SUPREME COURT OF KENTUCKY

File No. 2014-SC-000357-D
(2013-CA-001275)

ENCOMPASS INDEMNITY COMPANY — APPELLANT

vs.

RICHARD TRYON — APPELLEE

Appeal from Jefferson Circuit Court, Division 4
Civil Action No. 12-CI-04231
Hon. Charles L. Cunningham, Jr., Judge, Presiding

BRIEF FOR APPELLANT, ENCOMPASS INDEMNITY COMPANY

Submitted by:

WILLIAM B. ORBERSON
PATRICIA C. LE MEUR
JAMES C. WADE
PHILLIPS PARKER ORBERSON & ARNETT, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40202
Telephone: (502) 583-9900
COUNSEL FOR APPELLANT, ENCOMPASS INDEMNITY COMPANY

It is hereby certified that copies of the within brief were served by mail this 22 day of May, 2015 upon: A. Thomas Johnson, Esq., 304 West Liberty Street, Louisville, KY 40202, Counsel for Appellee, Richard Tryon; Robert E. Stopher, Esq. and Robert D. Bobrow, Boehl Stopher & Graves, LLP, 400 West Marked Street Louisville, KY 40202, Counsel for Appellee, Philadelphia Indemnity Insurance Company; Hon. Charles L. Cunningham, Jr., Judge, Jefferson Circuit Court, Division 4, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, Trial Judge; and Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601.

William B. Orberson
Patricia C. Le Meur

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INTRODUCTION

This is a case involving construction of an automobile insurance policy provision with respect to an unscheduled but owned motorcycle. The specific issue is whether a narrow limitation on UIM coverage provided under an insured's automobile policy – precluding UIM coverage for the insured's use of a vehicle which he owns or which is regularly available to him – is enforceable with respect to the insured's use of an unscheduled motorcycle.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant, Encompass Indemnity Company, by counsel, advises the Court that this party desires oral argument as it is counsel's belief that oral argument would be helpful to the Court in deciding the issues presented in this case.

STATEMENT OF POINTS AND AUTHORITIES

May it please the Court:

STATEMENT OF THE CASE

I. Despite clear policy language to the contrary, Appellee seeks UIM benefits for injuries arising from his use of his motorcycle under two automobile policies that he purchased to separately insure his two other vehicles.

In 2012, Tryon owned three motor vehicles: a 2009 Yamaha motorcycle, a 2004 Lexus RX330, and a 1996 Pontiac Firebird. He insured each of the three vehicles separately with a different insurance carrier: he insured the motorcycle with Nationwide Insurance Company of America (hereinafter "Nationwide"); he insured the Lexus through Encompass; and he insured the Firebird with Philadelphia Indemnity Insurance Company (hereinafter "Philadelphia").

On July 20, 2012, Tryon was involved in a two-vehicle accident while riding his motorcycle. Logan Hopkins, who was a minor at the time of the accident, was driving his father's car and allegedly caused the accident when he turned across Tryon's lane of travel. Tryon filed suit in Jefferson Circuit Court against Hopkins and his father for injuries arising from the accident. Tryon also asserted UIM claims against Nationwide, Encompass, and Philadelphia. Encompass properly denied his claim based on the plain language in the Policy clearly precluding coverage.

II. Both Encompass' UIM insuring agreement and UIM exclusions explicitly provide that owned or regularly available vehicles not insured under the policy do not fall within the scope of coverage.

The Encompass policy unambiguously precludes UIM coverage for Tryon's use of any vehicles which he owns but does not list on the policy. Tryon purchased an automobile insurance policy from Encompass for the coverage period of July 7, 2012 to July 7, 2013.

(*See* Encompass Policy, attached as Exhibit 5.) The only vehicle insured under this policy was his 2004 Lexus RX330; importantly, Tryon's motorcycle was not an insured vehicle under the policy. (Encompass Policy Renewal Package Coverage Summary, p.1-2 of 6, attached as Exhibit 1.) Tryon elected to obtain underinsured motorist (UIM) coverage with limits of $100,000 per person/$300,000 per accident. (Exhibit 1 at p.3 of 6.) Tryon purchased only minimum UIM coverage of $25,000 per person/$50,000 per accident under his motorcycle policy with Nationwide. (Nationwide Amendment Declarations, p.1, Exhibit 6.)

Even a superficial review of the Encompass UIM insuring agreement and pertinent definitions demonstrates that the policy does not provide UIM coverage for Tryon's use of his own motorcycle. The Encompass UIM endorsement contains the following insuring agreement:

> We will pay damages which any ***covered person*** is legally entitled to recover from the owner or operator of an ***underinsured motor vehicle*** because of ***bodily injury***.
>
> **1.** Sustained by a ***covered person***, and
>
> **2.** Caused by an ***accident*** arising out of the ownership, maintenance or use of an ***underinsured motor vehicle***.

(Encompass Policy Underinsured Motorists Coverage, Insuring Agreement, p.2 of 6, attached as Exhibit 2.) (Emphasis in original.)

The policy's definition of "covered person" does not include the insured "while ***occupying***, or when struck by, a vehicle owned by you which is not insured for this coverage under this policy." (Exhibit 2, Definitions 1(a), p.1 of 6.) (Emphasis in original.)

An "insured motor vehicle" is defined in pertinent part as

> An ***automobile***, motorcycle or motor home shown in the Coverage Summary if the Coverage Summary indicates **Underinsured Motorists Coverage** for that vehicle.

(Exhibit 2, Definitions 2(a), p.1 of 6.) (Emphasis in original.) Only the Tryons' 2004 Lexus RX330 is listed in the Coverage Summary. Accordingly, Tryon was not a "covered person" while occupying his motorcycle and was not entitled to UIM benefits from Encompass under the insuring agreement for his motorcycle accident.

This limitation of UIM coverage is again explicitly stated in the exclusions section of the Encompass UIM endorsement. That section of the policy specifically excludes UIM coverage in certain circumstances, including:

> 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.

(Exhibit 2, Underinsured Motorists Losses We Do Not Cover, p.3 of 6.) (Emphasis in original.) Again, Tryon was not a "covered person" when using his motorcycle, and use of the motorcycle owned by and regularly available to him is expressly excluded from UIM coverage under the policy. In short, Tryon did not purchase UIM coverage from Encompass for his use of his motorcycle.

III. The Trial Court correctly granted Encompass' summary judgment motion, holding that Tryon was not entitled to UIM benefits under the Encompass policy.

Encompass filed a motion for summary judgment on the grounds that its policy did not provide UIM coverage to Tryon for his July 2012 motorcycle accident because he was

using an owned and regularly available vehicle that was not specifically identified for any coverage under the Encompass policy. Philadelphia similarly moved for summary judgment on Tryon's claim against it for UIM benefits. After the issues were fully briefed and argued, the Trial Court appropriately granted summary judgment.

Specifically, the Trial Court held that the Encompass policy language was unambiguous and that it clearly precluded UIM coverage of Tryon's use of his motorcycle. (See 7/12/2013 Trial Court Opinion and Order at p.4, attached as Exhibit 3.) The Trial Court determined that the Court of Appeals' opinion in *Hartley* was directly on point and utilized that opinion to guide its own decision. *Motorists Mutual Insurance Co. v. Hartley*, 2010-CA-00202-MR (Ky.App. Feb 11, 2011)(review denied and opinion ordered unpublished, Ky. Feb. 15, 2012).

Without question, the two cases are factually similar.[1] Hartley rejected the opportunity to insure his motorcycle in the same policy under which his car was insured; he chose not to pay premiums to his automobile insurer to cover the risk of his motorcycle use; and the automobile policy unambiguously and clearly precluded UIM coverage for vehicles that were owned or available for his regular use but not covered under the policy. *See Id.* at p.2-3; Exhibit 3 at p.4. Here, Tryon certainly had the opportunity to insure his motorcycle with Encompass; he chose not to pay premiums to Encompass to cover the risk of his motorcycle use; and the Encompass policy unambiguously precludes UIM coverage for his use of an owned or regularly available vehicle not insured under his policy. The *Hartley*

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[1] In fact, Tryon's counsel acknowledged in oral argument before the Court of Appeals that *Hartley* is directly on point and that, if *Hartley* is applied herein, Tryon's claim for UIM benefits from Encompass will fail.

Court held that the UIM exclusion of coverage for owned but not insured vehicles did not violate public policy and, further, that motorcycles in particular are a high-risk class of vehicles to which the exclusion appropriately applied. *See Id.* at pp.8-10. The Trial Court in this case held that Encompass' policy language was unambiguous and clearly precluded UIM coverage for Tryon's motorcycle use. Relying on *Hartley*, the Trial Court granted Encompass' motion for summary judgment.

IV. The Court of Appeals failed to apply controlling precedent, including this Court's recent opinion in *State Farm Mut. Ins. Co. v. Hodgkiss-Warrick* regarding enforceable limitations on UIM coverage, and improperly reversed.

Notwithstanding controlling statutes and case law to the contrary, the Court of Appeals reversed summary judgment in favor of Encompass. (*See* Court of Appeals Opinion, attached as Exhibit 4.) It recognized that *Hartley* is directly on point but refused to apply the reasoning in that case solely because it is unpublished. *See* Exhibit 4 at pp.5-6. It also characterized this Court's decision in *State Farm Mut. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky.2013) as "irrelevant" and ignored the public policy considerations articulated therein. Instead, the Court of Appeals applied "anti-stacking" case law to impermissibly expand Tryon's UIM coverage while ignoring the policy's clear UIM exclusion language that the *Hodgkiss-Warrick* opinion determined was enforceable. *See* Exhibit 4 at p.7. In so doing, it also completely disregarded the different treatment afforded to motorcycles under the Kentucky Motor Vehicle Reparations Act (MVRA) and precedential case law. Finally, the Court of Appeals incorrectly concluded that Tryon had a reasonable expectation of UIM coverage from Encompass for his motorcycle accident and reversed.

ARGUMENT

Encompass' unambiguous limitation on UIM coverage is enforceable as a matter of public policy, and this Court should affirm summary judgment in favor of both Encompass and Philadelphia. The Encompass policy clearly precludes UIM coverage for Tryon's use of a vehicle owned by him or available for his regular use which is not insured under the Encompass policy. Tryon is not entitled to UIM benefits from Encompass for injuries arising out of an accident that occurred while he was operating his own motorcycle, which he specifically chose not to insure under his Encompass auto policy. Tryon's arguments that the plain language of the Encompass policy must be ignored, either based on the holdings of a series of "anti-stacking" cases or through application of the doctrine of reasonable expectations, are simply erroneous. The reasonable limitation of UIM coverage complies with Kentucky law and Kentucky public policy regarding optional coverages and motorcycle use, and should be enforced as written. Further, Tryon has identified no ambiguity in the policy language that would trigger application of the doctrine of reasonable expectations. Accordingly, the Court of Appeals' decision should be reversed, and the Trial Court's Order granting summary judgment in favor of Encompass should be affirmed.

I. Tryon's use of his motorcycle clearly falls outside the scope of the UIM coverage that he purchased from Encompass.

Pursuant to the plain policy language, Tryon did not purchase UIM coverage from Encompass for his use of his motorcycle. The Encompass policy precludes UIM coverage for Tryon's use of an owned or regularly available vehicle not specifically listed as insured under the policy. The insuring agreement of the UIM endorsement provides that Encompass

will "pay damages which any 'covered person' is legally entitled to recover from the owner or operator of an underinsured motor vehicle," but it clearly sets forth that an insured, such as Tryon, is not a "covered person" entitled to UIM coverage when injured while using his own motor vehicle for which he did not purchase coverage under the Encompass policy. *See* Exhibit 2 at p. 1-2. Tryon is not a "covered person" because the motorcycle he owned and was operating at the time he was injured was not insured under the Encompass policy. Giving the policy terms their ordinary meaning, it is clear that the Encompass insuring agreement did not provide UIM coverage for Tryon's use of his own motorcycle at the time of the accident.

Tryon's use of owned or regularly available vehicles not insured under the policy is also explicitly excluded from UIM coverage by the Encompass policy. The "Underinsured Motorists Losses We Do Not Cover" section contains an exclusion for injuries sustained by any "covered person" arising out of the use of "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." See Exhibit 2 at p.3. With respect to his use of his motorcycle, Tryon fell outside the scope of UIM coverage and triggered the coverage exclusion for unscheduled owned or regularly available vehicles. Thus, the UIM insuring agreement and the UIM exclusions both clearly demonstrate that Tryon did not purchase UIM coverage nor was he entitled to UIM coverage under the Encompass policy.

Tryon cannot unilaterally and retroactively alter the insurance agreement to now include UIM coverage that he did not purchase:

> Terms in an insurance policy are to be given their plain meanings, and courts should not make a different contract for the parties by enlarging the risk contrary to the natural and obvious meaning of the existing contract.

Pierce v. West American Ins. Co., 655 S.W.2d 34, 36 (Ky.App.1983); *see also, Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 680 (Ky.App.1996) (The "terms used in insurance contracts 'should be given their ordinary meaning as persons with ordinary and usual understanding would construe them.'").

There is no dispute that the motorcycle on which Tryon was riding at the time was owned by him and regularly available for his use. Likewise, there is no dispute that he decided not to insure his motorcycle with Encompass. The express policy language operates to exclude him from UIM coverage with Encompass under these facts. As the Trial Court correctly determined, Tryon is not entitled to UIM benefits from Encompass for injuries he sustained in his motorcycle accident.

II. Encompass' narrow limitation on UIM coverage for unscheduled vehicles owned by or regularly available to Tryon is applicable and enforceable.

The Encompass UIM endorsement complies with statutory and public policy requirements. The preclusion from coverage of owned or available vehicles not insured under the policy is reasonable and has been repeatedly upheld by Kentucky courts in a variety of situations, ***especially with respect to motorcycles***.[2] Thus, Tryon's attempt to expand UIM

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[2] Motorcycles are treated differently under the MVRA and Kentucky case law. For almost 40 years now, Kentucky courts have consistently enforced insurance policy provisions precluding UM and UIM coverage of non-scheduled motorcycles. *See Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky.1977).

coverage beyond what he purchased, by characterizing the limitation on the scope of UIM coverage as an anti-stacking provision that contravenes public policy, simply fails.

A. Reasonable limitations on UIM coverage, particularly with respect to unscheduled motorcycles, are valid and enforceable under Kentucky law.

Kentucky law explicitly permits an insurer to place reasonable limitations, such as the one at issue here, on UIM coverage that it makes available to its insureds. *See Hodgkiss Warrick*, 413 S.W.3d at 884-85. Reasonable limitations on UIM coverage fall within the bounds of Kentucky public policy. *See Id.* at 886. As this Court has recently made clear, public policy is established by the legislature and cannot be created simply based upon self-interest or perceived public interest. *See Id.* at 880-81. "The establishment of public policy is not within the authority of the courts. ... It is the prerogative of the legislature to declare that acts constitute a violation of public policy." *Kentucky Farm Bureau Mut. Ins. Co. v. Thompson*, 1 S.W.3d 475, 476-77 (Ky.1999); *see also, Hodgkiss-Warrick*, 413 S.W.3d at 880-81. Kentucky's public policy, as reflected in the MVRA, does not mandate UIM coverage in every instance, but rather, it requires that UIM coverage be made available upon request and subject to reasonable terms and conditions. *See* KRS §304.39-320(2). The MVRA also recognizes and accounts for the significant risk associated with motorcycle use and does not require insurers to underwrite that risk without having adequate opportunity to evaluate it and to set premiums accordingly. *See* KRS §304.39-040.

1. Reasonable limitations on UIM coverage are enforceable.

The MVRA unequivocally provides that UIM coverage is optional, and it permits insurers to place reasonable limitations on that coverage:

> 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.

KRS §304.39-320(2) (Emphasis added). The UIM statute serves the remedial purpose of giving drivers the option to purchase additional coverage to protect themselves against "the possibility of encountering an underinsured tortfeasor." *Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577, 579 (Ky.App. 2001). However, that remedial purpose does not frustrate or supercede the other more broad purposes of the MVRA:

> 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.

Hodgkiss-Warrick, 413 S.W.3d at 881. The statute plainly provides that UIM coverage must be made available if requested, may be waived by the insured, and can be limited by terms and conditions not inconsistent with the remainder of that statute.

Public policy with respect to UIM coverage is different than that regarding mandatory liability coverage. "While our General Assembly, through the MVRA, has evinced an overriding public policy in the area of automobile liability coverage, a mandatory form of insurance, there is no comparable public policy regarding underinsured motorist coverage,

and optional coverage." *Hodgkiss-Warrick*, 413 S.W.3d at 884. Thus, reasonable limitations on UIM coverage comply with the statutory provisions and, thereby, public policy requirements. "Reasonable conditions, restrictions, and limitations on insurance coverage are not deemed *per se* to be contrary to public policy." *Snow v. West American Ins. Co.*, 161 S.W.3d 338, 341 (Ky.App.2004).

In fact, as specifically stated in *Hodgkiss-Warrick*, "Courts 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 precedent." *Hodgkiss-Warrick*, 413 S.W.3d at 880. Accordingly, Tryon has not, and cannot, point to any such public policy consideration dictating the outcome he seeks in this case.

Moreover, the MVRA provides for reasonable limitations on other optional insurance coverage. For example, in contrast to the statutory requirements for UIM coverage, uninsured motorist coverage (UM) is required to be provided in every policy and can only be waived by the insured in writing. *See* KRS §304.20-020(1). Nevertheless, even UM coverage is subject to reasonable limitations: "[T]he statute does recognize that individual insurers may, by contractual definitions, provide coverages and terms and conditions in addition to those required by the statute." *Burton v. Farm Bureau Ins. Co.*, 116 S.W.3d 475, 478 (Ky.2003)(Holding that a "physical contact" requirement for hit and run claims under the UM endorsement complied with public policy and was enforceable). Therefore, a UIM policy containing reasonable coverage limitations both serves the remedial purpose of the statute and is enforceable as a matter of public policy.

2. Kentucky Courts consistently enforce the exclusion of unscheduled motorcycles, with their high associated risk of operation, from optional UIM coverage.

For decades, motorcycles have been treated differently under Kentucky law than other types of vehicles. Recognizing the inherently greater risk associated with operating a motorcycle, the General Assembly made certain otherwise mandatory coverages optional for motorcycle insurance:

> Every insurer writing liability insurance coverage for motorcycles in this Commonwealth shall make available for purchase as part of every policy of insurance covering the ownership, use, and operation of motorcycles the option of basic reparations benefits, added reparations benefits, uninsured motorist, and underinsured motorist coverages.

KRS §304.39-040(3) (Emphasis added.). "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." *Hartley,* 2010-CA-00202 at 9-10. Reasonable limitations on UIM coverage permitted in KRS §304.39-320(2) are consistent with and further public policy goals stated in KRS §304.39-040(3).

For over 40 years, Kentucky's courts have enforced policy provisions precluding non-covered motorcycles from both UM and UIM coverage. *See Preferred Risk Mut. Ins. Co. v. Oliver,* 551 S.W.2d 574 (Ky.1977); *State Farm Mut. Ins. Co. v. Christian*, 555 S.W.2d 571 (Ky.1977); *Baxter v. Safeco Ins. Company of America,* 46 S.W.3d 577 (Ky.App.2001); *Motorists Mut. Ins. Co. v. Hartley,* 2010-CA-00202 (Ky.App.); *Larkin v. United Services Automobile Association,* 2011 WL 6260361 (Ky.App.).

Kentucky's courts recognize the significant risks inherent in use of a motorcycle

which justify enforcement of coverage exclusions:

> It is common knowledge that motorcycle riders, as a class, are among the highest risk groups conceivable. Motorcycles offer no protection whatsoever from the front, back, sides or top, and leave the rider exposed to every peril of highway travel. 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.

Oliver, 551 S.W.2d at 577. Twenty-four years later, the *Baxter* Court applied this same logic where an insured sought UIM benefits under a policy containing an exclusion for owned motorcycles. That Court held that it was "manifestly unfair" to require an insurance carrier, which did not write the policy for the motorcycle, to be held accountable for damages it could not have foreseen. *Baxter,* 46 S.W.3d at 579. More recently, the Court of Appeals in *Larkin* and *Hartley* has enforced "owned or available for regular use" exclusions to preclude recovery of UIM benefits for injuries arising from use of owned but not covered motorcycles. *See Larkin,* 2011 WL 6260361 at p.3; *Hartley,* 2010-CA-00202 at10-11.

This line of precedential case law relies on distinctions made in the MVRA between motorcycles and other vehicles. For example, as discussed above, owners of all other motor vehicles are required to carry uninsured and underinsured coverage pursuant to KRS §304.20-020 unless they opt out, while those coverages are optional for motorcycle owners unless they affirmatively opt in pursuant to KRS §304.39-040. As a matter of public policy, then, motorcycles are treated differently than other vehicles, and exclusion of non-covered owned or regularly available motorcycles from optional coverage has been upheld as consistent with public

policy. In fact, the *Hartley* Court rightly concluded that not enforcing the "owned or available for regular use" exclusion with respect to an owned but not covered motorcycle would violate public policy. *See Hartley*, 2010-CA-000202 at 11.

In reversing the Trial Court's summary judgment order, the Court of Appeals simply ignored the well-known heightened risk associated with motorcycle use and the "manifest unfairness" of requiring an insurer to provide coverage when those risks were neither disclosed to it nor assumed by it. *See Oliver*, 551 S.W.2d at 577; *Baxter*, 446 S.W.3d at 579. The limitation on the scope of coverage provided by the Encompass UIM endorsement is reasonable and unambiguous, particularly with respect to Tryon's use of his motorcycle. Because Encompass did not evaluate nor underwrite the risk of Tryon's use of his motorcycle, it violates the public policy of Kentucky, the MVRA and decades of case law to require Encompass to provide coverage for which Tryon did not pay a premium.

3. Voiding unambiguous and reasonable UIM coverage limitations would frustrate the purpose of the MVRA.

One purpose of the MVRA is "guaranteeing the continued availability of affordable motor vehicle insurance." *Hodgkiss-Warrick*, 413 S.W.3d at 882; KRS §304.39-010. Nullifying the limitation precluding UIM coverage of unscheduled vehicles owned or regularly available to the insured would effectively hobble insurers' ability to accurately assess risk, underwrite risk and price risk. Rates for all Kentucky motorists would necessarily increase in order to pay for UIM benefits to those individuals who obtain UIM coverage by failing to disclose to their insurers that they own additional vehicles which are not specifically identified or scheduled under the policy. *See Hartley*, 2010-CA-000202 at 11. 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. Not only is this fundamentally unfair, it also contravenes Kentucky law and public policy as expressed in the MVRA. *See Hodgkiss-Warrick*, 413 S.W.3d at 882; *Hartley*, 2010-CA-000202 at 11; *Baxter*, 446 S.W.3d at 579; KRS §304.39-010.

B. The owned or available for regular use limitation on UIM coverage provided in Encompass' UIM endorsement was held enforceable by this Court in *Hodgkiss-Warrick*.

Encompass' preclusion of UIM coverage for Tryon's use of his owned or regularly available motorcycle is both reasonable and enforceable. Tryon is unable to articulate any manner in which the Encompass UIM endorsement runs afoul of public policy as articulated in the legislative mandates of the MVRA. This unambiguous limitation on the scope of UIM coverage has been repeatedly upheld and applied by Kentucky courts as complying with public policy. *See Hodgkiss-Warrick*, 413 S.W.3d at 881-82; *Baxter*, 46 S.W.3d at 578; *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky.App.2010); *Murphy v. Kentucky Farm Bureau Mut. Ins. Co.*, 116 S.W.3d 500, 501 (Ky.App.2002); *Pridham v. State Farm Mut. Ins. Co.*, 903 S.W.2d 909 (Ky.App.1995); *Windham Cunningham*, 902 S.W.2d 838, 840-41 (Ky.App.1995); *Arguelles v. Nationwide Investment Servs.* Corp., 2012-CA-000459 (Ky.App.2013); *Larkin v. United Services Automobile Ass'n*, 2011-CA-000434 (Ky.App.2011); *Motorists Mut. Ins. Co. v. Hartley*, 2010-CA-000202 (Ky.App.2011).

1. This Court in *Hodgkiss-Warrick* recently decided the public policy issue under review with regard to motor vehicles in general.

The *Hodgkiss-Warrick* Court, after conducting a careful and thorough review of Kentucky public policy, determined that a provision precluding UIM coverage when the insured

was injured in a vehicle owned by or regularly available to the insured or a resident relative was enforceable. *See Hodgkiss-Warrick*, 413 S.W.3d at 886. Hodgkiss-Warrick sought UIM benefits under her own insurance policy for injuries she sustained while riding as a passenger in her daughter's car. *See Id.* at 877. The UIM insuring agreement provided that State Farm would "pay compensatory damages for bodily injury an insured is legally entitled to recover from the owner or driver of an uninsured vehicle." However, the policy excluded from the definition of "underinsured motor vehicle" "a land motor vehicle: ... (2) owned by, rented to, or furnished or available for the regular use of you or any resident relative." *Id.* at 878. Hodgkiss-Warrick had been sharing a residence with her daughter for approximately eight months prior to the accident. Therefore, State Farm denied benefits because Hodgkiss-Warrick's use of the owned and regularly available vehicle was not included in the scope of her UIM coverage. *See Id.*

This Court held that "there is no prohibition on the type of UIM exclusion here" under Kentucky public policy, reversing the Court of Appeals, which had held that the State Farm policy limitation was unenforceable as a matter of public policy. *Id.* at 877. The limitation itself was admittedly clear and would preclude coverage in the absence of public policy prohibition. Neither Hodgkiss-Warrick nor the Court of Appeals panel identified a provision of the MVRA forbidding this UIM limitation. In fact, the MVRA unequivocally makes UIM coverage optional and subject to reasonable limitations. *See Id.* at 881.

The *Hodgkiss-Warrick* Court noted that it had previously "held that in statutes providing optional vehicle coverages, the statutory allowances for 'terms and conditions' permits reasonable exclusions from coverage." *Id.* at 881, *citing Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky.1977)(enforcing motorcycle exclusion from UIM coverage). It also noted that a similar

"regular use" exclusion had been enforced as reasonable in *Motorist Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky.1999). The *Hodgkiss-Warrick* Court observed that other Courts relied upon the reasoning articulated in the *Glass* decision, notwithstanding factual differences among them.

> Although the fact patterns of *Windham, Glass* and the subsequent Court of Appeals' cases differ somewhat from each other and from the present case, all but one of them, *Edwards*, involve claims by a household member injured in one household vehicle for UIM benefits provided under a policy or policies covering another or other household vehicles. 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 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.

Id. at 882. This Court in *Hodgkiss-Warrick* and the other courts to which it cited upheld UIM limitations for similar reasons, including decreasing an insured's incentive to minimize other coverage in reliance on less expensive UIM coverage and decreasing exposure of insurers "to substantial risks they were not paid to underwrite. *See Id.* at 882.

In support of her position, Hodgkiss-Warrick cited to several cases in which exclusions from liability coverage were held to violate public policy because they did not comply with mandatory liability coverage requirements. *Id.* at 884. However, no similar requirements exist regarding UIM coverage. *See Id.* at 887. Thus, because the MVRA only requires that UIM coverage be made available but does not make it mandatory in the way that liability coverage is mandated, the Court held that regular use exclusions did not "tend to defeat the [MRVA's] mandates" and "did not deprive [the insured] of meaningful coverage." *Id.* at 884.

The *Hodgkiss-Warrick* Court further recognized that household vehicles, by their

proximity and availability to the insured, pose a substantially greater risk to the insured than do non-household vehicles and that it is reasonable for an insurer to limit this risk which it otherwise cannot assess or underwrite. *See Id.* at 884.

> Generally at least, household vehicles, by virtue of their proximity and availability to the insured, pose a substantially greater risk to the insured than do non-household vehicles. It is not unreasonable for an insurer to segregate those different types of risk; to limit UIM coverage as was done here to, essentially, non-household vehicles; and thus to discourage relatives residing together from attempting to shift the higher household risk from liability insurance to the less costly UIM insurance.... Without the exclusion, some members of the household could be induced to purchase less liability coverage in reliance on other members' UIM coverage. Regardless of the potential for such incentives, moreover, the exclusion also addresses the fact that without it an insurer is apt to be exposed to substantial risks of which it was not apprised and for which it was paid no premium.

Id. at 885-86.The *Hodgkiss-Warrick* Court concluded that the UIM coverage limitation for owned or regularly available vehicles was reasonable and "passes statutory muster." *Id.* at 866.

The Court of Appeals' decision below refusing to enforce Encompass' UIM endorsement is directly contrary to this Court's ruling in *Hodgkiss-Warrick*. The Court of Appeals panel erroneously asserted that *Hodgkiss-Warrick* is irrelevant to the instant case because it purportedly applied Pennsylvania law and because it dealt with a "regular use" exclusion rather than an "owned but not scheduled for coverage" exclusion. Neither of these distinctions applies.

First, while the State Farm policy at issue in *Hodgkiss-Warrick* was a Pennsylvania policy and was governed by Pennsylvania law, the issue in that case was whether Kentucky public policy would preclude enforcement of such UIM exclusions even though Pennsylvania law would permit their application. The *Hodgkiss-Warrick* Court's reasoning and analysis about those

exclusions dealt directly with Kentucky public policy and not Pennsylvania law.

Second, as in this case, the policy language at issue in *Hodgkiss-Warrick* was a single provision that limiting coverage for use of unscheduled vehicles that were owned or available for regular use. In attempting to distinguish *Hodgkiss-Warrick*, the Court of Appeals parsed the Encompass provision into a "regular use" exclusion that comports with public policy and an "owned" exclusion that violates public policy. This is not supported in the MVRA or case law and, frankly, defies common sense. As explained in *Hodgkiss-Warrick*, because of their proximity and availability to the insured, household vehicles — i.e., vehicles available for the insured's regular use — pose a greater risk to the insured than non-household vehicles pose. *See Id.* at 884. In other words, risk increases with proximity and accessibility, and this justifies reasonable limitations on UIM coverage of such vehicles. *See Id.* An owner certainly has more control than anyone else over the proximity and availability of a vehicle, as demonstrated in this case by Tryon's use of his own motorcycle, and over the amount and type of coverage purchased. *See Baxter*, 46 S.W.3d 577, 579 (Ky.App.2001). At a minimum, ownership of a vehicle presupposes the right to regular use and presents the same risk posed by proximity of an otherwise regularly available vehicle. Thus, by the Court of Appeals' own logic, Tryon was operating a vehicle available for his regular use, and the Court should have enforced the policy provisions in question and affirmed summary judgment.

The reasoning of the *Hodgkiss-Warrick* decision certainly applies to this case and requires enforcement of Encompass' UIM coverage limitation. The scope of coverage was clearly defined in the endorsement and did not include Tryon's use of his own motorcycle. Notwithstanding this, Tryon chose to purchase minimum UIM coverage limits under his motorcycle policy and to

purchase substantially higher limits of UIM coverage under the Encompass policy which insured his lower risk Lexus automobile. As clearly demonstrated by the language limiting UIM coverage of owned or regularly available vehicles solely to those vehicles insured under the policy, Encompass neither assessed nor underwrote the risk associated with Tryon's use of his own motorcycle. As this Court in *Hodgkiss-Warrick* emphasized, exposing a UIM insurer to substantial risks for which it was not paid a premium to underwrite contravenes Kentucky public policy and the MVRA. *See Id.* at 882 & 885-86; *see also, Baxter*, 46 S.W.3d at 578-79 (Enforcing UIM provision precluding UIM coverage for insured's use of his owned but not scheduled motorcycle.). The Encompass preclusion of coverage for unscheduled owned or regularly available vehicles satisfies the purposes of the MVRA, removes the incentive to minimize other coverage in favor of less expensive UIM coverage, and protects the insurer from exposure to substantial risks of which it was unaware and for which it was not paid a premium. In short, pursuant to the reasoning in *Hodgkiss-Warrick*, the Encompass UIM coverage limitation passes statutory muster and should be enforced as written.

2. The UIM coverage limitation contained in the Encompass endorsement is enforceable with respect to Tryon's motorcycle accident.

Kentucky courts have had no hesitation in enforcing such UIM coverage limitations in cases involving "non-listed" motor vehicles, especially "non-listed' motorcycles. For example, the *Baxter* Court expressly held that provisions similar to the provisions here are valid and that, as a result, there was no UIM coverage for an accident involving an owned motorcycle not covered by the policy. *See Baxter*, 46 S.W.3d at 578-79. Plaintiff's decedent in that case was killed in a collision with a car while riding his motorcycle. He lived with his parents, and his estate sought

UIM benefits as an insured under his parents' two insurance policies on their cars. Those policies specifically excluded from UIM coverage an injury sustained while operating an owned motorcycle, and the insurance company denied coverage. *See Id.*

The Court of Appeals upheld summary judgment in favor of the insurance company. Relying in part on *Motorists Mutual Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky.1997) and *Windham v. Cunningham*, 902 S.W.2d 838 (Ky.App.1995), the Court stated:

> Kentucky courts have previously upheld insurance policy provisions excluding from underinsured coverage motor vehicles owned by or available for the regular use of the policyholder or any family member.

Baxter, 46 S.W.3d at 578.

Having determined that the exclusion from UIM coverage of an owned but not covered motorcycle was just as valid as an exclusion of the owned but not covered automobile, the Court then discussed the significant risks inherent in ownership of a motorcycle:

> It is common knowledge that motorcycle riders, as a class, are among the highest risk groups conceivable. Motorcycles offer no protection whatsoever from the front, back, sides or top, and leave the rider exposed to every peril of highway travel. 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 consequence.

Id. at 579, quoting *Oliver*, 551 S.W.2d at 577. The Court held that the same logic applied to underinsured motorists and further held that it was "manifestly unfair" to require the insurance carrier, which did not write the policy for the motorcycle, to be held accountable for damages it could not have foreseen. *Baxter*, 46 S.W.3d at 579.

More recently, the Court of Appeals in *Larkin* held that the trial court correctly enforced provisions in the decedent's automobile policy precluding UIM coverage for damages arising from use of an owned but not covered vehicle. *See Larkin, supra* at p.2-3. The decedent in that case was killed in a collision while operating his owned but uninsured motorcycle. His estate sought recovery of UIM benefits under the policy which insured his automobiles. The insurer denied coverage based on an owned but not covered provision in the UIM policy. *See Id.* at p.1-2.

The *Larkin* Court affirmed summary judgment in favor of the insurer, citing with approval the trial court's calculus in balancing the plaintiffs' reasonable expectations regarding his UIM coverage, public policy and statutory mandates regarding insurance coverage, and the "unambiguous policy exclusion." *Id.* at p.2. The Court determined that the decedent could not have reasonably expected to receive UIM benefits on his motorcycle because it was "expressly excluded by the policy language," and, further, that he could not "reasonably be construed as an insured for purposes which exceed the policy language, or for all conceivable purposes." *Id.* at p.3. Holding that the owned but not covered policy language applied and was consistent with public policy, the Court stated: "In the matter at bar, the policy exclusion at issue is not only directly applicable to the instant facts, but does not run afoul of public policy requiring that an insured receive what he reasonably expects his policy to provide." *Id.* at 3.

Finally, the Court of Appeals in *Hartley* held that summary judgment in favor of an insurer based on an owned but not scheduled for coverage exclusion in the UIM policy was consistent with public policy. *See Hartley*, 2010-CA-000202 at 1-2. The plaintiff in that case was injured in an accident while driving his owned motorcycle. He settled with the at-fault driver's insurance company and obtained UIM benefits from the insurer that insured his motorcycle. He

then sought additional UIM benefits from Motorists, which issued a policy for his two other vehicles, a Ford Expedition and a Nissan Frontier. The Motorists policy precluded UIM coverage for injuries sustained while the plaintiff was occupying any motor vehicle that he owned but did not insure under the Motorists policy. *Id.* at p.2-3.

After determining that the exclusion was unambiguous and that the insured had no reasonable expectation of coverage, the *Hartley* Court then turned to the plaintiff's argument that the exclusion violated public policy. Like the Court of Appeals panel below, Hartley relied upon *Chaffin v. Kentucky Farm Bureau Mut. Ins. Co.*, 789 S.W.2d 754 (Ky.1990) and *Hamilton Mut. Ins. Co. v. United States Fidelity & Guar. Co.*, 926 S.W.2d 466 (Ky.App.1996) to support his position that the exclusion violated public policy and should not be enforced. *Id.* at p.5-6.

The *Hartley* panel rejected the argument that *Chaffin* and *Hamilton* required invalidation of the owned but not scheduled for coverage exclusion under the facts of this case, stating "Indeed, it is recognized that motorcycles are more expensive to insure and, consequently, motorcycle exclusions are enforceable." *Id.* at 8, citing *Oliver*, 551 S.W.2d at 577 and *Baxter*, 46 S.W.3d at 578-79. The Court further noted that owners of all other motor vehicles must opt out of uninsured and underinsured coverage pursuant to KRS §304.20-020, but motorcycle owners must affirmatively opt in to all optional coverage pursuant to KRS §304.39-040. *See Id.* at 10. "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." *Hartley*, 2010-CA-000202 at 10.

The *Hartley* Court then held that <u>not</u> enforcing the unambiguous policy exclusion would violate public policy:

> To afford UIM coverage to Hartley, who did not pay premiums to Motorists for coverage of his motorcycle 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 not to include his motorcycle on the Motorists policy, it remains that the Motorists policy unambiguously precludes coverage.

Id. at 11.

Beyond cavil, Tryon was not an insured under the Encompass UIM endorsement for his use of his owned motorcycle, and Encompass' denial of UIM benefits for injuries arising out of his 2012 motorcycle accident does not run afoul of public policy. Encompass is permitted by statute to place reasonable terms and conditions on the UIM coverage that it provides. *See* KRS §304.39-320(2). Kentucky courts have consistently upheld limitations precluding coverage for owned but not covered vehicles, particularly motorcycles. Those same limitations which are contained in the Encompass UIM endorsement are enforceable in this case.

3. Contrary to Tryon's assertions, the decisions in *Chaffin, Dicke,* and *Hamilton* are not applicable.

First and foremost, the *Chaffin, Dicke*, and *Hamilton* cases are inapplicable because they do not involve motorcycles. *See Chaffin*, 789 S.W.2d at 755; *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327, 328 (Ky.1993); *Hamilton*, 926 S.W.2d at 467.

Further, Tryon's reliance upon these "anti-stacking" cases is simply misapplied and cannot command the expanded coverage he seeks. As a threshold matter, before he can assert any right to stack coverage, Tryon must first establish that he is entitled to the coverage at issue. *See Windham*, 902 S.W.2d at 840; *Burton*, 326 S.W.3d at 475. This he cannot do.

The Court of Appeals in *Burton* found that anti-stacking cases were inapplicable to the question of whether an owned or regularly available limitation on UIM coverage could be enforced. *See Burton*, 326 S.W.3d at 475. The plaintiff in that case was injured while riding as a passenger in a car driven by her husband and owned by them both. After receiving payment of policy limits on the vehicle involved in the accident, she sought UIM benefits under a separate policy on a vehicle owned by her husband and available for her regular use. The Circuit Court granted Kentucky Farm Bureau's summary judgment motion on grounds that Burton was not entitled to UIM benefits for injuries sustained while using a vehicle owned by or regularly available to her. *See Id.*

The Court of Appeals disagreed with Burton's statement of the issue on appeal as whether she was able to "stack" coverage under the two separate policies. "However, the issue presented does not concern 'stacking' of the two insurance policies: It is whether Ms. Burton can recover UIM benefits under the terms of the policies." *Id.* The court then reviewed the terms of the policies, which clearly provided that a vehicle owned or available for the regular use of the insured or any family member was excluded from the definition of underinsured vehicle. As it was undisputed that Ms. Burton was injured while riding in a car she owned and that the separate policy covered a vehicle available for her regular use, the terms of the policies excluded UIM coverage. *See Id.* at 475-76. The court further noted that this type of coverage limitation has been repeatedly upheld as not being against public policy, and it held that the doctrine of reasonable expectations did not apply. *See Id.* at 76. In short, Burton's "attempt to escape the unambiguous exclusion in the policies" and the applicable case law regarding enforceable exclusions was "unpersuasive." *Id.* at 477.

Like the appellant in *Burton*, both Tryon and the Court of Appeals panel below misinterpreted this as a "stacking" case without first making a determination of whether Tryon could even recover under the policies at issue. The Court of Appeals simply held that *Chaffin* and *Dicke* were the controlling precedent and then applied the holdings of those cases to the dissimilar UIM coverage limitation at issue here.

The gravamen of *Chaffin* and *Dicke,* as well as of *Hamilton Mut. Ins. Co. v. U.S. Fidelity & Guar. Co.*, 926 S.W.2d 466 (Ky.App.1996), is that it is inappropriate for an insurance contract to preclude stacking by use of a prohibition that voids an element of coverage that has been purchased. The plaintiff in *Chaffin* was injured by an uninsured motorist, and she sought UM benefits under three policies issued by Kentucky Farm Bureau, one covering the vehicle she was driving at the time of the accident and two others covering her other two vehicles. *See Chaffin*, 789 S.W.2d at 755. The provision at issue in *Chaffin* was an "other vehicle exclusion" from UM coverage:

> 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 type used with that vehicle.

Id. The *Chaffin* court noted that UM coverage is mandatory, that Chaffin paid separate premiums under separate policies for UM coverage, and that the "other vehicle" provision eliminated all but one item of the purchased coverage. *See Id.* at 756. The provision effectively rendered insurance coverage paid for by the plaintiff illusory, and it was therefore void as against public policy. *See Id.* at 757-58. The exclusion was too broad for its stated purpose of preventing fraud and

collusion, and the court directed the insurer to other cases for examples of more narrow coverage limitations that complied with public policy. *See Id.* at 757.

The decedent in *Dicke* died while riding as a guest passenger in a vehicle owned by someone else. His estate sought UIM benefits from Allstate under a single policy containing two items of UIM coverage for which separate premiums had been paid. *Dicke*, 862 S.W.2d at 328. The UIM provision at issue provided:

> If you have two or more autos insured in your name and one of those autos is involved in an accident, only the coverage limits shown in the declarations page for that auto will apply. When you have two or more autos insured in your name and none of them is involved in the accident, you may choose any single auto shown on the declarations page and the coverage limits applicable to that auto will apply.
> The limits for any other auto covered by the policy will not be added to the coverage for the involved or chosen auto.

Id. at 330. The *Dicke* court held that this exclusion was too broad to comply with the limitations on UIM coverage permitted under the statute. The policy provision eliminates one of the items of coverage purchased, was inconsistent with the statute, and exceeded any permissible right of the insurer to set terms and limits. *See Id.* at 329. Again, the provision provided illusory coverage and was void as against public policy.

Neither of the decisions relied upon by the Court of Appeals below stands for the proposition that limitations on UIM coverage are *per se* unenforceable; rather, they hold that policy exclusions which eliminate coverage that was purchased violate public policy, and they instruct that more narrowly-tailored limitations can and do comply with the statutory requirements and public policy. Interestingly, the *Hamilton* court followed *Chaffin* only reluctantly and invited guidance from the Supreme Court regarding the applicability of anti-

stacking cases to an owned but not scheduled for coverage provision. *See Hamilton*, 926 S.W.2d at 469. The Court of Appeals panel mistakenly relied on these anti-stacking cases. Here, the Encompass policy does not provide illusory coverage, and it is not comparable with the broad exclusions in *Chaffin* and *Dicke*.

The Encompass policy neither provides illusory coverage nor contains a prohibition that eliminates an item of coverage purchased by Tryon. The Encompass UIM endorsement provides Tryon with the UIM coverage he purchased: coverage while operating his listed vehicle; coverage while occupying a vehicle owned by someone outside his household; and coverage as a pedestrian. The policy also plainly and unambiguously precludes coverage that he did not purchase: coverage for injuries arising out of Tryon's use of his owned or regularly available vehicles not scheduled for coverage under the policy, including his motorcycle and its associated risks of operation. Tryon never had UIM coverage through Encompass for his use of any owned or regularly available vehicle not shown on the coverage summary. Thus, the Encompass policy does not provide illusory coverage or withhold purchased coverage. Rather, it simply does not provide coverage for a risk it never intended to insure, the motorcycle. Because Tryon was never entitled to UIM coverage through Encompass for his motorcycle accident, stacking is not an issue. *See Windham,* 902 S.W.2d at 840; *Burton*, 326 S.W.3d at 475; *see also Marcum v. Rice*, 987 S.W.2d 789 (Ky.1999) (upholding per-person limitation on UIM coverage as reasonable and enforceable).

The reasonable limitations contained in the Encompass UIM endorsement are enforceable, particularly with respect to Tryon's use of his motorcycle. Tryon has even conceded that the exclusion of an owned but not covered motorcycle is consistent with applicable law. *See*

Tryon's Court of Appeals Brief, p.14. Certainly Kentucky courts have taken note of the significant hazard associated with operating a motorcycle, again consistent with statutory mandates. *See Oliver,* 551 S.W.2d at 577; *Baxter*, 46 S.W.3d at 579; *see also* KRS §304.39-040(3). They have upheld coverage limitations such as those contained in the Encompass policy where the insurer did not evaluate and underwrite the risk. Encompass did not insure Tryon's motorcycle, and there is no evidence that it was even aware that he owned said vehicle. It would, therefore, be manifestly unfair to hold Encompass accountable for damages associated with Tryon's use of his owned motorcycle, a risk that it could not anticipate and did not receive a premium to cover. *See Hodgkiss-Warrick*, 413 S.W.3d at 882 & 886.

Contrary to Tryon's assertions, public policy mandates enforcement of the Encompass UIM endorsement as written. The language of the endorsement is clear, and it plainly and conspicuously precludes UIM coverage for Tryon's use of his owned or regularly available vehicles not insured under the policy. It neither removes coverage that was purchased, nor does it provide illusory coverage. Because Tryon did not purchase UIM coverage from Encompass to cover his motorcycle use, he cannot retroactively create new coverage.

III. The doctrine of reasonable expectations cannot be utilized to create expanded UIM coverage under the Encompass policy.

Although the plain language of the Encompass UIM endorsement clearly precludes coverage for Tryon's use of his motorcycle, he nonetheless attempts to circumvent the contract language to expand coverage beyond what he purchased by claiming that there is an ambiguity as to the "type" of vehicle excluded from UIM coverage, which he argues entitles him to coverage for his motorcycle because he reasonably expected to have it. However, there is no

ambiguity regarding the scope of UIM coverage, and Tryon's resort to the doctrine of reasonable expectations is specious.

The doctrine of reasonable expectations provides that "the insured is entitled to all of the coverage he may reasonably expect to be provided under the policy.". *Glass*, 996 S.W.2d at 450). However, it is not, triggered unless there is an ambiguity in the policy language. *See Hendrix v. Fireman's Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky.App.1991); *Hartley*, 2010-CA-000202 at 4-5. To establish the existence of an ambiguity, there must first be a determination that the policy provision at issue is subject to multiple, inconsistent interpretations. *See State Auto Ins. Co. v. Stinson*, 142 F.3d 436, 3 (6th Cir.1998), an unpublished opinion *quoting Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky.App.1994). While ambiguities are to be determined in favor of the insured, "'[o]nly actual ambiguities, not fanciful ones,' are required to be construed against the drafter." *Snow*, 161 S.W.3d at 341, *quoting True v. Raines*, 99 S.W.3d 439, 443 (Ky.2003). Further, "an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat" an insured's expectation of coverage. *Glass*, 996 S.W.2d at 450.

From the plain language of the insuring agreement, definitions, and exclusions, it is readily apparent that Tryon did not purchase UIM coverage from Encompass for the use of his motorcycle. As discussed above, the Encompass policy clearly, conspicuously, and unequivocally precludes UIM coverage for Tryon's use of owned or regularly available vehicles that he did not insure under the Encompass policy. *See Glass*, 996 S.W.2d at 450; *Windham*, 902 S.W.2d at 841. Tryon claims that the policy is ambiguous as to the type of vehicle in which he must be injured in order to have UIM coverage under the Encompass policy. *See* Tryon's Court of Appeals Brief, p.9. However, UIM coverage is not limited or excluded on the basis of vehicle type. Rather, UIM

coverage is limited or excluded if the vehicle is owned or regularly available for use by Tryon and the vehicle is not listed or scheduled for coverage under the policy. Giving the terms of the Encompass UIM endorsement "their ordinary meaning as persons with ordinary and usual understanding would construe them," it is clear that Tryon did not purchase UIM coverage from Encompass for his use of his motorcycle because he deliberately chose not to pay for UIM coverage when he decided not to schedule his motorcycle on the Encompass policy. *RSJ, Inc.*, 926 S.W.2d at 680. In short, no one, including Tryon, could have objectively expected UIM coverage from Encompass for Tryon's July 2012 motorcycle accident. *See Burton*, 116 S.W.3d at 479; *see also, Larkin v*, 2011-CA-000434, p.3. Thus, while Tryon may, in retrospect, regret his failure to purchase UIM coverage for his motorcycle from Encompass, there is no ambiguity in the policy that gives rise to any expectation of UIM coverage for his motorcycle.

CONCLUSION

Encompass' UIM endorsement, including its preclusion from coverage of owned or regularly available vehicles not insured under the policy, conforms with Kentucky public policy, and the summary judgment in favor of Encompass should be affirmed. Pursuant to the plain language of Encompass' UIM policy, Tryon did not have UIM coverage for his use of any vehicle – much less a motorcycle – which he owned or which was regularly available to him and which he did not insure under the policy. This reasonable coverage limitation which complies with the public policy of the state of Kentucky and the mandates of the MVRA has been consistently enforced by Kentucky courts. The preclusion clearly and unambiguously applies to the motorcycle that Tryon operated at the time of his July 2012 motorcycle accident, and he had no expectation, reasonable or otherwise, of UIM coverage. Accordingly, Encompass' policy must

be enforced as written, and Tryon's attempt to retroactively expand the coverage he purchased must fail.

It is, therefore, respectfully submitted that the opinion of the Court of Appeals should be reversed and the judgment of the Jefferson Circuit Court should be affirmed.

Respectfully submitted,

William B. Orberson
Patricia C. Le Meur
James C. Wade
PHILLIPS PARKER ORBERSON & ARNETT, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40202
Telephone: (502) 583-9900
Facsimile: (502) 587-1927
Counsel for Appellant/Defendant below, Encompass Indemnity Company