perceives as more dangerous than a regular car on an ad hoc basis from the otherwise invalid UIM anti-stacking provisions in insurance contracts, is just not fair. Or reasonable. How can any of our courts possibly decide that such risks, in an individual case, or in the aggregate in comparison with all motor vehicle wrecks, will cause insurance premium rates to increase?

These types of risk, statistical and coverage-cost issues are precisely the sorts of issues as to which legislatures, with the help of their legislative subcommittees, are much better equipped to handle than courts.

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[7]See Brief for Appellant Encompass, Exhibit 5 under "Special Value - Motor Vehicle - Kentucky, p 16 of 18.

[8]See Brief for Appellant Encompass, Exhibit 5 under "Special Value - Motor Vehicle - Kentucky, p 18 of 18.

Again: Considering the reasonable expectations of persons like Tryon who currently are paying for UIM insurance in accordance with long-standing Kentucky case law, the insurance companies could simply clearly and explicitly state, if they perceive that there is a major problem with insureds making UIM claims as to motorcycle accidents as to which motorcycles they have not written the contract, that such owned-motorcycle claims are not covered. That would at least make clear that the customer can't expect to stack in a motorcycle wreck.

And again: Or the insurance companies could simply *ask*. If the insured owns a motorcycle which the insurance company is not insuring, have the insured sign an acknowledgment or waiver that its UIM benefit does not cover it. That also would defeat any possible expectation on the part of the customer to stack if injured on his motorcycle.

There just seems to be something wrong about letting an insurance company retain anti-stacking language in its UIM contract, language declared invalid by Kentucky law decades ago, and now try to take advantage of it to the detriment of a person like Rick Tryon, especially when other provisions in the same contract expressly state that Kentucky law applies.

ARGUMENT III

The case of State Farm Mutual Insurance Company v. Hodgkiss-Warrick, 413 S.W. 3d 875 (Ky. 2013) is inapposite to the case under review.

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Hodgkiss-Warrick is cited throughout the briefs of the Appellants as a case relevant to the decision in the case at bar.

Hodgkiss-Warrick dealt with an insurance provision which invalidated UIM coverage if the person was injured in an underinsured vehicle owned by or regularly available to the insured or a resident relative. This Court stated:

> ....The gist of these cases is that it is not unreasonable or contrary to the MVRA to exclude UIM benefits in that situation, because otherwise household members would have an incentive to minimize their liability coverage in reliable on less expensive UIM coverage, and because otherwise the insurer is apt to be exposed to substantial risks it was not paid to underwrite.

413 S. W. 3d. at 882.

The basis for this decision was that people in the same household can, in principle at least, control the amount of *liability* insurance one of them purchases as to a vehicle regularly used by others in the same household. The scenario is this: the "free riders" could or would then purchase extra amounts of UIM benefits as to their own cars, which they did not regularly use, so as to protect themselves when regularly riding with the low-liability-limits-insured (the potential tortfeasor if you will). This was similar to the sort of fact pattern that occurred in Arguelles v. Nationwide Investment Services Corporation, 2012-CA-000459 (Ky. App. 2013) (unpublished), also cited by Appellant Encompass as well as Motorists Mutual Insurance Company v. Glass 996 S.W. 2d 437 (Ky. 1997) cited by both Appellants and *amicus* Kentucky Defense Counsel, Inc.

This fact pattern is not similar to the fact pattern under review. The facts in this

Tryon case are that Tryon purchased insurance on all of his vehicles exactly as Kentucky case law and statutory law provided and exactly as the three insurance companies, all with many years of presence----and presumed profitability-----in the State of Kentucky, allowed (I dare say, encouraged). He was injured by an underinsured driver whom he did not know. Tryon had no control over who was driving the tortfeasor-Hopkins vehicle-------much less how much liability insurance had been purchased to cover the car. The Hopkins vehicle happened to collide with Tryon's motorcycle, causing the injuries. The collision could just as easily have occurred while Tryon was driving his antique car or the Lexus which he and his wife drove with much greater frequency. And the injuries could have been even worse: Persons are killed in car wrecks, as opposed to motorcycle wrecks, with much greater frequency simply due to the fact that there are so many more cars than motorcycles on American roads. Had that been the case, of course, we would not be here.

This case does not involve Rick Tryon intentionally buying minimal amounts of liability insurance on his antique car or Lexus or motorcycle and then getting injured in that antique car or Lexus or motorcycle such that an underinsured motorist circumstance arises as to which he is making a claim for UIM under all three of his policies.

ARGUMENT IV

There should be no reason in this case to differentiate between the UIM purchased by Tryon as to each of his motor vehicles and the umbrella policy in State Farm Mutual Automobile Insurance Company v. Marley, 151 S. W. 3d 33 (Ky.

2004).

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This argument was actually made by the dissenting Justices in Hodgkiss-Warrick, so it stems from the arguments made in response to Hodgkiss-Warrick.

In Marley, this Court held that an umbrella policy purchased by a tortfeasor could and should be considered an additional source of liability coverage as to which an injured person could make claim in suing the tortfeasor who owned the umbrella policy. One of the issues raised was whether a family exclusion provision in the policy was valid. This Court held that the umbrella policy, a completely optional coverage, could and should be considered an automobile policy under the MVRA, and because of that, the family exclusion policy should be invalidated as in other motor vehicle insurance contracts subject to Kentucky law. This Court held:

> ... The mere fact that the policy is labeled as an umbrella policy and written separately from the underlying automobile policy, or that it covers claims other than automobile accidents, does not validate an exclusion provision of this nature.

Marley at pp. 35-36.

The umbrella policy whose "regular use" exclusion was held invalid in Marley was *optional* insurance just like the UIM in the case bar. The umbrella covered a liability shortfall just as the UIM in this case covered a liability shortfall. The exclusionary language invalidated in Marley is not the same type of language that we have in the case at bar but it has the same intent: to defeat the injured person's recovery. That intent

should be invalidated here as in Marley. The reasons: First, it was Tryon's, the injured party's, own prescience as well as his prior good faith purchases of UIM to protect himself that is involved in the case at bar. He should be allowed the benefits of his purchase. Second, the anti-stacking language with which Tryon has had to contend in the case at bar over the last two years had been invalidated by prior decisions of this Court for many years.

ARGUMENT V

If the Kentucky Supreme Court should decide that injuries suffered when riding a motorcycle owned by an insured are excluded from the benefits of "stacking" other UIM policies purchased by the insured as to other vehicles, such a ruling should be applied only *prospectively.* Such a decision should only be applied to cases filed after the date finalizing such a decision by the Court of last resort.

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This argument was raised for the first time in Appellant's Civil Appeal Prehearing Statement and at Tryon's Appellant's Brief to the Kentucky Court of Appeals (pp. 16-17).

Such a decision would amount to a departure from well-established and logically-consistent case law construing contracted-for UIM benefits as "personal" to an insured who bought them, and not "tied" or "limited" to injuries specifically occurring on a motorcycle owned by the insured. This type of decision is a decision which affects contracts. Purchasers should be able to depend on contracts and the decades of

interpretations that Courts have applied to them -------- especially contracts involving motor vehicle insurance created by statute. These types of contracts protect the persons and property, the personal safety and well-being of people. People buy them to protect themselves and their families.

Absent a prospective-only application, Tryon's reasonable expectations as to contracted-for UIM coverage, is *ex post facto* extinguished. And that is not right.

Basic fairness demands a prospective application only, in cases where such contracts would be impacted by such a decision. As the Alaskan Court of a different time, different case, and different circumstances, paraphrased basic fairness relative to prospective application of a court's decision:

> A state supreme court has unfettered discretion to apply a particular ruling either purely prospectively, purely retroactively, or partially retroactively, limited only "by the juristic philosophy of the judges....., their conceptions of law, its origin and nature." The decision is not a matter of law but a determination based on weighing the merits and demerits of each case. Consideration is given to applying a ruling prospectively "whenever injustice or hardship will thereby be averted."

Warwick v. State ex rel. Chance, 548 P.2d 384, 393-394 (Alaska 1976).

This highly conceptual way of stating the matter was fleshed out by the Kentucky Court of Appeals (then the Supreme Court) a bit earlier on in Haney v. City of Lexington, 386 S..W. 2d 738 (Ky. 1964). To paraphase this Court's predecessor Court as to the matter of prospective versus retrospective application of a judicial

decision in the context of a tort case (municipal liability)[9], the alternatives are these: (1) announce the new rule without applying it and suggest that it be applied to cases brought in the future (pure prospectivity); (2), apply the ruling to the appellant in the instant case but deny applying it to all other cases filed before the date of the opinion (partial retroactivity); (3), apply the rule to the instant case and all others pending or to be filed (pure retroactivity).

The Haney court, in consideration of the fact that it was tort case, gave the decision purely retroactive effect. It applied its holding to its case at bar and all pending cases. The same was done without much explanation in Hilen v. Hays, 673 S.W. 2d 713 (Ky. 1984). The notion seems to be that in tort cases the parties have not built up any significant reliance as such on a particular judicial interpretation of the tort, probably because torts "just happen," so there is no harm in the purely retrospective application.

The case under consideration at bar involves a contract however, and different considerations apply. Should this court decide to depart from its prior holdings invalidating anti-stacking provisions in UIM contracts, even one as specific as that which applies only to a motorcycle owned by an insured and whether stacking of UIM he purchased in connection with his other cars should be disallowed, that holding should not be applied to Tryon and perhaps not to any insurance contract made prior to the date of the finality of the decision.

This Court's predecessor Court in Hanks v. McDanell, 210 S.W. 2d 784 (Ky.

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[9]The merits of this case involving sovereign (municipal) immunity have been greatly altered by later pronouncements of this Court.

1948), in dealing with the interpretation of a will, overruled a line of cases that were together known as the "Biting Rule." That judicial precedent disallowed the giving of a fee in one part of the document and then a life estate in another section of the same document. The Hanks court overruled that line of cases and held the "Biting Rule" invalid. In doing so, the Hanks court stated that it realized that the doctrine of *stare decisis* is especially important in a case such as this which affects property rights of the parties involved:

> It is true that where rules of property ....are involved courts will exercise greater caution in overruling them, but the reason for that greater caution is to preserve rights that have been acquired under the overruled opinion.....

Hanks at 787.

The Hanks court went on to hold that there was a way to equitably handle this problem:

> ...The cautionary rule against overruling prior cases settling rules of property, to which we have referred , becomes eliminated when the overruling opinion reserves such rights by giving that opinion only prospective effect...
>
> We have concluded that all of our former opinions recognizing and applying the "Biting" rule should be and they are now expressly overruled, but that this opinion shall have only a prospective effect and not apply to or affect any vested rights acquired under that rule while it was in force and effect, all of which rights are expressly preserved and upheld.

Hanks[10] at 788.

A similar situation calling for the prospective-only application of a judicial decision departing from *stare decisis* and affecting property rights presented itself more recently in the complicated legal machinations involving "broad form deed" litigation. The case of Akers v. Baldwin, 736 S.W. 2d 294 (Ky. 1987), which was subsequently overruled[11] on other grounds, overruled the case of Buchanan v. Watson, 290 S.W. 2d 40 (Ky. 1956). Buchanan had held that a person who acquired the mineral rights to a piece of land under a "broad form deed" could use any means to mine the land------without paying damages to the owner of the surface or "servient" tract. This created a major problem when coal companies, subsequent to Buchanan, began to use strip mining techniques to mine those minerals. Akers basically reversed Buchanan and allowed for damages to be paid the surface owner in such situations. However the Court realized that the decision would impact the property rights of all those persons who had acquired mineral rights relying on the Buchanan case (i.e., anticipating having no need to pay damages for the mining of the minerals). Hence it declared that the decision would have prospective effect only:

> ...We can no longer countenance the existence of such a judicially created public policy, and therefore, as stated, we overrule that part of Buchanan v. Watson, which denied damages to the owner of the surface of the land.
>
> Because of the possible adverse effect of

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[10]In all honesty, given the ruling in Hanks, this may be *obiter dicta*. But the court certainly pronounces its intent to make its ruling prospective only for the reasons it sets out.

[11]Ward v. Harding, 60 S.W. 2d 280 (Ky. 1993)

> our decision on mineral rights acquired in reliance on Buchanan, we limit the application of this decision by excluding from its effect all conveyances by broad form deed, and leases and mining efforts under broad form deeds, made between the effective date of Buchanan, May 4, 1956 and the initial rendition date of this decision, July 2, 1987. Such conveyances, leases and mining efforts shall continue to be controlled by Buchanan.....

Akers, at 307.

The Tryon insurance contracts in the case before the Court now should be dealt with similarly. Should this Court wish to overrule its long-standing rule that anti-stacking provisions in UIM contracts are invalid in the specific situation where the owner owns a motorcycle, gets injured on it, and wishes to make claims for UIM stemming from insurance contracts on his owned automobiles, then that holding should be applied prospectively only and not to the contracts entered into between Tryon and these insurance companies.

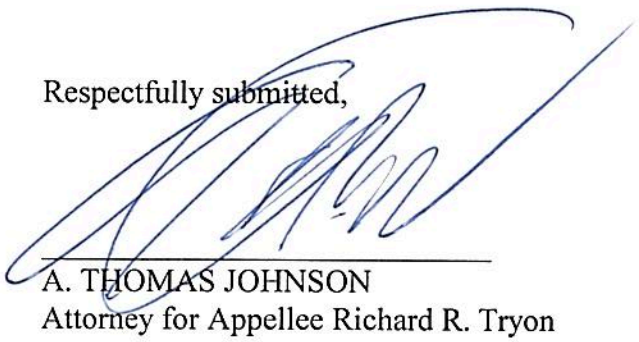
CONCLUSION

The holding of the Court of Appeals in this case should be affirmed and the case remanded to the Jefferson Circuit Court for further proceedings.

Alternatively, the holding of the Kentucky Court of Appeals as to Appellee Philadelphia should be affirmed and that portion of the case remanded to the Jefferson Circuit Court for further proceedings.

Alternatively, a decision reversing the Kentucky Court of Appeals should be applied only prospectively and not to the Appellee Tryon whose case should be remanded to the Jefferson Circuit Court for further proceedings in accordance with the directions of this Court.

Respectfully submitted,



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