FILED
APR 16 2012
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2011-SC-0002[illegible]6-D

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANT

vs. ON APPEAL FROM KENTUCKY COURT OF APPEALS
NO. 08-CI-00169, 09-CI-00105 AND 09-CI-00117

KAREN HODGKISS-WARRICK — APPELLEE

---

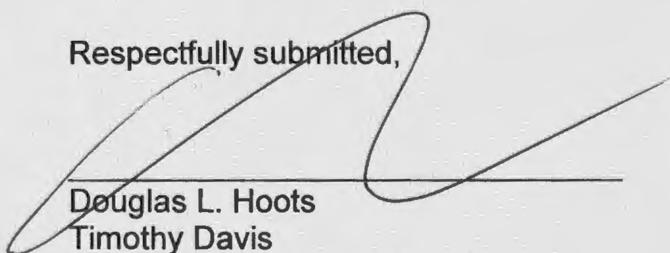
**REPLY BRIEF FOR APPELLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

---

## CERTIFICATE OF SERVICE

This is to certify that on April 16, 2012 the foregoing Reply Brief for Appellant, State Farm Mutual Automobile Insurance Company, has been served by mailing a true and correct copy to: Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Jeffrey T. Burdette, Chief Circuit Judge Rockcastle Circuit Court, 50 Public Square, Somerset, Kentucky 42501; J. Warren Keller, Clayton O. Oswald, Taylor Keller Dunaway & Tooms, PLLC, 1306 West Fifth Street, London, Kentucky 40741 and Charles C. Adams, Jr., Herren & Adams, 148 North Broadway, Lexington, Kentucky 40507. I further certify that the record on appeal was not withdrawn by the Appellant.

Respectfully submitted,



Douglas L. Hoots
Timothy Davis
Landrum & Shouse LLP
106 West Vine Street, Suite 800
Lexington, Kentucky 40507
(859) 255-2424
Counsel for Appellant,
State Farm Mutual Automobile Insurance Company

## STATEMENT OF POINTS AND AUTHORITIES

**STATEMENT OF POINTS AND AUTHORITIES** .......................................... i, ii

**PURPOSE OF THE BRIEF** .......................................................... iii

**ARGUMENT** .......................................................................... 1

**I. KENTUCKY COURTS HAVE ALWAYS ENFORCED THE CLEAR CONTRACTUAL LANGUAGE AT ISSUE** ..................... 1, 2, 3, 4

*Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky. 2010) .......................................... 1, 2

Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437, 449-450 (Ky. 1999) .......................................... 1

*Murphy v. Kentucky Farm Bureau Mut. Ins. Co.*, 116 S.W.3d 500 (Ky. App. 2002) .......................................... 1, 2, 7

*Estate of Snow v. West American Ins. Co.*, 161 S.W.3d 338 (Ky. App. 2005) .......................................... 1

*Edwards v. Carlisle*, 179 S.W.3d 257 (Ky. App. 2004) .......................................... 1

*Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577(Ky. App. 2001) .......................................... 1

*Lewis v. West American Ins. Co.*, 927 S.W.2d 829 (Ky. 1996) .......................................... 3, 5

**II. THE COURT OF APPEALS SHOULD NOT ATTEMPT TO ESTABLISH PUBLIC POLICY IN KENTUCKY** .......................................... 4, 5

*Zeitz v. Foley*, 264 S.W.2d 267, 268 (Ky. 1954) .......................................... 4

KRS 304.39-010(1) .......................................... 5

KRS 304.39-010(6) .......................................... 5

**III. THE COURT OF APPEALS COMPLETELY MISCONSTRUED AND MISAPPLIED SUPREME COURT PRECEDENT** .......................................... 6, 7, 8

SCR 1.010(8) (a) .......................................... 6

*Williams v. State Farm Mut. Auto Ins. Co.*,
255 S.W.3d 913 (Ky. 2008) ........................................................ 6, 7

*State Farm Mut. Ins. Co. v. Marley*,
115 S.W.3d 33 (Ky. 2004) ........................................................ 8

**CONCLUSION** ........................................................ 8

## PURPOSE OF THE BRIEF

The purpose of this Reply Brief is to further address the case law and some of the statements and arguments made in Appellee's Response Brief.

