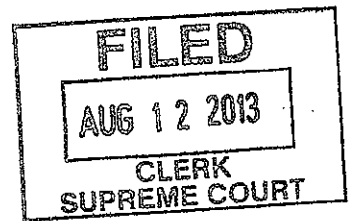


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2012-SC-000731-D



KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLANT

v.

APPELLANT'S 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 Appellant's 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 9th day of August, 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 It is further certified that no part of the record on appeal has been withdrawn from the clerk of the trial court or the Court of Appeals.



Michael D. Risley

INTRODUCTION

The issue of first impression before the Court is whether an exclusion stating that the policy does not provide Underinsured Motorist Coverage for bodily injury sustained by any insured while occupying or operating a motorcycle owned by any insured applies to a loss of consortium claim asserted by the injured party's spouse. The trial court, recognizing that Tamra Hoskins's loss of consortium claim flowed from the bodily injury sustained by her spouse, found the exclusion applicable to Tamra Hoskins's loss of consortium claim and dismissed her claim. The Court of Appeals reversed, finding the exclusion inapplicable to Tamra Hoskins's loss of consortium claim.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes the Court should hold oral argument in this case. The opportunity to address any issues or questions the Court may have will be of value to both the Court and the parties.

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- A – Copy of Kentucky Farm Bureau Policy
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- C – Lincoln Circuit Court Opinion and Order
- D – Court of Appeals Opinion

STATEMENT OF THE CASE

The Kentucky Farm Bureau Mutual Insurance Company policy at issue states that it does not provide Underinsured Motorist (“UIM”) coverage for bodily injury sustained by an insured while occupying or operating a motorcycle owned by an insured. While there has never been any dispute that the provision excluded from coverage any claim by Bernard Hoskins, the person sustaining the bodily injury at issue, the Court of Appeals held that the exclusion did not apply to Tamra Hoskins’s loss of consortium claim flowing from Bernard Hoskins’s bodily injury.

In so ruling, the Court of Appeals erred. For the reasons discussed below, Kentucky Farm Bureau asks that the Opinion of the Court of Appeals be reversed with directions that the summary judgment granted by the trial court in Kentucky Farm Bureau’s favor be reinstated.

A. The Kentucky Farm Bureau Policy

Kentucky Farm Bureau issued an automobile liability insurance policy to Bernard and Tamra Hoskins that included UIM coverage. [Record on Appeal (“R.A.”) 29-49, attached as Exhibit A]¹ Kentucky Farm Bureau’s insuring agreement provides:

INSURING AGREEMENT

A. We will pay compensatory damages which an *insured* is legally entitled to recover from the owner or operator of an *underinsured motor vehicle* because of *bodily injury*:

1. Sustained by an *insured*; and
2. Caused by an accident.

The owner’s or operator’s liability for these damages must arise out of the ownership, maintenance or use of the *underinsured motor vehicle*.

Id., at 18. [R.A. 43]

¹ The parties submitted an agreed statement of the case as the record on appeal pursuant to Rule 75.15. The citations to the record are to the agreed statement as approved by the trial court and certified by the Clerk.

The UIM coverage provided by the Kentucky Farm Bureau policy is subject to a number of exclusions, including an exclusion for bodily injury sustained by an insured while occupying or operating a motorcycle owned by an insured:

EXCLUSIONS

A. We do not provide Underinsured Motorists Coverage for *bodily injury* sustained by any *insured*:

....

4. While *occupying* or operating a motorcycle owned by any *insured*.

Id., at 19. [R.A. 43]

B. Bernard Hoskins's Bodily Injury

On May 4, 2010, Bernard Hoskins was occupying and operating a motorcycle he owned when he was struck by a dump truck. [R.A. 4, Amended Complaint, attached as Exhibit B] Bernard's left leg was badly injured. Id. Tamra Hoskins was not occupying or operating the motorcycle at the time of the accident. Id.

