COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2011-SC-000206-D

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY — APPELLANT

V. ON APPEAL FROM KENTUCKY COURT OF APPEALS
NO. 2010-CA-000603-MR

KAREN HODGKISS-WARRICK — APPELLEE

BRIEF FOR APPELLEE, KAREN HODGKISS-WARRICK

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief for Appellee, Karen Hodgkiss-Warrick, has been served by mailing a true and correct copy thereof by U.S. mail, postage prepaid, first class, on this the 2nd day of April, 2012, 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, Esq., Clayton O. Oswald, Esq.,** Taylor Keller Dunaway & Tooms PLLC, 1306 West Fifth Street, London, Kentucky 40741; and **Douglas L. Hoots, Esq., Timothy Davis, Esq.,** Landrum & Shouse LLP, 106 West Vine Street, Suite 800, Lexington, Kentucky 40507. I further certify that the record on appeal was not withdrawn by the Appellee.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee agrees with the Appellant that oral argument would be beneficial because of the technical and confusing nature of insurance "exclusion" clauses.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee submits that the following factual and procedural summary is necessary in addition to and in response to Appellant's Statement of the Case.

a. Facts

- Around September 1, 2007, Karen-Hodgkiss Warrick separated from her husband, John Warrick, and temporarily moved to 135 Hereford Drive, Oakdale, Pennsylvania. Karen and her husband had been insuring their vehicles with State Farm for some 25 years. Both policies had underinsured motorist ("UIM") coverage.
- Later in September, 2007, Karen's 23-year-old daughter, Heather Hodgkiss, also moved to 135 Hereford Drive, Oakdale, Pennsylvania, which has been described as a "duplex-type building," with separate mailing addresses designated by "A" & "B". Heather had been fully emancipated for 4 years or more.
- When Heather moved into Hereford Drive, she had **already leased** and **insured** the accident vehicle, a Ford Fusion. Karen did not co-sign on the lease and had no involvement in or knowledge of Heather's purchase of the liability insurance through GEICO. Heather had her own job and paid her own car insurance premiums.

- The accident occurred in Rockcastle County, Kentucky on May 17, 2008 when Karen, Heather and two friends, Pamela and Heather Reynolds, traveled to Burnside, Kentucky to buy a special-breed puppy for Karen on her birthday.
- The accident occurred when Heather made a left hand turn across traffic on U.S. 25 in Rockcastle County and all four occupants of the Ford Fusion were injured with Karen being the most severely injured. The collision was very severe, totaling both vehicles. The driver of the oncoming vehicle was also severely injured.
- Karen has a permanent, crippling injury to her right shoulder. At the time summary judgment was entered against Karen in March, 2010, her medical expenses were at least $75,659.19. Her known bills and expenses from Kentucky medical providers totaled $17,159.96. Karen underwent an open reduction, internal fixation surgery in Pennsylvania, and nearly a year after the accident, her surgeon described her as permanently disabled and as having difficulty with activities of daily living. After being off work for nearly a year, Karen tried to return to her job at Costco, but lost her job and her medical insurance.
- Heather Hodgkiss had minimum liability limits of $25,000 per person, $50,000 per accident with GEICO.

Because there were four injury claims and a spousal consortium claim against Heather's policy, Karen only received a gross settlement of $16,000 and a net settlement of $7,142.10.

- Before the accident, Karen did not know the amount of Heather's insurance coverage on the Ford Fusion. They only "lived together" in this temporary arrangement for about one year. There is no evidence that Karen and Heather manipulated their insurance coverages on their vehicles.
- Heather's Ford Fusion involved in the accident was not available for Karen's regular use. Karen didn't have a key or access to a key and never drove Heather's Fusion on any occasion. In fact, she had only been a passenger in the Fusion on one other brief occasion before the trip to Kentucky.

b. Procedural Events

At the trial court, State Farm argued that Karen was not entitled to benefits under her own underinsured motorist coverage because of an exclusion in her policy which State Farm has referred to as a "regular use" exclusion, which provides:

> **Underinsured Motor Vehicle** does not include a land motor vehicle:
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> **Owned by**, rented to, or furnished or available for the regular use of you or any **resident relative**.

In its Statement of the Case on page 2 of its brief, State Farm states that the exclusion bars Karen's UIM claim under the present facts because the **underinsured motor vehicle** was **owned by** Karen's daughter, Heather Hodgkiss, a **resident relative**. In other words, it is undisputed that State Farm is not relying upon the "regular use" language in the exclusion, but rather, State Farm denied Karen's underinsured motorist claim because of the family/household relationship with her daughter.

In any event, the trial court agreed with State Farm and entered summary judgment on Karen Hodgkiss-Warrick's UIM claim. The Court of Appeals reversed essentially finding that Kentucky courts do not enforce "family" or "household" exclusions, including those in out-of-state automobile insurance policies.

ARGUMENT

I. Kentucky courts do not enforce provisions from contracts entered into out-of-state if those provisions are against the public policy of this Commonwealth.

There is no disagreement between the Karen Hodgkiss-Warrick and Appellant Farm regarding the principle stated above. In its motion for summary judgment, State Farm acknowledged: "Of course, even if an insurance policy exclusion is valid under another state's law, the policy will not be enforced if it violates Kentucky's public policy." (State Farm Memorandum, p. 8, RA pp. 542-694).

In fact, as recently as 2004, this Court refused to apply Indiana law to an Indiana contract of insurance where all of the parties were from Indiana, but the motor vehicle accident occurred in Kentucky. *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky. 2004). In *Marley,* this Court described the "choice of law" issue as follows:

> The parties stipulated that under Indiana law the household exclusion clauses in both policies are valid and enforceable. The Marleys were all residents of Indiana. The policies were issued in Indiana and the vehicle was primarily garaged in Indiana. The only contact the Marley family had with Kentucky is that the accident occurred while driving through the Commonwealth on their way to Florida. **It could be said that under traditional choice of law principles, the law of Indiana is applicable. However, Kentucky courts have traditionally refused to apply the law of another state if that state's law violates a public policy as declared by the Kentucky legislature or courts.** *See R.S. Barbee & Co. v. Bevins, Hopkins & Co.*, 176 Ky. 113, 195 S.W. 154 (1917). [Bolding added for emphasis].

Marley at 35.

The Marley family was from Indiana. The accident vehicle was garaged in Indiana and the insurance policies were issued in Indiana. Tragically, Larry Marley fell asleep while driving his family through Kentucky resulting in the death of one child and serious injuries to other family members, including paraplegia of a 16-year-old daughter. *Id.* at 34. At issue was a $1,000,000 umbrella policy issued in Indiana. *Id.* There was no

dispute that if Indiana law was applied, the umbrella policy's household[1] exclusion was valid and enforceable, and the Marleys would get nothing under the policy.

This Court articulated the "critical issue" as follows:

> The critical issue is whether a household exclusion in the personal liability umbrella policy as it applies to automobile liability coverage violates Kentucky public policy. In *Lewis v. West American Ins. Co.*, Ky. 927 S.W.2d 829 (1996), household exclusions in automobile liability policies were held to be unenforceable regardless of the policy limits because they violate Kentucky public policy.

Id. at 34.

This Court held that Kentucky's public policy of ensuring that motor vehicle accident victims are "fully compensated" made the Indiana policy's exclusion void and unenforceable. *Id.* at 36.

> **It is clear that the public policy of Kentucky is to ensure that victims of motor vehicle accidents on Kentucky highways are fully compensated**. The household exclusion in the umbrella policy as it applies to automobile liability coverage violates that public policy and is void and unenforceable. [Bold print added].

Id. at 36.

Again, all of the accident victims in *Marley* were from Indiana. So, in the above quote, when the Kentucky Supreme Court recognizes the "public

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[1] "Family" or "household" exclusions "limit the insurance coverage available for a person's injury solely on the basis of the injured party's status as a member of the policyholder's family." *Lewis v. West American Ins. Co.*, 927 S.W.2d 829, 830 (Ky. 1996). For a discussion and history of family/household and other similar exclusions and immunities which have been discarded in Kentucky and most other states, *see Lewis* at pages 830-833.

policy" of ensuring that victims of motor vehicle accidents on Kentucky highways are fully compensated, the Court is including accident victims from out-of-state.

II. Kentucky courts have rejected "family" or "household" exclusions.

In a series of cases over the last three decades, this Court has repeatedly invalidated motor vehicle insurance clauses which void coverage in accidents involving family members. *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865 (Ky. 1981); *Lewis v. West American Ins. Co.*, 927 S.W.2d 829 (Ky. 1996); *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky. 2004); *Bentley v. Bentley*, 172 S.W.3d 375 (Ky. 2005).

In Kentucky's leading case on these policy exclusions, *Lewis v. West American*, the Kentucky Supreme Court stated:

> We find that such an exclusion to insurance coverage is deleterious to our community interests and **is repugnant to the public policy of our Commonwealth.** Accordingly, **we hold that family exclusions to liability insurance policies are invalid and unenforceable.** [Bold print added].
>
> * * *
>
> In holding the family exclusion provision invalid, we draw upon the experiences learned from, and the public policy articulated in, our past decisions rejecting the possibility of collusion by a few as a valid reason to deny benefits to an entire innocent class.

Lewis at 830.

In *Lewis*, the Kentucky Supreme Court further recognized that family exclusion clauses result in "socially destructive inequities." *Id.* at 833. "Typical family relations require family members to ride together on their way to work, church, school, social functions or family outings." *Id.* at 833 quoting *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wash.2d 203, 643 P.2d 441, 444 (1982).

The Court then illustrated the "inequities" of family exclusion clauses with three examples:

> First, every day in our Commonwealth parents participate in car pools and drive their children and their neighbor's children to school, social, and recreational events. However, if the parents' negligence results in an automobile collision equally and seriously injuring all passengers, only the neighbor's children can be fully compensated. The policy holders' children, despite the severity of their injuries are limited to the minimum mandated insurance coverage.
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> Second, when two married couples drive to dinner in the driver's car and all are injured by the driver's negligence, the driver's friends are protected by the full amount of insurance coverage but not the driver's spouse. If one of the friend's operates the automobile, the friend's spouse is provided full insurance protection, but not the owner or owner's spouse.
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> Third, it is commonplace for two neighborhood families to drive to a common destination with the children from both families intermingled in both cars. Unfortunately, if the cars negligently collide, only those children who happen to be riding with their neighbor can be fully compensated.

Id. at 833.

The examples from *Lewis* poignantly illustrate the unfairness of excluding insurance coverage based upon family relationships. Medical bills go unpaid. Lost earnings are lost forever. Families' financial health were often destroyed until this Court stepped in and held that "family" and "household" exclusions are inequitable and against the public policy of this state.

III. The exclusion in the present case is overbroad and operates as a "family/household" exclusion to deny benefits to accident victims where there is merely a family/household relationship.

Insurance companies have long argued that they need "family" exclusions to "prevent collusive suits." *Lewis* at 834 *quoting Chaffin v. Kentucky Farm Bureau Ins. Co.*, 789 S.W.2d 754, 756 (Ky. 1990). Rejecting the insurance industry rationale, this Court described the family exclusion as "overbroad," because it "prohibited claims 'in a multitude of circumstances in which collusion is not a reasonable possibility.'" *Lewis* at 834 *quoting* from *Chaffin* at 757. The *Lewis* Court further stated:

> The over inclusiveness of the family exclusion clause is socially destructive and corrosive to our citizenry's confidence in our system of justice. **The family exclusion operates to bar all valid claims of injured family members in order to preclude the possibility of collusion.** We cannot lock our Commonwealth's courthouse doors to the many who are injured and maimed because of a suspicion that a few members of this class might advance an exaggerated claim. [Bold print added].

Lewis at 834.

The present insurance policy exclusion (which State Farm has called a "regular use"[2] exclusion) is also "overbroad" and is being used to deny coverage to Karen Hodgkiss-Warrick for one reason – because Karen was temporarily living with her daughter, Heather, the "owner"[3] of the underinsured accident vehicle.

State Farm's "regular use" exclusion is overbroad for two reasons. First, the language excludes UIM coverage not only in "regular use" situations[4] where vehicles "are furnished or available for the regular use of the insured or a family member," but also in classic "family" or "household" situations like the present case.

The accident vehicle, Heather Hodgkiss' Ford Fusion, wasn't "furnished or available for the regular use" of Heather. She was the owner of the vehicle. This Court just recently rejected the suggestion that a vehicle that someone **owns** could be considered "furnished" to the owner in an effort to make the regular use exclusion apply. *Williams v. State Farm Mut. Auto. Ins. Co.*, 255 S.W.3d 913, 914 (Ky. 2008).

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[2] *See* State Farm's Court of Appeals' brief at page 12: "The UIM exclusion in the case at bar is known as a 'regular use' exclusion, inasmuch as it excludes UIM coverage for vehicles that are furnished or available for the regular use of the insured or a family member."

[3] Heather Hodgkiss actually had leased the underinsured accident vehicle, but "**Owned by**" is defined in Karen's State Farm policy as including vehicles someone has leased, as well as vehicles that are "registered to" someone. So, for the purposes of analyzing Karen's UIM endorsement, the underinsured accident vehicle was "owned by" her daughter, Heather Hodgkiss.

[4] *See Murphy v. Kentucky Farm Bureau Mut. Ins.*, 116 S.W.3d 500 (Ky. App. 2002) for a factual situation that actually involves "regular use." The *Murphy* case is discussed in detail at page 10 *infra*.

Moreover, the Ford Fusion was clearly not "furnished or available for the regular use of" Karen Hodgkiss-Warrick. Karen had her own vehicle. Karen didn't co-sign Heather's lease of the Fusion. Karen had no key to the car and never, ever drove it. In fact, Karen had only ridden in the car on one other brief occasion before the trip to Kentucky.

In other words, State Farm's exclusion of Karen's underinsured motorist coverage has nothing to do with the "regular use" language in the policy. It's easy to strike the exclusion's language that State Farm is **not** relying upon in this case which leaves the classic household exclusion that Kentucky and so many other states outlawed many years ago:

> **Underinsured Motor Vehicle** does not include a land motor vehicle:
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> **Owned by**, rented to, {~~or furnished or available for the regular use of you or~~} any **resident relative**. [Bold print is original from the State Farm policy; the exclusion appears at page 23 of the 43-page policy booklet. RA pp. 542-694. Copy attached.].

State Farm is refusing Karen's UIM claim because the **underinsured vehicle** was **owned by** or rented to a **resident relative** of Karen's, namely her daughter, Heather.

Even State Farm doesn't try to pretend that the "furnished" or "regular use" language applies to our facts. At page 2 of its Brief to this Court, State Farm sets out the exclusionary language exactly as we have above and then explains how the exclusion is applied to the present facts: "There are no material issues of fact because Ms. Hodgkiss-Warrick resided with her daughter at the time of the accident. Her daughter owned the vehicle involved in the accident." This is a classic situation involving a

motor vehicle insurance coverage denial because two family members resided in the same household.

Secondly, State Farm's "regular use" exclusion is also overbroad because it excludes claims where the claimant had no **control** over the amount of liability insurance purchased for the underinsured vehicle.

In its Court of Appeals brief at pages 6-7, State Farm suggested that the exclusion **"has often been upheld based on the argument that a person cannot underinsure his own vehicle – i.e., that since liability insurance is much more expensive than UIM coverage, a person cannot purchase the minimum liability limits and then purchase a great amount of inexpensive UIM coverage, which basically converts inexpensive UIM coverage into expensive liability coverage. This rationale presupposes that the claimant has some say in the amount of liability insurance to be purchased."** (State Farm's Court of Appeals Brief, pp. 6-7; bold print added).

Throughout this litigation State Farm has relied upon *Murphy v. Kentucky Farm Bureau Mut. Ins.*, 116 S.W.3d 500 (Ky. App. 2002) as its main authority that the regular use exclusion is valid and enforceable in Kentucky. The linchpin of the Court of Appeals' decision in *Murphy* was that the **claimant** had "control over how much liability coverage" the accident vehicle had. *Id.* at 503.

Murphy v. Kentucky Farm Bureau presents a typical "regular use" situation. Austin Goodpaster was 14 years old when he was killed in a motor vehicle accident. At the time, Austin was living in a household which included his mother, Tina Murphy, his stepfather, Brian Murphy, and his

sister, Shannon Goodpaster. Tragically, Austin was killed in a single-car accident due to the negligence of his brother, Dale Goodpaster. *Murphy* at 501.

The accident vehicle was owned by Austin's mother, Tina Murphy, and was insured with Kentucky Farm Bureau. The vehicle's liability coverage of $25,000 was paid to Austin Goodpaster's estate. Both Brian Murphy (Austin's stepfather) and Shannon Goodpaster (Austin's sister) owned vehicles with underinsured motorist coverage through Kentucky Farm Bureau. The UIM coverage endorsements included "regular use" exclusionary language almost identical to State Farm's in the present case. *Id.* at 501.

The at-fault driver, Dale Goodpaster, did not own the accident vehicle, but it was **available for his regular use**. In fact, there was no dispute that the vehicle "was available for the regular use by family members." *Id.* Still, in holding that Farm Bureau's regular use exclusion was valid to bar the claims of Austin's estate, the Court of Appeals noted the importance of the fact that the **claimant**, i.e., plaintiff/appellant, Tina Murphy, had **control** over the amount of liability insurance on the accident vehicle in which her son was killed. *Id.*at 503. The *Murphy* court stated at page 503:

> **The justification for the regular-use exclusion is not the possibility of collision, but rather the fact that the insured or another 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 this accident, his mother did have such control because she owned and insured the car in which he was riding. **Unlike the parent in *Lewis*, Tina**

Murphy had the option of purchasing greater liability coverage for her child. [Bold print added].

The *Murphy* case illustrates the insurance industry rationale articulated by State Farm in its Court of Appeals brief at pages 6-7, i.e., that insurance-savvy families with multiple drivers and multiple vehicles will purchase low liability limits and lots of UIM coverage to protect family members in a catastrophic accident and that's unfair to insurance companies because underinsured motorist coverage is relatively less expensive than liability coverage.

The insurance industry argument is dubious at best. Very few people are that knowledgeable about how motor vehicle insurance works. People buy what their insurance agent tells them they need considering what they can afford and the assets they are trying to protect. The fact is, insurance companies have never liked paying claims caused by the negligence of the claimant's family member and they've found a new way to deny many of those claims with the "regular use" exclusion.

However, regardless of whether insurance companies really need protection from insureds manipulating their coverages as suggested by State Farm, no manipulation occurred in the present case. Karen Hodgkiss-Warrick had no **control** over how much liability insurance her fully-emancipated 23-year-old daughter carried on her car at the time of the accident. Heather's car was leased and her liability insurance with GEICO was purchased well before Heather and Karen came to temporarily share the same mailing address. What Karen could **control** (with her agent's help) was the purchase of underinsured motorist coverage on her own

automobile policy. Still, State Farm wants to deny her claim, not because she had any say in Heather's coverage, but because she and Heather moved in together.

The caselaw upholding the "regular use" exclusion clearly relies upon the "control" issue. Even State Farm has admitted that: "This rationale presupposes that the **claimant has some say** in the amount of liability insurance to be purchased." (State Farm's Court of Appeals Brief, p. 7. [Bold print added]. Yet, State Farm's exclusion is devoid of any language which would make **control** over the liability limits part of the analysis of whether the exclusion applies. As such, State Farm's so-called "regular use" exclusion is overbroad; it often operates as a household exclusion and cannot be enforced in Kentucky as written.

IV. The fact that State Farm's exclusionary language appears in Karen Hodgkiss-Warrick's own underinsured motorist endorsement, rather than in the liability section of her daughter's GEICO policy is a "distinction without a difference."

State Farm goes to great lengths to distinguish the present case from this Court's 2004 decision in *State Farm v. Marley*, *supra*, on the basis that the present case involves underinsured motorist coverage. *Marley* involved a $1,000,000 umbrella policy.

Umbrella policies provide additional liability coverage for an insured's negligence in addition to the liability coverage the insured has on underlying policies they may have on their home, automobiles, etc. Umbrella policies are optional and are often purchased by people with

substantial assets to protect. Umbrella policies are not governed by Kentucky's Motor Vehicle Reparations Act, and in fact, you don't even have to own a motor vehicle in order to purchase and enjoy the benefit of an umbrella policy.

Underinsured motorist coverage is also an optional coverage, but UIM is specifically governed by Kentucky's Motor Vehicle Reparations Act in KRS 304.39-320. Generally speaking, people buy underinsured motorist coverage to protect themselves and their family members in the case of injuries caused by the driver of a vehicle that is insured, but the available liability coverage is insufficient.

Twenty-three year-old Heather Hodgkiss had minimum liability limits of $25,000 per person, $50,000 per accident on her Ford Fusion. Heather made the simple, but serious mistake of turning left in front of oncoming traffic and caused very serious injuries and damages to two of her vehicle's occupants and the driver of the oncoming vehicle. Under any definition, Heather was "underinsured" for the consequences of this motor vehicle accident.

Ironically, Natalie Bussell (the driver of the oncoming vehicle) and Heather Reynolds (a rear-seat passenger in Heather's Fusion) both had underinsured coverage with State Farm which State Farm paid without a fight because Bussell and Reynolds weren't related to and living with Heather Hodgkiss.

Karen Hodgkiss-Warrick had the foresight to pay an extra premium to State Farm for her UIM coverage – or, at least, her State Farm agent had the foresight to sell it to her. In the *Marley* case, Larry Marley had the

foresight and wherewithal to purchase a million dollar umbrella policy to provide liability coverage over and above his van's coverage of $100,000 per person, $300,000 per accident. *Marley* at 34. In deciding the *Marley* case, this Court invalidated the Indiana umbrella policy's household exclusion to further Kentucky's stated public policy of ensuring that victims of motor vehicle accidents on Kentucky highways are fully compensated. *Id.* at 36.

In comparison to the optional umbrella policy in *Marley*, Kentucky's public policy interest in voiding the exclusionary language in the present case is more compelling, not less. In deciding *Marley*, this Court distinguished "farm-owners" policies (where household exclusions are still allowed) which have no relation to the Motor Vehicle Reparations Act from "automobile" policies where the exclusions have been outlawed for years.[5] The Court stated:

> **The practical issue here is whether the umbrella policy is an automobile policy as required by *Thompson*.** Clearly, *Thompson* is different from this case because it involved a farm tractor covered under a farm policy. Both by statute and case law, a farm tractor is not an automobile within the meaning of the MVRA. *See* KRS 187.290(4) and *Kentucky Farm Bureau Mut. Ins. Co. v. Vanover*, Ky., 506 S.W.2d 517 (1974). The insurance policy in this case covers automobile accidents. The mere fact that the policy is labeled as an umbrella policy and written separately from the underlying automobile policy, or that it covers claims other than automobile accidents, does not validate an exclusion provision of this nature.
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> * * *

[5] *See Marley* at page 35, discussing *Kentucky Farm Bureau Mut. Ins. Co. v. Thompson*, 1 S.W.3d 475 (Ky. 1999).

> An umbrella policy was purchased to serve as an extension of the automobile policy limits and **any distinction between the automobile liability and an umbrella liability policy is a distinction without a difference**. [Bold print added].

Marley at 35-36.

The point is, if an out-of-state umbrella policy is enough of an "automobile" policy to enjoy the public policy protections emanating from our Motor Vehicle Reparations Act, it's hard to understand how Karen's UIM coverage which is, in fact, part of her own automobile insurance policy would not be given the same treatment by this Court barely eight years later.

V. It's an open question whether a Pennsylvania court would have enforced this exclusion under these facts.

At page 6 of its Brief to this Court, State Farm claims that the "same basic policy provision has recently been enforced in Pennsylvania under the same basic fact scenario." State Farm then cites to *Burstein v. Prudential Property and Casualty Insurance Co.*, 809 A.2d 204, 205 (Pa. 2002). *Burstein* is the only Pennsylvania case cited in State Farm's Brief to this Court. In reality, Prudential's exclusionary language in *Burstein* was substantially different from State Farm's here, and more importantly, the application of the Prudential exclusion to the facts in *Burstein* doesn't turn on a family relationship.

In *Burstein v. Prudential*, Mr. and Mrs. Burstein's injuries were caused by an underinsured motorcyclist to whom they were not related. At

the time of the accident, the Bursteins were occupying a vehicle owned by Mrs. Burstein's employer which was furnished to Mrs. Burstein "as a benefit of employment." *Id.* at 205. The Bursteins' UIM claims were **not** rejected because they were married to each other or because they were related to the tortfeasor or anyone else in the case. The Bursteins' UIM claims were excluded because they were occupying a "regularly used, non-owned vehicle."[6] *Id.* at 207. *Burstein* does not involve an insurance denial based upon a family relationship.

State Farm admitted in its Court of Appeals Brief, at page 6, that **"Pennsylvania law, like Kentucky law, has previously held that family car exclusions violate public policy."** [Bold print added]. It's an open question what the Pennsylvania courts would do with this case. Since "family" exclusions violate Pennsylvania's public policy, the Pennsylvania courts would have to perform the same analysis that ours have. Certainly, *Burstein v. Prudential* doesn't resolve the issue.

VI. The other "regular use" cases cited by State Farm also turn on whether the claimant had control over the liability coverage on the underinsured vehicle.

Throughout its Brief, State Farm claims that Kentucky courts have repeatedly upheld its "regular use" or similar exclusions. Upon closer examination, only the *Burton v. Kentucky Farm Bureau* case and *Motorists Mutual v. Glass* case have facts and insurance policy language similar enough to the present case to have any precedential value. Still, *Burton*

[6] The State Farm exclusion in this case doesn't even mention "non-owned vehicles."

and *Glass*, like the *Murphy* case, turn on whether the UIM insured had **control** over the amount of liability coverage on the accident vehicle. None of the following cases change or undermine the **control** requirement:

- *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky. App. 2010) – The case involves a wife versus husband accident where the wife tried to collect the liability limits from the accident vehicle (their own SUV) and UIM coverage on another vehicle registered to her husband. The opinion expressly relies on and quotes *Murphy* regarding the effect of "control" over the liability limits.
- *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1999) – Jeffrey Glass was injured while riding as a passenger in his own pickup truck and then tried to make UIM claims against his parents' policies with Motorists Mutual. Like *Murphy* and *Burton*, Jeffrey Glass obviously had **control** over how much liability coverage he carried on his own truck.
- *Edwards v. Carlisle*, 179 S.W.3d 257 (Ky. App. 2004) – A daughter was injured in a Ford Mustang she regularly used, but which her parents owned and insured through Shelter. The accident and the daughter's injuries were caused by a friend who apparently grabbed the steering wheel in an act of horseplay. The Court of Appeals upheld the denial of UIM coverage on the parents' Shelter policy because: "The [UIM] statute clearly contemplates that the underinsured motorist 'will be operating a different vehicle than the vehicle providing UIM coverage for the injured claimant.'" *Id.* at 260. Thus, the case obviously presents a different issue than the present case. Karen Hodgkiss-

Warrick claimed UIM benefits from coverage on her own vehicle and her husband's vehicle, not the accident vehicle. Moreover, the parents in *Edwards* clearly **controlled** the amount of liability coverage on the accident vehicle as the parents purchased the liability policy with Shelter and it was undisputed that the Mustang was "regularly used" by the daughter.

- *Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577 (Ky. App. 2001) – The opinion deals with a motorcycle exclusion in an auto policy and has no precedential value to this case. "It seems manifestly unfair to now require an insurance carrier that did not write the policy for the motorcycle, has not written policies for motorcycles in Kentucky for twenty years, and with no apparent knowledge that its insured – Bruce's parents – had a family member living with them who did own a motorcycle to now be held accountable for damages it in no way could have foreseen." *Id.* at 579.
- *Snow v. West American Ins. Co.,* 161 S.W.3d 338 (Ky. App. 2004) – The opinion does not involve an underinsured motorist claim, but rather a situation where a son caused a fatal accident in a vehicle he owned, but he had failed to insure. The son was living with his father at the time and there was an attempt to make the father's insurance carrier provide "liability" coverage (not UIM coverage) for an accident involving a motor vehicle it did not insure and never had insured. Like *Baxter*, the facts are so far afield from the present case that the opinion has no precedential value.

CONCLUSION

The Court will recall that Karen's husband, John Warrick, also had a vehicle insured with State Farm that had underinsured motorist coverage. As acknowledged in State Farm's memorandum in support of its motion for summary judgment: "Clearly, Karen Hodgkiss-Warrick is a relative of John Warrick, since the two are married, though separated." (State Farm's memorandum, p. 11, RA pp. 542-694). However, State Farm argued that Karen can't claim UIM benefits under her husband's policy because she was not residing with him at the time of the accident even if their separation was temporary. (State Farm's memorandum, pp. 10-11, RA pp. 542-694).

So, to sum up State Farm's position, Karen can't recover UIM benefits under her husband's policy because she **was not** residing with him at the time of the accident. On the other hand, Karen can't recover UIM benefits on her own policy because she **was** residing with her daughter when she was injured in her daughter's car. It's a wonder that anyone ever collects UIM benefits from State Farm.

As this Appellee pointed out in our response to State Farm's motion for discretionary review, if there are no boundaries and insurance companies are allowed to write insurance contracts as they please, it won't be long before they'll include an exclusion which says they don't have to honor UIM claims involving red cars in accidents on Tuesdays. After all, UIM coverage is optional and the parties are free to contract as they want.

But this Court has said that there are boundaries to what the law and public policy of this state will allow. This Court held long ago that the family/household exclusion crosses the boundary of what is acceptable in

automobile insurance policies and this Court has defended that boundary repeatedly. The parties agree that "family" exclusions also violate the public policy of Pennsylvania, so the only real question is whether State Farm's so-called "regular use" exclusion operates as a "family" or "household" exclusion under the facts of this case.

State Farm gave us the answer to this question on page 2 of its Brief. Appellant said that there are no material issues of fact that the exclusion applies because the Appellee resided with her daughter at the time of the accident and her daughter owned the underinsured vehicle involved in the accident.

State Farm's admission illustrates how unfair family/household exclusions are and why virtually every state has outlawed them. All you have to do is change one fact. If Heather had moved in across the street, State Farm would have no argument – at least under this exclusion. Or, if the four friends had taken Pamela Reynolds' or Heather Reynolds' vehicle to Kentucky, then Karen would have collected on her UIM policy long ago.

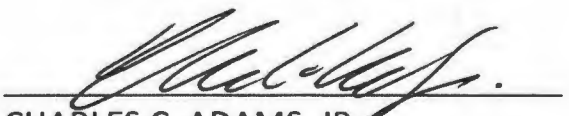
However, insurers figured out a long time ago that family members spend a large percentage of their time traveling in each other's vehicles. Insurers know they can avoid a tremendous number of claims with the old family/household exclusions and their new-fangled variations.

It's unfortunate that this Court must once again step in and invalidate yet another exclusion which denies claims based upon family relationships, and the sad thing is, it probably won't be the last time.

WHEREFORE, Appellee respectfully requests that this Court sustain the Court of Appeals' decision and order that judgment be entered in favor

of Karen Hodgkiss-Warrick with pre-judgment interest at the statutory rate of 8% from the time of the filing of her suit for UIM benefits against State Farm and post-judgment interest at the rate of 12% from the date of this Court's decision.

Respectfully submitted,



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