# ARGUMENT

## I. KENTUCKY COURTS HAVE ALWAYS ENFORCED THE CLEAR CONTRACTUAL LANGUAGE AT ISSUE

In her effort to obtain coverage where none exists, Ms. Hodgkiss-Warrick does not cite any authority invalidating the State Farm policy language. And Ms. Hodgkiss-Warrick suggests that Kentucky Courts have not repeatedly upheld the policy language which defines an underinsured motor vehicle. (Appellee Brief, p. 19). In reality, the policy language at issue has been upheld on numerous occasions. In its original brief, State Farm cited several cases validating the "owned or available for regular use of you or any resident relative" policy language. See eg., *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky. 2010); *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 449-450 (Ky. 1999); *Murphy v. Kentucky Farm Bureau Mut. Ins. Co.*, 116 S.W.3d 500 (Ky. App. 2002); *Estate of Snow v. West American Ins. Co.*, 161 S.W.3d 338 (Ky. App. 2005); *Edwards v. Carlisle*, 179 S.W.3d 257 (Ky. App. 2004); *Baxter v. Safeco Ins. Co. of America*, 179 S.W.3d 577 (Ky. App. 2001).

One has to wonder how much precedent is needed when State Farm has provided the Court with at least five Kentucky cases confirming the validity of the "owned or available for use of you or any resident relative" policy language and Ms. Hodgkiss-Warrick has provided no authority to the contrary. Ms. Hodgkiss-Warrick argues a non-existent or irrelevant factual distinction as support for her claim that her case is legitimately distinguishable from all others. Ms. Hodgkiss-Warrick says the distinguishing feature is that she had no control over the amount of liability coverage on the accident vehicle. However, a cursory review of the applicable case law reveals that

this so-called distinction is a distinction without a difference in all the cases. And in some cases, it is not even a distinguishing fact.

There is no need to again analyze the entire litany of cases that support the relevant policy language. Suffice it to say, the cases typically involved situations where one family member sought UIM coverage under one policy after recovering liability coverage from a policy insuring another family member. It would not be uncommon for the injured family member to claim lack of knowledge or control of the at-fault family member's liability policy coverage. For example, in *Burton v. Farm Bureau*, supra, a wife/passenger was injured while riding in a vehicle driven by her husband. The wife recovered the minimum liability limits on her husband's policy and then asserted a UIM claim under another policy insuring a different household vehicle. The *Burton* Court did not consider invalidating the policy language based on whether the wife had control over the amount of liability coverage on her husband's vehicle. To the contrary, the Burton Court actually noted, as one justification for the policy language, the fact that the named insured <u>or another family member</u> (emphasis added) had control over the amount of liability insurance. As stated in *Burton*, the justification for the policy provision is the fact that a family member controls how much liability insurance is purchased, not the possibility of a collusive lawsuit. *Burton* at 476.

Similarly, in *Murphy v. Kentucky Farm Bureau*, supra, a child was killed in a single car accident while occupying a car driven by another family member. The estate of the deceased child filed an action to recover UIM benefits under policies covering two other vehicles in the household. Like Ms. Hodgkiss-Warrick, the estate argued the policy language (which excluded from the definition of an underinsured vehicle any

vehicle "owned by or available for the regular use of any family member") violated public policy. Specifically, the estate noted the deceased child was an innocent minor who had no control over the liability coverage for the vehicle the child was occupying at the time of the tragic accident. The estate also claimed the provision was against public policy pursuant to the authority of *Lewis v. West American Ins. Co.*, 927 S.W.2d 829 (Ky. 1996), which invalidated the household exclusion in automobile liability policies. The *Murphy* Court correctly recognized that the policy language was not a household exclusion and UIM coverage is not the same as liability coverage. Specifically, the *Murphy* Court stated:

> [T]he regular-exclusion at issue in the present case does not deny a family member's general liability coverage; it denies UIM coverage if the underinsured vehicle is owned by or for the regular use of the insured or household member. The justification for the regular-use exclusion is not the possibility of collusion, but rather the fact that the insured or other family member has control over how much liability coverage is purchased. While Austin did not have control over how much liability coverage he had in the accident, his mother did have control because she owned and insured the car in which he was riding. Id. at 502.