C. Tamra Hoskins's Claim For UIM Benefits

Bernard and Tamra filed a tort action against John Lewis, the driver of the dump truck, in Lincoln Circuit Court. [R.A. 4] Bernard asserted claims for the injuries he sustained in the accident, while Tamra asserted her derivative loss of consortium claim against the allegedly negligent driver.² Id.

Bernard never filed a claim for UIM benefits with Kentucky Farm Bureau. However, Tamra Hoskins alleged in the amended complaint that John Lewis was underinsured and that she was entitled to UIM benefits from the Kentucky Farm Bureau automobile policy issued to Bernard and Tamra Hoskins. [R.A. 4]

² The Hoskins also filed a claim against the Department of Highways, the owner of the dump truck, in the Court of Claims.

D. The Trial Court's Grant of Summary Judgment

Kentucky Farm Bureau moved to dismiss Tamra Hoskins's amended complaint seeking UIM benefits. [R.A. 50] In its motion to dismiss, Kentucky Farm Bureau argued that its policy did not provide coverage for bodily injury sustained by an insured while occupying a motorcycle owned by any insured and therefore did not provide coverage for Tamra Hoskins's claim for UIM benefits since her loss of consortium was entirely dependent upon, and derivative of, the bodily injury sustained by Bernard Hoskins. Id. Tamra Hoskins responded to Kentucky Farm Bureau's motion and filed her own motion for summary judgment. [R.A. 64]

In an Opinion and Order entered on July 29, 2011 [R.A. 88, attached as Exhibit C], the trial court granted Kentucky Farm Bureau's motion, holding that:

The loss of consortium claim can survive on its own merits, yet it is still derived from the Plaintiff Bernard Hoskins' injury and claim. Plaintiff Bernard Hoskins was injured during the operation of a motorcycle, the specific conduct excluded by the policy. The Kentucky Supreme Court has stated that for both the bodily injury and loss of consortium claims, Plaintiffs are limited to receiving the policy limits of one injured person. That interpretation and holding by the Kentucky Supreme Court clearly affects this case and establishes the consortium claim flows from Bernard Hoskins' claim, and is in fact one when viewed with recovery. The Plaintiff, Tamara Hoskins, regardless of her status as an "insured" under the policy, cannot recover for injuries directly derivative from a claim which, in and of itself, is not recoverable. Therefore, there is no genuine issue of material fact as to whether or not the Plaintiff, Tamara Hoskins, is covered under the insurance policy for her husband's motorcycle accident. Her claim fails as a matter of law.

[R.A. 88, attached as Exhibit C, at 4-5]

E. The Court of Appeals 2-1 Opinion

A divided Court of Appeals panel rendered its Opinion on October 12, 2012. See

Exhibit D. In reversing the trial court's holding that Tamra Hoskins was not entitled to UIM benefits, the Court of Appeals recognized that Tamra Hoskins's loss of consortium claim was derivative of her husband's bodily injury. Nonetheless, the Court of Appeals held that the policy provision excluding coverage for bodily injury did not apply to Tamra Hoskins's loss of consortium claim, even though it was derivative of the bodily injury incurred by Bernard Hoskins and even though the loss of consortium claim would not exist in the absence of Bernard Hoskins's bodily injury. Thus, according to the Court of Appeals, even though the person suffering the bodily injury has no claim for UIM benefits because there is no coverage for bodily injury, the spouse asserting a derivative loss of consortium claim has a claim for UIM benefits.

The Court of Appeals panel was divided 2-1. Judge Taylor dissented, but did not file a written dissenting Opinion.

ARGUMENT

The Court of Appeals erred when it held that a policy provision excluding coverage for bodily injury sustained by an insured while occupying an owned motorcycle did not apply to a loss of consortium claim entirely derivative of the bodily injury sustained by an insured while occupying an owned motorcycle.

The Kentucky Farm Bureau UIM policy does not expressly provide coverage for loss of consortium claims. Instead, the Kentucky Farm Bureau UIM policy provides coverage for compensatory damages that an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury: (1) sustained by an insured; and (2) caused by an accident.

A loss of consortium claim potentially comes within that UIM coverage because a

spouse's loss of consortium is an element of damages arising from the injury sustained by the claimant's spouse. See Moore v. State Farm Mutual Ins. Co., 710 S.W.2d 225, 226 (Ky. 1986) (describing a loss of consortium claim as a claim of damage flowing from a spouse's bodily injury). A loss of consortium is possible only because of the injury sustained by a spouse; if there is no injury to the spouse, there is no loss of consortium claim.

But the UIM coverage provided by the Kentucky Farm Bureau policy is subject to an exclusion for bodily injury sustained by an insured while occupying or operating a motorcycle owned by an insured. Bernard Hoskins's bodily injury constituted bodily injury sustained by an insured while occupying or operating a motorcycle owned by an insured. Thus, coverage for Bernard Hoskins's bodily injury was excluded by that provision. Tamra Hoskins's loss of consortium claim also was excluded by that provision because the loss of consortium claim simply seeks to recover some elements of damage flowing from Bernard Hoskins's bodily injury.

Just as the grant of coverage includes all damages flowing from the bodily injury sustained by an insured caused by the owner or operator of an underinsured motor vehicle (meaning the bodily injury coverage applies to a derivative loss of consortium claim), the owned motorcycle exclusion removes from coverage all damages flowing from the bodily injury sustained by an insured while occupying or operating a motorcycle owned by an insured. Because the Kentucky Farm Bureau policy does not provide UIM coverage for the bodily injury sustained by Bernard Hoskins, the Kentucky Farm Bureau policy does not provide UIM coverage for the damages which flow from Bernard Hoskins's bodily injury, including Tamra Hoskins's loss of consortium claim. The Court

of Appeals decision to the contrary should be reversed.

I. A LOSS OF CONSORTIUM CLAIM IS DERIVATIVE OF THE SPOUSE'S INJURY CLAIM.

While it sometimes has been stated that a loss of consortium claim is a separate claim from the spouse's bodily injury claim, a loss of consortium claim is entirely derivative of the spouse's bodily injury. Daley v. Reed, 87 S.W.3d 247, 248-49 (Ky. 2002) ("We note at the outset that virtually every jurisdiction that has addressed the issue has concluded that a loss of consortium is not a separate 'bodily injury' but is derivative of the injured party's bodily injury claim."); Department of Education v. Blevins, 707 S.W.2d 782, 785 (Ky. 1986) ("[B]oth the personal injury and loss of consortium claim derive from the same injury."). A loss of consortium claim does not exist in the absence of injury incurred by a spouse.³ Id. If Bernard Hoskins had not incurred any injury, Tamra Hoskins would not have a loss of consortium claim.

Because of its derivative nature, a loss of consortium claim is necessarily tied to the injury which allegedly caused the loss of consortium. If there is no potential recovery for the spouse's injury, there can be no recovery for the alleged loss of consortium. See, e.g., Godbey v. University Hospital, 975 S.W.2d 104, 106 (Ky. App. 1998) ("As far as the claim of damages for loss of consortium, if no causation is established for the injuries which she alleges caused her loss, no recovery can be had. Her cause of action is derivative of her husband's."). In fact, courts have often recognized the derivative nature of a loss of consortium in a variety of circumstances in which a loss of consortium claim has been found to be unavailable:

³ While loss of consortium claims have expanded to include claims arising from bodily injury suffered by parents or a child, this case deals with the more traditionally recognized loss of consortium claim of a spouse of someone who has incurred bodily injury. Accordingly, Kentucky Farm Bureau speaks in those terms.

- No loss of consortium claim exists if the injury claim is pre-empted. Cooley v. Medtronic, Inc., 2012 U.S. Dist. LEXIS 55878 (E.D. Ky. 2012);
- No loss of consortium claim exists if the injury claim is barred by the exclusive remedy provision of the Kentucky Workers Compensation Act. Brooks v. Burkeen, 549 S.W.2d 91 (Ky. 1977);
- No loss of consortium claim exists if the defendant is immune from liability for the injury claim. McDaniel v. BSN Medical, Inc., 2010 U.S. Dist. LEXIS 121365 (W.D. Ky. 2010);
- In a product liability case, no loss of consortium claim exists if the spouse's claim is barred by limitations. Boggs v. 3M Co., 2012 U.S. Dist. LEXIS 120324, * 34-35 (E.D. Ky. 2012); and
- Any fault attributable to the spouse suffering the injury is attributed to the loss of consortium claimant. Norton v. Canadian American Tank Lines, 2009 U.S. Dist. LEXIS 28580 (W.D. Ky. 2009).

The Court of Appeals' conclusion that Tamra Hoskins's loss of consortium claim is not subject to the exclusion for bodily injury sustained by an insured while occupying or operating an owned motorcycle effectively negates the consistent recognition by this Court and other courts that a loss of consortium claim is derivative of, and dependent on, the spouse's bodily injury. While the Court of Appeals stated that it recognized that a loss of consortium claim was derivative of the spouse's claim for bodily injury, it didn't treat it as such. As a claim entirely derivative of Bernard Hoskins's bodily injury, Tamra Hoskins's loss of consortium claim is excluded from coverage by the exclusion for the bodily injury sustained by Bernard Hoskins.

On occasion, and for a specific purpose, a loss of consortium claim has been described as a separate claim from the bodily injury claim. Considered in proper context, however, those cases in no way take away from a loss of consortium claim being derivative of the spouse's bodily injury. For example, in Floyd v. Gray, 657 S.W.2d 936, 938 (Ky. 1983), the Court held that a loss of consortium claim was not subject to the 2-

year statute of limitations contained in the Motor Vehicle Reparations Act because “[l]oss of consortium is not a recoverable injury within the purview of the MVRA.” In Kotsiris v. Long, 451 S.W.2d 411, 413 (Ky. 1970), the case in which Kentucky first recognized a wife’s loss of consortium claim, the Court held that the settlement of the husband’s bodily injury claim did not foreclose the wife asserting a loss of consortium claim since the claims were for different elements of damages. In Martin v. Ohio County Hospital Corp., 295 S.W.3d 104, 109 (Ky. 2009), the Court held that a spouse’s loss of consortium claim did not end at the death of the injured spouse.

But nothing in those cases takes away from a loss of consortium claim being derivative of the spouse’s personal injury claim. As recently explained:

The plaintiffs are correct that Kentucky courts consider a loss of consortium claim independent from the injured spouse’s claim for some purposes. These holdings do not address the Kentucky approach to whether the loss of consortium claims flows from the claim of the injured spouse. The cases cited by the plaintiffs establish that the loss of consortium is a separate cause of action, not that it is wholly independent and distinct.

Norton, supra, 2009 U.S. Dist. LEXIS 28580, *4.⁴

A loss of consortium claim is not wholly independent and distinct from the spouse’s bodily injury claim; rather, it is derivative of and flows from the spouse’s bodily injury claim. Because a loss of consortium claim exists only because of the spouse’s bodily injury, it cannot be separated from and treated independently from the spouse’s bodily injury, as was done by the Court of Appeals.

⁴ Judge Burdette likewise described the consortium claim as a claim which “flows from” the injury claim. See R.A. 88, attached as Exhibit C, at 4.

II. THIS COURT HAS NOT SEPARATED A LOSS OF CONSORTIUM CLAIM FROM THE BODILY INJURY CLAIM FROM WHICH IT IS DERIVED FOR INSURANCE COVERAGE PURPOSES.

This Court recognized the derivative nature of a loss of consortium claim in Moore v. State Farm Mut. Ins. Co., 710 S.W.2d 225 (Ky. 1986). In Moore, the Court held that a liability policy's limit for "all damages arising out of bodily injury sustained by one person" applied to both the claimant's injury claim and the spouse's loss of consortium claim. Since the insurer had paid the "per person" limit to settle the injured party's injury claim, there was no coverage available for the spouse's loss of consortium claim. The Court in Moore stated:

Under policies fixing a maximum recovery for "bodily" injury to one person, . . . the limitation [is] applicable to all claims of damage flowing from such bodily injury, and that therefore it is immaterial that some part of the damages may be claimed by a person other than the one suffering the bodily injuries. In other words, all damage claims, direct and consequential, resulting from injury to one person, are subject to the limitation.

710 S.W.2d at 226, quoting from W.E. Shipley, Annotation, Construction and Application of Provision in Liability Policy Limiting the Amount of Insurer's Liability to One Person, 13 A.L.R.3d 1228, 1234 (1967).

Later in Daley v. Reed, *supra*, this Court followed Moore and held that the same rule applied to a claim for loss of parental consortium. As recognized therein:

We note at the outset that virtually every jurisdiction that has addressed the issue has concluded that loss of consortium is not a separate "bodily injury" but is derivative of the injured party's bodily injury claim; and thus, a claim for loss of parental consortium falls within the "each person" limit of the policy's coverage.

The Court in Daley recognized that prior courts describing a loss of consortium claim as being “independent and separate” did not “intend by the language to change the law applicable to insurance coverage for loss of consortium claims. . . .” Id. at 249. In fact, as explained by the Court in Daley, the “independent and separate” language was used in some cases in response to the argument that a loss of consortium claim is subsumed by a wrongful death claim; the Court in those cases was indicating that a consortium claim in which a survivor seeks damages for loss of companionship, service, etc., is separate and independent from a wrongful death action in which the decedent’s estate seeks recovery for the loss of the decedent’s power to labor and earn money. Id.

As recognized in Daley, that differentiation between a loss of consortium claim and a wrongful death claim, and the language used in those cases, was of little significance to the question of insurance coverage. On that question, the Court made three points.

First, the Court in Daley stated that “the existence of a cause of action does not mean that those damages are ispo facto recoverable from a particular policy of insurance.” Id. Just because Tamra Hoskins has a loss of consortium claim does not

⁵ Other cases in which courts have concluded that a spouse’s loss of consortium is derivative of and considered a part of the injured spouse’s bodily injury include Westfield Ins. Co. v. DeSimone, 201 Cal.App.3d 598, 247 Cal.Rptr. 291, 295 (Cal. App. 1988); Conner v. Stanford, 692 So. 2d 1146, 1148 (La. App. 1997); Auto Club Ins. Ass’n v. Lanyon, 369 N.W.2d 269, 271 (Mich. App. 1985); State Farm Mut. Auto. Ins. Co. v. Chambers, 860 S.W.2d 19, 22 (Mo. App. 1993); Smock v. Hall, 725 N.E.2d 673, 675 (Ohio App. 1999); Miller v. Public Employees Mut. Ins. Co., 795 P.2d 703, 705-706 (Wash. App. 1990); Federal Kemper Ins. Co. v. Karlet, 428 S.E.2d 60, 64 (W. Va. 1993); Richie v. American Family Mut. Ins. Co., 409 N.W.2d 146, 148 (Wis. 1987). cf. Lepic v. Iowa Mut. Ins. Co., 402 N.W.2d 758, 765 (Iowa 1987) (parents’ claim for loss of child’s consortium falls within the “each person” limit).

mean that there is insurance coverage for that element of damages associated with her spouse's bodily injury.

Second, in what the Court in Daley described as being "[o]f more significance to the issue raised in this case," the Court again observed that both the bodily injury claim and the loss of consortium claim "*derive from the same injury.*" Id. The significance, of course, is that the loss of consortium claim cannot be separated from the bodily injury claim, a fact seemingly lost on the Court of Appeals in its Opinion in this case.

Third, the Court in Daley rejected an argument that the policy's "per person" limit applicable to damages arising out of bodily injury to one person did not apply to the loss of consortium claim because the policy did not define "damages" as including loss of service. The Court correctly recognized:

If the word "damages" in Allstate's policy does not include "damages for care and loss of service," there is no coverage at all for damages for loss of consortium.

Id., at 250.

The same reasoning applies here. If the term "bodily injury" does not include loss of consortium damages, there is no coverage for Tamra Hoskins's loss of consortium claim. Conversely, if the coverage for bodily injury includes loss of consortium damages, the exclusion for bodily injury sustained while operating an owned motorcycle excludes coverage for those loss of consortium claims.

The Court of Appeals summarily dismissed the applicability of Moore and Daley because the policy language in those cases was different from the policy language contained in the Kentucky Farm Bureau policy. But the rationale expressed in those cases was much broader than simply relying on the policy language; this Court appreciated the derivative nature of a loss of consortium claim, properly saw that a loss of

consortium claim seeks recovery of damages flowing from the spouse's bodily injury, and held that the consortium claim could not be separated from the bodily injury claim for insurance coverage purposes. The same rationale calls for the Court of Appeals decision to be reversed in this case.

III. THE OWNED MOTORCYCLE EXCLUSION IS INTENDED TO EXCLUDE FROM COVERAGE ALL DAMAGES FLOWING FROM THE BODILY INJURY INCURRED BY AN INSURED WHILE OCCUPYING OR OPERATING A MOTORCYCLE OWNED BY AN INSURED.

The guiding factor of the Court's interpretation of any contract, including a policy of insurance, is to satisfy the parties' intentions:

[T]hese rules do not contravene the fact that the policy must receive a reasonable interpretation consistent with the parties' intent. Neither should a nonexistent ambiguity be utilized to resolve a policy against the company. Courts should not rewrite an insurance contract to enlarge the risk to the insurer.

Estate of Clem v. Western Heritage Ins. Co., 2005 U.S. Dist. LEXIS 46247, *16 (E.D. Ky. 2005), quoting from Ayers v. C & D General Contractors, 237 F. Supp. 2d 764, 768 n.5 (W.D. Ky. 2002). See also Meyers v. Kentucky Medical Ins. Co., 982 S.W.2d 203, 208 (Ky. App. 1997) (Rejecting interpretation of policy language which "tends to deviate from the intention of the parties and certainly serves to enlarge the risk to the insurer.").

The owned motorcycle exclusion is a common exclusion and seeks to address a factor which greatly increases an insurer's risks: an insured's operation of a motorcycle he or she owns and presumably uses on a regular basis. As this Court has recognized:

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.

Preferred Risk Mut. Ins. Co. v. Oliver, 551 S.W.2d 574, 577 (Ky. 1977). Consistent with the increased risks attached to riding a motorcycle, a policy provision excluding from UIM coverage bodily injury sustained by an insured while occupying or operating an owned motorcycle is valid and enforceable. See Baxter v. Safeco Ins. Co., 46 S.W.3d 577, 578-79 (Ky. App. 2001).

In no way can the owned motorcycle exclusion contained in the Kentucky Farm Bureau UIM policy be interpreted as intending to provide coverage for Tamra Hoskins's loss of consortium claim but not for Bernard Hoskins's bodily injury from which the loss of consortium claim is derived. Such an exclusion intends to remove from "the set of risks that [the insurer] would insure against, and that respondents would pay premiums for, all claims arising from injuries sustained by a motorcycle driver or rider." Eurick v. Pemco Ins. Co., 738 P.2d 251, 253 (Wash. 1987). For that exclusion to have its intended effect, the exclusion necessarily applies to "all claims" arising from the bodily injury excluded by that provision, including Tamra Hoskins's derivative loss of consortium claim. To hold otherwise "would render the exclusion virtually meaningless." Id.

The trial court properly gave the policy's provisions their intended effect. Recognizing that Ms. Hoskins's loss of consortium claim "flows from Bernard Hoskins's claim," the trial court correctly held that Ms. Hoskins, "regardless of her status as an 'insured' under the policy, cannot recover for injuries directly derivative from a claim which, in and of itself, is not recoverable." See Exhibit C, at 4. [R.A. 91]

Any other interpretation of that provision is not reasonable. The intent of such an

exclusion is to remove from coverage all damages flowing from the bodily injury sustained by an insured injured while occupying or operating an owned motorcycle. To interpret such a provision as excluding from coverage the claim of the person suffering the bodily injury but not that person's spouse's loss of consortium claim, a claim entirely derivative of the injured person's bodily injury, fails to give the exclusion its intended effect. In doing just that, the Court of Appeals erred.

IV. NO RULE OF POLICY INTERPRETATION CALLS FOR THE RESULT REACHED BY THE COURT OF APPEALS.

No rule of policy interpretation calls for a ruling in Ms. Hoskins's favor. Such rules exist to assist in interpreting a policy; none call for a particular result. Certainly, none call for the court to immediately decide, "the insurer must lose." See St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 226 (Ky. 1994) ("The rule of strict construction against an insurance company certainly does not mean that every doubt must be resolved against it and does not interfere with the rule that the policy must receive a reasonable interpretation consistent with the parties' object and intent or narrowly expressed in the plain meaning and/or language of the contract"); Kentucky Ass'n of Counties v. McClendon, 157 S.W.3d 626, 630 (Ky. 2005) (same rule stated).

As the Court of Appeals recognized in Swartz v. Metropolitan Property & Casualty Co., 949 S.W.2d 72 (Ky. App. 1997), "the deciding factor is not what the individual insured knew, read, or expected, but what he or she actually paid for UIM coverage and the manner in which the insurance company calculated and billed the premium." 949 S.W.2d at 75. The Hoskins did not pay for coverage for injuries incurred while occupying or operating an owned motorcycle, and the policy should not be

interpreted as providing coverage for Tamra Hoskins's loss of consortium claim, thereby creating coverage which was never paid for.

The two-judge Court of Appeals majority focused on the motorcycle exclusion not specifically stating that it applied to derivative claims. See Exhibit D, at 5. But the loss of consortium claim "is but one of several arising from injuries sustained by a person who was, at the time, within the scope of a valid exception to underinsured motorist coverage" Eddy v. Fidelity and Guaranty Insurance Underwriters, Inc., 776 P.2d 966, 970 (Wash. 1989). As with the loss of consortium that flows from an injured party's bodily injury, the exclusion does not specifically state that it applies to a claim for pain and suffering, a claim for impairment of the ability to labor or earn money, or for any other specific type of damage flowing from the bodily injury sustained by an insured. Yet no one is arguing that the exclusion does not apply to those other types of damages flowing from an insured's bodily injury because they are not specifically mentioned in the exclusion.

Of course, the focus should not be on what might have been written, but rather on what actually was written. Here, the exclusion states that the policy does not provide UIM coverage for bodily injury sustained by an insured while occupying or operating a motorcycle owned by an insured. The exclusion does not apply to particular persons, but to the bodily injury sustained by any insured. As recognized in Eurick v. Pemco Ins. Co., supra, it removes from coverage "all claims arising from injuries sustained by a motorcycle driver or rider." 738 P.2d at 253. Because a spouse's loss of consortium claim flows from the bodily injury excluded from coverage, and thus is a claim arising from the bodily injury excluded from coverage, the loss of consortium claim likewise is

excluded from coverage.

An insured certainly has a right to all the coverage available under the policy. But no rule of construction requires a policy be interpreted to provide coverage not purchased and not intended to be provided. As that is the result reached by the Court of Appeals, it should be reversed.

V. OTHER JURISDICTIONS AGREE THAT AN EXCLUSION APPLICABLE TO A BODILY INJURY CLAIM APPLIES TO THE DERIVATIVE LOSS OF CONSORTIUM CLAIM.

In Eddy v. Fidelity and Guaranty Insurance Underwriters, Inc., *supra*, the Washington Supreme Court was confronted with an exclusion for “bodily injury sustained by any person . . . [w]hile operating, or occupying, any motor vehicle owned by or available for the regular use of you or any family member which is not insured for liability coverage under this policy.” In concluding that the exclusion applied to a spouse’s loss of consortium claim even though the spouse was not operating or occupying the vehicle at the time of the accident, the Washington Supreme Court held:

We conclude that a reasonable person reading USF&G’s policy would believe that the “other vehicle” exclusion applied to Darcy Eddy’s claim.

Amicus’ characterization of Mrs. Eddy’s claims as independent of Mr. Eddy’s claims may be an accurate one. However, it does not alter the fact that her claim is but one of several arising from injuries sustained by a person who was, at the time, within the scope of a valid exception to underinsured motorist coverage, as in Eurick. It would afford the insurer only an illusory protection from risk if the exclusion did not reach all claims arising from injuries sustained by one “operating or occupying a motor vehicle owned by or available for the regular use by” the named insured when that vehicle was not insured under the liability coverage of the same policy.

At the time of his injuries, Mr. Eddy was subject to the “other vehicle” exclusion. The fact that Mrs. Eddy was

not occupying the “other vehicle” at the time of Mr. Eddy’s injury is not enough to render the exclusion inapplicable to her claims. The holding in Eurick controls and defeats the loss-of-consortium claims of Mrs. Darcy Eddy as a matter of law. There is no coverage under the USF&G policy. Summary judgment in favor of the insurer, USF&G, is proper.

776 P.2d at 970.

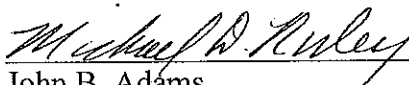
The Washington Supreme Court earlier had reached the same conclusion concerning the application of a motorcycle exclusion. In Eurick v. Pemco Ins. Co., 738 P.2d 251 (Wash. 1987), the exclusion applied to “bodily injury to an insured while operating, occupying or using a motorcycle.” The Court in Eurick held that the exclusion applied to the derivative loss of consortium claim of the parents of a minor child killed in a motorcycle accident because “the clear intent of the contract was to exclude from the set of risks that Pemco would insure against, and that respondents would pay premiums for, all claims arising from injuries sustained by a motorcycle driver or rider.” 738 P.2d at 253. See also Hollenback v. Farm Bureau Mutual Ins. Co., No. 297900, 2011 Mich. App. LEXIS 1223 *10-12 n.3 (Mich. App. 2011) (“We reject plaintiffs’ argument and conclude that, with regard to automobile liability coverage, a loss of consortium claim is derivative of a claim for bodily injury and is subject to the same exclusions and limitations as the bodily injury claim.”).

These cases are directly on point and persuasively explain why the Court of Appeals erred. The Washington Supreme Court properly considered the nature of a loss of consortium claim and the intent of the exclusion at issue, and held that the exclusion applied to the loss of consortium claim. This Court should do the same.

CONCLUSION

The Kentucky Farm Bureau UIM policy does not provide coverage for the bodily injury sustained by Bernard Hoskins. Tamra Hoskins's loss of consortium claim is a claim for an element of damages flowing from the bodily injury sustained by Bernard Hoskins and the policy exclusion applicable to Bernard Hoskins's bodily injury claim also applies to Tamra Hoskins's derivative loss of consortium claim. Because the Court of Appeals erred in holding that the Kentucky Farm Bureau policy provided coverage for Tamra Hoskins's loss of consortium claim, 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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APPENDIX

- A – Copy of Kentucky Farm Bureau Policy
- B – Amended Complaint
- C – Lincoln Circuit Court Opinion and Order
- D – Court of Appeals Opinion