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SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2012-SC-000731-D

KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLANT

v.

APPELLANT'S REPLY BRIEF

TAMRA HOSKINS — APPELLEE

* * * * *

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS
NO. 2011-CA-001454-MR

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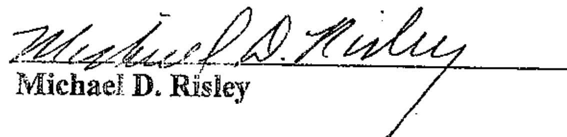
CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Reply Brief was served by first class mail, postage prepaid, upon Richard Hay, Esq., P.O. Box 1124, Somerset, KY 42502-1124; J. Paul Long, Esq., P.O. Box 85, Stanford, KY 40484-0085; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, on this 4th day of October, 2013. It is further certified that no part of the record on appeal has been withdrawn from the clerk of the trial court or the Court of Appeals.



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STATEMENT OF POINTS AND AUTHORITIES

I. The exclusion "for bodily injury" applies to Hoskins's derivative loss of consortium claim. 1

Lager v. Miller-Gonzalez, 896 N.E.2d 666 (Ohio 2008) 1-2

Vierkant v. AMCO Ins. Co., 543 N.W.2d 117 (Minn. App. 1996) 2

Philbrick v. Liberty Mut. Ins. Co., 934 A.2d 582 (N.H. 2007) 2

St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223 (Ky. 1994) 3

Eddy v. Fidelity and Guaranty Insurance Underwriters, Inc., 776 P.2d 966 (Wash. 1989) 3

Floyd v. Gray, 657 S.W.2d 936 (Ky. 1983) 3, 5

Arch Specialty Ins. Co. v. J. B. Martin, Inc., 2007 U.S. Dist. LEXIS 84627 (N.D. Ohio 2007) 4

Moore v. Ewing, 781 N.Y.S.2d 51 (N.Y. App. 2004) 4-5

Daley v. Reed, 87 S.W.3d 247 (Ky. 2002) 5

II. The cases cited by Hoskins are of little help 6

Kotsiris v. Long, 451 S.W.2d 411 (Ky. 1970) 6

Floyd v. Gray, 657 S.W.2d 936 (Ky. 1983) 6

Department of Education v. Blevins, 707 S.W.2d 782 (Ky. 1986) 6-7, 8

Williams v. Kentucky Dep't of Education, 113 S.W.3d 145 (Ky. 2003) 7

Martin v. Ohio County Hospital Corp., 295 S.W.3d 104 (Ky. 2009) 7

Norton v. Canadian American Tank Lines, 2009 U.S. Dist. LEXIS 28580 (W.D. Ky. 2009) 8

Daley v. Reed, 87 S.W.3d 247 (Ky. 2002) 8

Allstate Ins. Co. v. Fibus, 855 F.2d 660 (9th Cir. 1988) 8

Bilodeau v. Lumbermens Mutual Casualty Co., 467 N.E.2d 137 (Mass. 1984) 8

Brunn v. Motorists Mutual Ins. Co., 2006 Ohio App. LEXIS 16 (Ohio App. 2006) 8-9

King v. Wachauf, 2013 Ohio App. LEXIS 2456 (Ohio App. 2013) 9

Burgess v. Erie Ins. Group, 2007 Ohio App. LEXIS 881 (Ohio App. 2007) 9

Siciliano v. National Mut. Ins. Co., 2007 Ohio App. LEXIS 5791 (Ohio App. 2007) 9

Touhy v. Taylor, 2007 Ohio App. LEXIS 3305 (Ohio App. 2007) 9

Lager v. Miller-Gonzalez, 896 N.E.2d 666 (Ohio 2008) 9

Arch Specialty Ins. Co. v. J. B. Martin, Inc., 2007 U.S. Dist. LEXIS 84627 (N.D. Ohio 2007) 9

Jones v. State Farm Mut. Auto. Ins. Co., 760 N.W.2d 186 (Iowa 2008) 10

CONCLUSION 10

I. THE EXCLUSION "FOR BODILY INJURY" APPLIES TO HOSKINS'S DERIVATIVE LOSS OF CONSORTIUM CLAIM.

Hoskins's central argument, that an exclusion for claims "for bodily injury" does not apply to her loss of consortium claim because she did not suffer "bodily injury," has been expressly rejected by multiple courts. In addition to the cases cited in Kentucky Farm Bureau's initial brief in which the exclusion has been applied to claims for uninsured or underinsured motorists coverage, the exclusion has frequently been applied to loss of consortium claims in the liability insurance context. For example, in Lager v. Miller-Gonzalez, 896 N.E.2d 666 (Ohio 2008), the Ohio Supreme Court held that an exclusion for claims for bodily injury applied to a wrongful death claim, which under Ohio law includes the surviving spouse's consortium claim.[1] While the exclusion in Lager made express reference to derivative claims, the Ohio Supreme Court rejected the premise that an other-owned auto exclusion excluding coverage "for bodily injury" was ambiguous because the policy also contained language providing underinsured motorist coverage "because of bodily injury":

> There is nothing ambiguous, uncertain, or unclear about the meaning of that exclusion. As the Third District properly recognized in [Touhy], other-owned-auto exclusions that disclaim UM coverage represent a clear intent to limit coverage for bodily injuries incurred in "the vehicles specifically covered under the insurance policy." . . .
>
> . . .
>
> Moreover, the Lagers' argument that their injuries are "because of" Sara's bodily injury, not "for" Sara's bodily injuries, is a semantic distinction. Though their wrongful-death claim arose "because of" Sara's bodily injury, i.e., her death, any coverage "for" her bodily injury

[1] Hoskins argues in her brief that Ohio law supports her position. See Brief for Appellee, at 24. As established in Lager and the other Ohio cased discussed herein, clearly it does not.

> was distinguished because her bodily injury arose when she was in a motor vehicle that was not an insured vehicle under the Lagers' policy.

896 N.E.2d at 670-71.

Similarly, in Vierkant v. AMCO Ins. Co., 543 N.W.2d 117 (Minn. App. 1996), the Minnesota Court of Appeals held that a household exclusion for bodily injury to an insured applied to a derivative loss of consortium claim asserted by a noninsured:

> The district court held that appellant had to indemnify respondents for claims made by Darlene Kaiser, a noninsured. The district court based its decision on its decision that Darlene Kaiser's claims for "required care" and "loss of services" were separate and not derivative of Jason Vierkant's bodily injury. We reverse, holding that Darlene Kaiser's claims are derivative.
>
> "Derivative" is defined in part as "that which has not its origin in itself, but owes its existence to something foregoing." . . . Typically, a claim for loss of services, i.e., loss of consortium, is characterized as a derivative claim . . . . We reject respondents' argument that Darlene's claims are not derivative of Jason's bodily injury. We hold required care and loss of services do not constitute separate claims in this case, even though they are listed as separate injuries within the coverage section of the policy, because they would not exist but for an insured's bodily injury.

543 N.W.2d at 122. See also Philbrick v. Liberty Mut. Ins. Co., 934 A.2d 582 (N.H. 2007) (exclusion for bodily injury arising out of sexual molestation applied not only to the injured minor's assault and battery claim but also to the parents' loss of consortium claim).

Notwithstanding such authorities, Hoskins argues that the exclusion should not be applied to her loss of consortium claim because exclusions are to be interpreted narrowly and in favor of finding coverage. Kentucky Farm Bureau is well aware of those authorities, since it deals with them in every case of contested coverage it handles, but it

also knows that those authorities do not mean that the insurer must lose on every coverage issue. See, e.g., St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 226 (Ky. 1994). Those cases also do not interfere with the rule that the policy must receive a reasonable interpretation consistent with the parties' object and intent. Id. Nothing suggests that the intent of the exclusion at issue is to exclude the injured party's claim but to provide coverage for a loss of consortium claim derivative of the injury claim. As recognized in Eddy v. Fidelity and Guaranty Ins. Underwriters, Inc., 776 P.2d 966, 970 (Wash. 1989), a reasonable person reading the exclusion at issue would believe the exclusion applied to a derivative loss of consortium claim.

In that regard, Hoskins's embracing of Justice Liebson's dissent in Floyd v. Gray, 657 S.W.2d 936 (Ky. 1983), is instructive. In what Hoskins agrees is an excellent discussion of the derivative nature of a loss of consortium claim,[2] Justice Liebson wrote:

> The basic problem with the majority opinion is failure to recognize the true nature of the action for damages for loss of consortium. Such an action is derivative in nature, arising out of and dependent upon the right of the injured spouse to recover. Mrs. Gray's claim arises out of the same personal injury as does her husband's claim. It is from the same cause. It is subject to all of the same defenses as are available against her husband, such as the contributory negligence claim that the jury rejected. Limitation is simply one of those defenses, statutorily provided.
>
> When a person sustains personal injury in a motor vehicle accident, the injury may give rise to multiple claims for tort liability deriving from the same injury. This occurs when there is a spouse who suffers from loss of consortium from that same injury.

657 S.W.2d at 941 (Liebson, J., dissenting).

[2] While Hoskins cites Floyd v. Gray in support of her argument, she also states that it was "wrongly decided" and that Justice Liebson's dissent "gives an excellent explanation of the derivative, yet independent nature of consortium claims." Brief for Appellee, at 10 n.45.

The derivative nature of Hoskins's loss of consortium claim establishes that the exclusion for bodily injury to an insured unambiguously applies to that claim. For example, in Arch Specialty Ins. Co. v. J. B. Martin, Inc., 2007 U.S. Dist. LEXIS 84627 (N.D. Ohio 2007), the insurer argued that "loss of consortium, as a derivative claim, does not warrant insurance coverage when coverage has been precluded for the injury from which loss of consortium flows." Slip op. at * 22. The court reviewed Ohio law (which Hoskins maintains supports her position), and agreed:

> [T]he court finds that Comcorp correctly reinforces the idea that a derivative claim cannot be provided insurance coverage if the injury from which the derivative claim flows is not covered by the insurance policy. Therefore, the court finds that Martin is not entitled to any coverage related to McPherson's loss of consortium claim.

Id. at * 26-27.

To the same effect is Moore v. Ewing, 781 N.Y.S.2d 51 (N.Y. App. 2004), in which the court relied on New York having previously found that a loss of consortium claim was not entitled to a separate per person limitation of liability from the personal injury claim in concluding that there is no coverage for the derivative loss of consortium claim if there is no coverage for the bodily injury claim:

> In the context of insurance policy interpretation, New York courts have held that because derivative claims do not constitute an independent bodily injury, a person asserting a derivative claim is not entitled to a separate per person limitation of liability; rather, the derivative claims are included in the per person limitation of liability applicable to the injured individual. . . .
>
> Here, a consistent result under New York law requires that under the policy's definition of "bodily injury," there must first be a covered bodily injury to an injured person before there is coverage for a resulting loss of services claim. This is the conclusion reached by other jurisdictions that have interpreted the same or similar provision that, like New

> York, consider a parent's claims to be derivative of the child's claims . . . .

781 N.W.S.2d at 56.

Like New York, Kentucky has held that a person asserting a derivative claim is not entitled to a separate per person limitation of liability. See Daley v. Reed, 87 S.W.3d 247 (Ky. 2002). To be consistent, Kentucky law should be that there is no coverage for a loss of consortium claim if there is no coverage for the bodily injury from which the loss of consortium claim derives.

While Hoskins questions Kentucky Farm Bureau citing tort cases in support of its position,[3] those cases help establish the derivative nature of a loss of consortium claim. As stated in Justice Liebson's dissent in Floyd v. Gray, which Hoskins so warmly embraces, loss of consortium is a derivative claim which arises out of and is dependent on the right of the injured spouse to recover. The cases previously cited by Kentucky Farm Bureau reflect that the derivative nature of a loss of consortium claim affects, for example, whether comparative fault applies to a loss of consortium claim even though the consortium claimant was not at fault (it does), whether a consortium claim exists if the injury claim is preempted (it does not), and, outside the motor vehicle context, whether a loss of consortium claim exists if the injury claim is barred by limitations (it does not). For the same reasons, and to be consistent, there should be no coverage for a loss of consortium claim if there is no coverage for the bodily injury from which the loss of consortium is derived.

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[3] In a different part of her brief, Hoskins embraces tort cases which she believes help her. See Brief for Appellee, at 13.

II. THE CASES CITED BY HOSKINS ARE OF LITTLE HELP.

The four Kentucky cases cited by Hoskins on pages 12-13 of her brief, which discuss loss of consortium claims in a variety of scenarios, are of little help to Hoskins and certainly do not call for a finding of coverage for Hoskins's claim. Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970), was the first case recognizing a wife's loss of consortium claim. In holding that settlement of the spouse's claim did not extinguish the wife's loss of consortium, this Court in Kotsiris emphasized that the wife's claim was for elements of damages separate and distinct from the elements of damages for which the husband could assert a cause of action. See 451 S.W.2d at 413 (in settling the husband's claim, "defendant did not pay out any money on behalf of or on account of any loss suffered by her."). Such recognition in no way takes away from the derivative nature of a loss of consortium, and indeed establishes that it is only a cause of action for different elements of damage derived from the same bodily injury.

Floyd v. Gray, 657 S.W.2d 936 (Ky. 1983), was based on the particulars of the Motor Vehicle Reparations Act and likewise does not take away from the derivative nature of a loss of consortium claim. In fact, Justice Liebson's dissertation on the derivative nature of a loss of consortium claim, discussed above and embraced by Hoskins in her brief, supports Kentucky Farm Bureau's position.

Dep't of Education v. Blevins, 707 S.W.2d 782 (Ky. 1986), simply recognized that KRS 411.135 created a cause of action for parents that could be submitted to the Board of Claims separate from the previously recognized wrongful death cause of action controlled by the decedent's estate. Allowing parents to recover in the Board of Claims for elements of damages not recoverable in a wrongful death action has nothing to do with whether the exclusion contained in Kentucky Farm Bureau's policy applies to

Tamra Hoskins's loss of consortium claim. In fact, this Court in Blevins reaffirmed that "both the personal injury claim and loss of consortium claim derive from the same injury." 707 S.W.2d at 785.[4]

The last Kentucky case discussed by Hoskins, Martin v. Ohio County Hospital Corp., 295 S.W.3d 104 (Ky. 2009), held that the damages for which a spouse could seek recovery in connection with a loss of consortium claim did not end upon the death of the injured spouse. In so holding, this Court did not say that a loss of consortium claim was not derivative in nature. Instead, the decision was based on the undisputable fact that the damages a spouse suffers when their spouse is negligently injured or killed do not magically end with the death of the injured spouse.

In her brief, Hoskins highlights a quote from Martin that a loss of consortium claim can continue even when the injured spouse or the estate "has settled or otherwise been excluded from an action . . . ." Id. at 107. The reference to the injured spouse or estate being "excluded from an action" is not a reference to an exclusion in an insurance policy. Instead, that passage simply confirms that the damages recoverable by a spouse on a loss of consortium claim are not the same as the damages recoverable by the injured party or as part of a wrongful death action. That fact is what has led courts to comment that there is not a "common and undivided interest" in the spouse's loss of consortium claim and the underlying tort claim, as this Court recognized in Martin. See id.

The cases cited by Hoskins in support of her position are some of the same cases described as establishing "that loss of consortium is a separate cause of action, not that it

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[4] Blevins was statutorily abrogated within three months of its issuance. See Williams v. Kentucky Dep't of Education, 113 S.W.3d 145, 156 (Ky. 2003). For this additional reason, Blevins is of no help to Hoskins.

is wholly independent and distinct." Norton v. Canadian American Tank Lines, 2009 U.S. Dist. LEXIS 28580, * 14 (E.D. Ky. 2009). That a loss of consortium claim has its own statute of limitations in the motor vehicle context, is for damages separate from the injured spouse's damages, and is for damages which do not cease upon the death of the spouse, "does not change the notion that a loss of consortium is derivative of the injured spouse's underlying claims." Id., at * 15. As this Court readily recognized in Daley v. Reed, 87 S.W.3d 247 (Ky. 2002), that a loss of consortium claim has been described as "independent and separate" does not take away from the "more significan[t]" fact that "both the personal injury and loss of consortium claim *derive from the same injury*." 87 S.W.3d at 249, quoting from Blevins, 707 S.W.2d at 785.

Likewise, the cases from other jurisdictions cited by Hoskins generally are irrelevant or of little help to Hoskins. For example, Allstate Ins. Co. v. Fibus, 855 F.2d 660 (9th Cir. 1988) and Bilodeau v. Lumbermens Mutual Casualty Co., 467 N.E.2d 137 (Mass. 1984), do not deal with the issue presented in this case but instead address whether a policy's "per person" limit applied to both the injured party's claim and their spouse's loss of consortium claim. The courts in those cases held that a separate per person limit applied to the injured party's injury claim and to the spouse's loss of consortium claim. Of course, this Court reached the opposite conclusion in Daley v. Reed, supra. In fact, this Court in Daley expressly stated that the Court of Appeals' reliance on Bilodeau "was misplaced." 87 S.W.3d at 249. Thus, the holdings in Allstate and Bilodeau cases actually have already been rejected by this Court.

Also misplaced is Hoskins's attempted reliance on Brunn v. Motorists Mutual Ins. Co., 2006 Ohio App. LEXIS 16 (Ohio App. 2006). While Brunn, if viable, would

support Hoskins' position, subsequent developments in Ohio establish that Brunn does not represent the law even in Ohio, where it was decided. In recently holding that a bodily injury exclusion applied to a spouse's consortium claim, the Ohio Court of Appeals stated "the continuing validity of the Court's decision in Brunn is questionable. . . ." King v. Wachauf, 2013 Ohio App. LEXIS 2456 * 13 (Ohio App. 2013). In addition to King, multiple other courts in Ohio have agreed with the position Kentucky Farm Bureau takes in this case. See, e.g., Burgess v. Erie Ins. Group, 2007 Ohio App. LEXIS 881 (Ohio App. 2007) (exclusion for "bodily injury to anyone we protect while operating, or when struck by a motor vehicle owned by, furnished to, or available for the regular use of you or a resident relative" applied to both the injured party's claim and his spouse's loss of consortium claim); Siciliano v. National Mut. Ins. Co., 2007 Ohio App. LEXIS 5791 (Ohio App. 2007) (exclusion for bodily injury suffered while occupying or operating a vehicle not insured under the policy applied to both the estate's claim and the surviving spouse's derivative claim, and UM/UIM coverage was not available to the surviving spouse); Touhy v. Taylor, 2007 Ohio App. LEXIS 3305 (Ohio App. 2007) (same result).

That King v. Wachauf is a proper resolution of the issue is reinforced by the Ohio Supreme Court's decision in Lager v. Miller-Gonzalez, supra, in which the Ohio Supreme Court expressly rejected the main premise of Hoskins's argument. In addition, in Arch Specialty Ins. Co. v. J. G. Martin, Inc., supra, the court explained why, under Ohio law, there is no coverage for a loss of consortium claim if there is no coverage for the associated bodily injury from which the loss of consortium derives. Thus, the prevailing Ohio law is directly contrary to Hoskins's position in this case.

That leaves only Jones v. State Farm Mut. Auto. Ins. Co., 760 N.W.2d 186 (Iowa 2008), as actual support for Hoskins's position. The one-paragraph discussion of the issue (on page 189 of the Opinion) is conclusory and inconsistent with the intent behind the exclusion at issue. The cases reaching the opposite conclusion, i.e., that an exclusion for bodily injury excludes from coverage loss of consortium claims derivative of the bodily injury, represent the better reasoned majority view and are consistent with both the intent of the exclusion and existing Kentucky law. Accordingly, this Court should hold that the Kentucky Farm Bureau policy's exclusion for bodily injury applies to all claims for the excluded bodily injury, including Hoskins's derivative loss of consortium claim.

CONCLUSION

For the reasons stated herein and in its initial brief, Kentucky Farm Bureau asks this Court to reverse the decision of the Court of Appeals and order that the summary judgment granted to Kentucky Farm Bureau by the trial court be reinstated.

Respectfully submitted,

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