The State Farm policy states that an underinsured motor vehicle does not include a motor vehicle:

> **Owned by**, rented to or available for the regular use of **you** or any **resident relative**.

There may be a factual dispute regarding whether the vehicle Ms. Hodgkiss-Warrick was occupying was furnished or available for her regular use. But, there is no dispute regarding the fact that the driver of the car (her daughter) owned the at-fault vehicle. And there is no dispute that Ms. Hodgkiss-Warrick had resided with her

daughter for over a year when the accident occurred. Therefore, the vehicle did not qualify as an underinsured motor vehicle. Consequently, Ms. Hodgkiss-Warrick is not entitled to UIM benefits in this case. The policy language is clear. The case law is clear. There is no UIM coverage available for her in this case.

## II. THE COURT OF APPEALS SHOULD NOT ATTEMPT TO ESTABLISH PUBLIC POLICY IN KENTUCKY

It is the purview of the Kentucky Legislature (not the Courts) to establish public policy.

> As the right of private contract is no small part of the liberty of the citizen, the usual and most important function of the Courts is to enforce and maintain contracts rather than to enable the parties to escape their obligations on the pretext of public policy or illegality. *Zeitz v. Foley*, 264 S.W.2d 267, 268 (Ky. 1954).

Frankly, it is a dangerous ride when courts choose to mount the horse of "public policy" without having the saddle of clear legislative intent. It is also a dangerous ride when lower courts tug against the reins of established precedent to reach a decision. Again, the Court of Appeals essentially disregarded established precedent to reach its decision. The Court of Appeals then mischaracterized the policy language at issue as a household exclusion. In doing so, the Court of Appeals accepted the argument that the relevant policy provision which, in part, defines an underinsured motor vehicle is the same thing as a household or family exclusion in an automobile or liability policy. Finally, the Court of Appeals misinterpreted and mischaracterized existing Kentucky Supreme Court precedent and surmised that our state's highest court would now view the policy language differently on "public policy" grounds in spite of recent case law to

the contrary. All of these legal gymnastics was unnecessary and inappropriate for a number of reasons.

As previously outlined, the "public policy" argument asserted by Ms. Hodgkiss-Warrick has been made and rejected in the recent past. Additionally, several cases have upheld the policy provision since the "household exclusion" in automobile liability policies was invalidated in 1996 in *Lewis v. West American*, supra. The underlying basis for the Court of Appeals' public policy analysis is the supposition that the Kentucky Legislature expressed disapproval of the relevant policy provision with the adoption of the Kentucky Motor Vehicle Reparations Act (MVRA). Leaving aside the fact that several courts have said otherwise, there is nothing in the MVRA that can be fairly interpreted as evidencing legislative disapproval of the policy provision. If anything, the MVRA (and public policy behind freedom of contract) support the policy language. The mandatory insurance language of the MVRA relates to automobile liability coverage. KRS 304.39-010(1). Here, we are considering first party optional UIM coverage. Another stated purpose of the MVRA is to help guarantee the continued availability of motor vehicle insurance at reasonable prices. KRS 304.39-010(6). Too often, it seems as if "public policy" is used as an excuse to compensate a single individual and broader public policy issues such as freedom of contract and affordability of insurance somehow get overlooked or lost in the process. Regardless, there may be legitimate public policy concerns behind protecting Kentucky residents from other drivers who come into our state with less liability insurance than is required by the Kentucky MVRA. But, there is no credible public policy argument behind providing out-

of-state residents with more UIM benefits than they would receive if they were injured in a motor vehicle accident in their home state.

### III. <u>THE COURT OF APPEALS COMPETELY MISCONSTRUED AND MISAPPLIED SUPREME COURT PRECEDENT</u>

The Court of Appeals should follow existing precedent of the Kentucky Supreme Court. SCR 1.010(8)(a). All existing precedent addressing the precise policy language at issue supports its enforcement. Rather than follow this precedent, the Court of Appeals speculated that the Kentucky Supreme Court has implicitly indicated that the policy provision would now be void against public policy.

Ironically, the Court of Appeals uses the fairly recent case of *Williams v. State Farm Mut. Auto Ins. Co.*, 255 S.W.3d 913 (Ky. 2008), as its support for the conclusion that the policy provision is now contrary to public policy because Ms. Hodgkiss-Warrick purportedly had no control over the amount of liability insurance on her resident daughter's vehicle. (Court of Appeals' Opinion pp. 11-12). In her Response Brief, Ms. Hodgkiss-Warrick seizes upon this statement by the Court of Appeals and vigorously argues (maybe for the first time) that the policy provision is overbroad. (Brief for Appellee pp. 9-15).

The Court of Appeals' analysis of *Williams* and Appellee's statements that *Williams* supports her claim that the existing policy provision is overbroad are puzzling, when one considers the actual decision in *Williams*. In *Williams* two brothers were killed in a single vehicle accident. They were occupying the vehicle driven by the driver/brother at the time of the accident. The passenger/brother's estate filed a UIM claim against his parents' automobile policy. The parents' policy stated its UIM

coverage did not apply when an injury occurred in a vehicle "furnished for the regular use of you, your spouse or any relative." Ultimately, the *Williams* Court determined UIM coverage was available under the parents' policy because the accident vehicle was owned by the driver/brother, but it was not "furnished" by the parents to the driver/brother. Id. at 913, 914. The fact that the passenger/brother had no control over the amount of liability insurance on the vehicle was not pertinent.

The *Williams'* decision was based on the fact that the parents did not "furnish" the vehicle involved in the accident. The *Williams* Court actually indicated that there would have been no UIM coverage if the policy had included broader language to also exclude from UIM coverage vehicles that are "owned" by another family member. Id. at 914. (Citing *Murphy v. Kentucky Farm Bureau Mut. Ins. Co.*, 116 S.W.3d 500 (Ky. App. 2003)). In other words, there would have been no coverage if the policy language had been broad enough. Respectfully, it is difficult to understand how the policy language used in *Williams* could be deemed too narrow, and now that the policy language has been corrected to conform with the dictates of *Williams,* it is allegedly too broad. Any way you slice it, the claim that the policy provision at issue is now too broad makes no sense.

Similarly, it is difficult to understand Ms. Hodgkiss-Warrick's claim that most of the cases cited which include the same or very similar policy language lack precedential value. Yet, at the same time Ms. Hodgkiss-Warrick focuses entirely on the household exclusion in liability policies to support her arguments. Surely more recent cases addressing the precise policy language at issue have more precedential value than does a 1996 case addressing a liability exclusion that is not even contained in current

insurance policies. The case that gets the most discussion in the Response Brief is probably *State Farm Mut. Ins. Co. v. Marley*, 115 S.W.3d 33 (Ky. 2004). Marley addresses the household exclusion in the context of an umbrella policy when the liability claim arises out of a motor vehicle accident. Once again, the issue before the Court does not involve a liability claim against another household member. Ms. Hodgkiss-Warrick successfully asserted a liability claim against her daughter. No insurance policy provision prevented her from asserting that claim.

The *Marley* Court only discussed the "household exclusion" as it applied to liability policies. To date, Ms. Hodgkiss-Warrick has refused to acknowledge the fact that the policy language at issue is not a "household exclusion" in a liability policy. In fact, she calls the difference between definition of an underinsured motor vehicle and a household exclusion in an automobile liability policy a "distinction without a difference." (Appellee Response Brief, p. 15). Our courts have heretofore always recognized the distinction between a liability claim and a first party contract claim. The distinctions that make no difference are the ones that Ms. Hodgkiss-Warrick attempts to fashion in an effort to get the Court to disregard existing case law directly addressing the actual policy language under review in this case.

## CONCLUSION

**WHEREFORE**, State Farm requests the Court of Appeals' Opinion be set aside and a decision be entered in conformity with the existing precedent.

Respectfully submitted,

DOUGLAS L. HOOTS
TIMOTHY DAVIS
LANDRUM & SHOUSE LLP
P.O. Box 951
Lexington, Kentucky 40588-0951
(859) 255-2424

ATTORNEY FOR MOVANT,
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing has this 16th day of April, 2012 has been mailed to the following:

Charles Adams
184 North Broadway
Lexington, KY 40507

Clayton Oswald
Taylor, Keller & Oswald
1306 West Fifth Street
Suite 100
London, KY 40743

Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

ATTORNEY FOR MOVANT,
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY