COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2014-SC-000015-MR

TOWER INSURANCE COMPANY OF NEW YORK — APPELLANT

V.

BRENT HORN, ET AL. — APPELLEES

ON REVIEW FROM
COURT OF APPEALS OF KENTUCKY
CASE NOS. 2012-CA-001693 & 2012-CA-001835

ON APPEAL FROM
MARTIN CIRCUIT COURT
HON. JUDGE JOHN DAVID PRESTON
CIVIL ACTION NO. 11-CI-00270

BRIEF FOR APPELLANT, TOWER INSURANCE COMPANY OF NEW YORK

Respectfully submitted:

J. STAN LEE, ESQ.
DONALD M. WAKEFIELD, ESQ.
BOWLES RICE LLP
Counsel for Appellant,
Tower Insurance Company of New York

CR 76.12(6) CERTIFICATE

This is to certify that the record was not withdrawn by the party filing this brief, and that on this the 15th day of December, 2014, service has been made in accordance with the Certificate of Service contained hereinafter upon the following: (1) Gregory L. Monge, Esq., VAN ANTWERP, MONGE, JONES, EDWARDS & MCCANN *(Counsel for Appellee, Brent Horn)*; (2) J. Christopher Bowlin, Esq., OSBORNE & BOWLIN, *(Counsel for Appellee, Mickayla Sesco, as the Administratrix of the Estate of Bradley Stafford)*; (3) A.C. Donahue, Esq. & Forrest Brock, Esq., DONAHUE LAW GROUP, *(Counsel for Appellee, Bridgefield Casualty Insurance Company)*; (4) Hon. John David Preston *(Judge, Martin Circuit Court)*; (5) Clerk of the Court of Appeals of Kentucky; and (6) Clerk of the Supreme Court of Kentucky.

J. STAN LEE, ESQ.
DONALD M. WAKEFIELD, ESQ.

INTRODUCTION

This is a case in which an insurance company (Tower Insurance Company of New York) appeals from the Court of Appeals decision to reverse the trial court's judgment declaring that it had no duty under a commercial automobile policy of insurance to defend or indemnify a permissive driver of the named insured as against a plaintiff's claims.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant does not believe that an oral argument is necessary, as this matter has been fully briefed and argued at length below, and the facts and arguments presented to both the Martin Circuit Court and the Court of Appeals are accurately and adequately reflected in the record below.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE 1-5

Brown v. Indiana Insurance Company,
184 S.W.3d 528 (Ky. 2005) 5

Liberty Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.,
522 S.W.2d 184 (Ky. 1975) 5

National Ins. Underwriters v. Lexington Flying Club, Inc.,
603 S.W.2d 490 (Ky.App. 1979) 5

ARGUMENT 6-18

I. STANDARD OF REVIEW 6

KRS 418.040 6

Commonwealth v. Whitworth ,
74 S.W.3d 695 (Ky. 2002) 6

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,
807 S.W.2d 476 (Ky. 1991) 6

Carter v. Smith,
366 S.W.3d 414 (Ky. 2012) 6

Fischer v. Fischer,
197 S.W.3d 98 (Ky. 2006) 6

II. THE TOWER POLICY EXCLUDES COVERAGE FOR ANY CLAIMS RELATING TO THE INJURIES SUFFERED BY MR. STAFFORD 7-9

Brown v. Indiana Insurance Company,
184 S.W.3d 528 (Ky. 2005) 7-9

Northland Ins. Co. v. Zurich Amer. Ins. Co.,
743 N.W.2d 145 (S.D. 2007) 8-9

III. THE SEVERABILITY CLAUSE DOES NOT NEGATE COVERAGE EXCLUSIONS 9-15

Northland Ins. Co. v. Zurich Amer. Ins. Co.,
743 N.W.2d 145 (S.D. 2007) 9, 11

Brown v. Indiana Insurance Company,
184 S.W.3d 528 (Ky. 2005) 9-15

Liberty Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.,
522 S.W.2d 184 (Ky. 1975) 11-15

National Ins. Underwriters v. Lexington Flying Club, Inc.,
603 S.W.2d 490 (Ky.App. 1979) 12-15

Com. v. Maynard, 294 S.W.3d 43 (Ky.App. 2009) 15

Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metro Sewer Dist., 72 S.W.3d 918 (Ky. 2002) 15

IV. THE EXCLUSIONS ARE NOT IN DEROGATION OF THE KENTUCKY MOTOR VEHICLES REPARATIONS ACT 15-18

KRS 304.39-010 15

Brown v. Indiana Insurance Company,
184 S.W.3d 528 (Ky. 2005) 16-17

Snow v. West Amer. Ins. Co.,
161 S.W.3d 338 17

Jones v. Bituminous Cas. Corp.,
821 S.W.2d 798 (Ky. 1991) 17

York v. Kentucky Farm Bureau Mut. Ins. Co.,
156 S.W.3d 291 (Ky. 2005) 17

Baxter v. Safeco Ins. Co. of Amer.,
46 S.W.3d 577 (Ky.App. 2001) 17

Brown v. Atlanta Cas. Co.,
875 S.W.2d 103 (Ky.App. 1994) 17

KRS 304.39-080 18

CONCLUSION 18

CERTIFICATE OF SERVICE 19

APPENDIX 20

STATEMENT OF THE CASE

The Parties:

The Plaintiff below is the Appellee, Mickayla Sesco ("Administratrix"), in her capacity as Administratrix of the Estate of Bradley E. Stafford ("Mr. Stafford"),[1] deceased, who brings a wrongful death claim. The Defendant below is the Appellee, Brent Horn ("Mr. Horn"), an individual who was driving the motor vehicle in which Mr. Stafford was a passenger at the time of his death. While not a party to the action below, B&B Contracting, LLC ("B&B") owned the subject motor vehicle and employed Mr. Stafford.

The first Intervening Plaintiff below is the Appellant, Tower Insurance Company of New York ("Tower"), which asserted this action to obtain a declaration of rights as to whether Mr. Horn is covered under the automobile insurance policy Tower issued to B&B.

The second Intervening Plaintiff below is the Appellee, Bridgefield Casualty Insurance Company, Inc. ("Bridgefield"), B&B's workers compensation insurer, which asserted a subrogation claim against Mr. Horn for the amounts it paid relating to Mr. Stafford's work-related injuries and death.

Underlying Facts:

On September 26, 2011, Mr. Stafford, who at the time was working as an employee of B&B, was ejected from the bed of a 2003 Chevrolet Silverado Extended 4x4

[1] Connie Stafford originally served as Administratix (*see,* Complaint [R. 1-5]), but Mickayla Sesco was substituted as Administratrix while this matter was pending before the Court of Appeals (*see,* Order of Substitution entered in the Court of Appeals on 03/28/2013).

pickup truck (the "Truck").[2] The Truck was owned by B&B,[3] and was being operated by Mr. Horn with B&B's permission.[4] Tragically, Mr. Stafford died from his injuries.[5]

On November 4, 2011, the Administratrix of Mr. Stafford's Estate sued Mr. Horn in the Martin Circuit Court to recover damages for wrongful death.[6] At the time of the accident, the Truck was insured through an automobile insurance policy issued by Tower to B&B (the "Tower Policy").[7] Mr. Horn asked Tower to defend and indemnify him under the Tower Policy. Since Tower disputed coverage, it filed an Intervening Complaint seeking a declaration of rights with respect to Mr. Horn concerning the subject accident.[8]

Pertinent Policy Provisions:

The Tower Policy defines an "insured" to include the named insured (i.e., B&B), as well as "anyone else while using with your permission a covered 'auto' you own, hire or borrow ...".[9] Since B&B owned the Truck, which was listed as a covered "auto," and Mr. Horn was using the Truck with permission at the time of the subject accident, Mr. Horn qualified as an "insured."

---

[2] Complaint, ¶ 4-5 [R. 1-5]; Horn's Answer to Complaint, Second Defense (admitting that Mr. Stafford was ejected from the Truck and died from his injuries, but denying fault) [R. 7-9]; Tower's Intervening Complaint, ¶ 7 [R. 19-23]; and Horn's Answer to Tower's Intervening Complaint, Second Defense [R. 24-27].

[3] Tower's Intervening Complaint, ¶ 9 [R. 19-23]; Horn's Answer to Tower's Intervening Complaint, Second Defense [R. 24-27].

[4] Tower's Intervening Complaint, ¶ 10 [R. 19-23]; Horn's Answer to Tower's Intervening Complaint, Second Defense [R. 24-27].

[5] Complaint, ¶ 4-5 [R. 1-5]; Horn's Answer to Complaint, Second Defense (admitting that Mr. Stafford was ejected from the Truck and died from his injuries, but denying fault) [R. 7-9]; Tower's Intervening Complaint, ¶ 7 [R. 19-23]; and Horn's Answer to Tower's Intervening Complaint, Second Defense [R. 24-27].

[6] *See*, Complaint [R. 1-5].

[7] Tower Policy **(APPENDIX EXHIBIT 1)**, attached as Ex. 3 [R. 439-495] to Tower's Motion for Declaratory Judgment [R. 403-559]; Tower's Intervening Complaint, ¶ 11-12 [R. 19-23].

[8] Tower's Intervening Complaint, [R. 19-23].

[9] Tower Policy [Appendix Ex. 1], Business Auto Coverage Form, Section II—Liability Coverage, Part A—Coverage, Subpart 1—Who is an Insured, Paragraph "b", page 2 of 11.

Next, the Tower Policy provides liability coverage to an "insured" as follows:[10]

SECTION II—LIABILITY COVERAGE

A. Coverage

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."
>
> ...
>
> We have the right and duty to defend an "insured" against a "suit" asking for such damages or a "covered pollution cost or expense." However, we have not duty to defend an "insured" against a suit seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

The term "bodily injury" is defined to include death.[11]

However, the Tower Policy contains the following exclusion from coverage (the "employee exclusion clause"):[12]

> This insurance does not apply to any of the following:
>
> 4. **Employee Indemnification And Employer's Liability**
>
> "Bodily injury" to:
>
> a. An "employee" of the "insured" arising out of and in the course of:
>
> (1) Employment by the "insured"; or
>
> (2) Performing duties related to the conduct of the "insured's" business; or
>
> b. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph a. above.
>
> This exclusion applies:

---

[10] Tower Policy [Appendix Ex. 1], Business Auto Coverage Form, Section II—Liability Coverage, Part A—Coverage, page 2 of 11.

[11] Tower Policy [Appendix Ex. 1], Business Auto Coverage Form, Section V—Definitions, Part C—"Bodily Injury", page 9 of 11.

[12] Tower Policy [Appendix Ex. 1], Business Auto Coverage Form, Section II—Liability Coverage, Part B—Exclusions, 4. Employee Indemnification And Employer's Liability, page 3 of 11.

(1) Whether the "insured" may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to "bodily injury" to domestic "employees" not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract". For the purposes of the Coverage Form, a domestic "employee" is a person engaged in household or domestic work performed principally in connection with a residence premises.

Further, the Tower Policy includes the following provision (the "severability clause") within the definition of an "insured":[13]

"Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

Tower relied on the employee exclusion clause in denying Mr. Horn's request for coverage, and consequently filed the Intervening Complaint for a declaratory judgment.[14]

Procedural History:

After discovery, Tower and Mr. Horn, pursuant to the summary judgment procedure authorized by CR 56, both filed Cross-Motions for Declaratory Judgment with regard to the coverage issue. Tower argued that the employee exclusion clause operated to exclude coverage for Mr. Stafford's estate's claims against Mr. Horn.[15] Conversely, Mr. Horn argued that one of the purposes of Kentucky's Motor Vehicles Reparations Act is to "broaden rather than to narrow or eliminate coverage," and contended that since he

---

[13] Tower Policy [Appendix Ex. 1], Business Auto Coverage Form, Section V—Definitions, G., "Insured", page 10 of 11.

[14] Tower had additionally relied upon a Worker's Compensation exclusion and a Fellow employee exclusion contained in the Tower Policy, however, such exclusions are not at issue on this appeal.

[15] Tower Motion for Declaratory Judgment [R. 403-559];and Tower's Response to Horn's Motion for Declaratory Judgment [R. 560-565].

was an "additional insured" rather than the "named insured," and since the Tower Policy contains a "severability clause," that the employee exclusion clause must be analyzed with particular respect to him, and consequently cannot be applied to exclude coverage.[16]

On September 13, 2012, the Circuit Court entered judgment in favor of Tower, holding that the employee exclusion applied, and that the severability clause, while serving to afford coverage to each insured under the policy, did not act to take exclusions out of the policy. *See,* Declaratory Judgment of 09/13/2012.[17] Mr. Horn appealed.[18]

On December 13, 2013, the Court of Appeals reversed the Circuit Court's ruling, finding the severability clause mandates that, in analyzing the employee exclusion clause, the term "insured" must be "deemed to refer only to the insured who is claiming coverage under the policy with respect to the claim then under consideration rather than to the insureds collectively."[19] Since Mr. Stafford was not Mr. Horn's employee, the Court of Appeals reasoned that the employee exclusion did not apply.[20]

In so ruling, the Court of Appeals rejected Tower's reliance upon this Court's holdings in Brown v. Indiana Insurance Company, 184 S.W.3d 528 (Ky. 2005), and Liberty Mutual Ins. Co. v. State Farm Mut. Auto. Ins. Co., 522 S.W.2d 184 (Ky. 1975).[21] Further, and as noted in the dissent of Chief Judge Glenn A. Acree, the Court of Appeals, without an en banc decision, effectively overruled National Insurance Underwriters v. Lexington Flying Club, Inc., 603 S.W.2d 490 (Ky.App. 1979).[22]

---

[16] Horn's Motion for Declaratory Judgment [R. 298-402].
[17] Declaratory Judgment **(APPENDIX EXHIBIT 2)** [R. 567-578].
[18] Horn's Notice of Appeal [R. 579-581].
[19] COA Opinion **(APPENDIX EXHIBIT 3)**, page 6.
[20] COA Opinion at p. 7-8 [Appendix Ex. 3].
[21] COA Opinion at 8-12 [Appendix Ex. 3].
[22] COA Opinion at 13, fn.4 [Appendix Ex. 3].

ARGUMENT

I. STANDARD OF REVIEW.

KRS § 418.040 provides as follows:

> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

KRS § 418.045 specifically permits declaratory judgment actions concerning the rights or duties of parties to a contract, so long as an actual controversy exists with respect thereto. An insurance policy is a contract. Herein, an actual controversy exists between Tower and Mr. Horn as to whether the Tower Policy provides coverage under the undisputed facts of this case, and both sides sought a declaration of their rights through the summary judgment procedure.

"The proper function of summary judgment is to terminate litigation when it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in respondent's favor." Commonwealth v. Whitworth, 74 S.W.3d 695 at 698 (Ky. 2002). The standard of review for summary judgments is whether the trial court correctly determined that there were no genuine issues of material fact and the moving party was entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476 at 480 (Ky. 1991). The Kentucky Supreme Court reviews a trial court's summary judgment ruling and the Court of Appeals opinion de novo. Carter v. Smith, 366 S.W.3d 414 at 419 (Ky. 2012). If summary judgment is sustainable on any basis, it must be affirmed. Fischer v. Fischer, 197 S.W.3d 98 at 103 (Ky. 2006).

II. THE TOWER POLICY EXCLUDES COVERAGE FOR ANY CLAIMS RELATING TO THE INJURIES SUFFERED BY MR. STAFFORD.

There is no dispute that as a permissive driver of the named insured (B&B), Mr. Horn is an additional insured under the Tower Policy. There is further no dispute that Mr. Horn was operating a covered auto, or that the bodily injuries (including death) suffered by Mr. Stafford were caused by the use of the covered auto. But, most importantly, there is also no dispute that Mr. Stafford was working within the course of his employment with B&B at the time of the accident.

This is vital, for the Tower Policy makes clear, through the employee exclusion, that the insurance does not apply to injuries suffered by an employee of the insured. The employee exclusion clause applies "regardless of whether the 'insured' is liable as an employer or in any other capacity." This exclusion therefore removes the bodily injuries (including death) suffered by Mr. Stafford from coverage under the policy.

In Brown v. Indiana Ins. Co., 184 S.W.3d 528 (Ky. 2005),[23] this Court dealt with and upheld an insurer's denial of coverage to both a named insured (the employer) and an additional insured (a permissive driver/employee) based in part on the employee exclusion clause. The pertinent facts of the Brown case are the same as the pertinent facts of this matter—an employee of the named insured was killed as a result of an automobile accident in which a pickup truck owned by the named insured was being driven by a permissive driver, who was an additional insured under an automobile policy, and who was seeking coverage under such policy. The only difference, though not a material one, is that the permissive driver in Brown was also an employee of the named insured, whereas in this case Mr. Horn, while a permissive driver, was not an employee

[23] A copy of the Brown decision is attached hereto as **APPENDIX EXHIBIT 4**.

of B&B.

And the coverage provision, the definition of an insured, the employee exclusion clause, and the severability clause involved in the Brown case *are each identical* to the ones contained in the Tower Policy. In Brown, this Court ruled that no coverage existed under the materially identical facts presented therein, and the insurer was not obligated to defend or indemnify the permissive driver/additional insured.

Northland Ins. Co. v. Zurich American Ins. Co., 743 N.W.2d 145 (S.D. 2007), is directly on point here.[24] In Northland, the Supreme Court of South Dakota addressed the very same arguments Mr. Horn presents in this case, and in the context of an identical factual scenario and with identical policy provisions. As here, in Northland an employee of the named insured had been injured in an accident involving a vehicle owned by the named insured, but driven by a permissive driver *who was not an employee of the named insured*, but who was nonetheless an "insured" as the term was defined in the policy. The liability coverage provision, the definition of an "insured," the employee exclusion clause, and the severability clause involved in Northland are all identical to those contained in the Tower Policy.

The permissive driver argued, just as Mr. Horn argues now, that the employee exclusion clause could only be applied against an "insured" who employed the injured employee (i.e., the named insured), and therefore could not be applied against him. In rejecting that argument, the Supreme Court of South Dakota ruled:

> We find that the Zurich policy language is not ambiguous. As such, upon examining the policy language, it cannot be said that the employer's liability exclusion applies to preclude coverage for the underlying action only for an employer of the employee who is asserting the claim. *Rather, the*

[24] A copy of the Northland decision is attached as Ex. 5 to Tower's Renewed Motion for Summary Judgment [R. 403-559]; and a courtesy copy is attached hereto as **APPENDIX EXHIBIT 5**.

exclusion applies to an "insured" as defined under the policy; specifically, the named insured (employer) and a permissive additional insured (omnibus insured).

Northland at 150 (emphasis added).[25]

Here, it is undisputed that Mr. Stafford was an "employee" of the "insured" (B&B), and that his injuries were sustained in the course of his employment. Given these undisputed facts, and given the coverage provision and the employee exclusion clause contained in the Tower Policy, as well as this Court's holding in Brown and the Supreme Court of South Dakota's holding in Northland, the Circuit Court was correct in holding that coverage is excluded under the Tower Policy.

III. THE SEVERABILITY CLAUSE DOES NOT NEGATE COVERAGE EXCLUSIONS.

Just as Mr. Horn argues now, it was previously argued to this Court in Brown, and to the Supreme Court of South Dakota in Northland, that due to the severability clause, the employee exclusion clause must be read separately with respect to each insured seeking coverage, and therefore was inapplicable to an additional insured who is not the employer of the injured employee.

The Supreme Court of South Dakota expressly rejected this argument, and instead held that an additional insured "is not entitled to any greater liability coverage than that afforded to the named insured who purchased the policy, notwithstanding the presence of a severability of interest clause in the policy." Northland at 150. Similarly, though not expressly discussing the severability clause, this Court in Brown also found that no

[25] Additionally, in the following cases, courts held that an employee exclusion in an automobile liability policy operates to preclude coverage of an additional insured with respect to liability arising out of injuries caused by such additional insured to employees of another insured under the policy: Desrosiers v. Royal Ins. Co., 468 N.E.2d 625 (Mass. 1984); Preferred Risk Mut. Ins. Co. v. Poole, 411 F.Supp. 429 (N.D.Miss. 1976), *aff'd* 539 F.2d 574 (5th Cir.) (applying Mississippi law); St. Paul Fire & Marine Ins. Co. v. Schilling, 520 N.W.2d 884 (S.D. 1994); State Farm Mut. Auto Ins. Co. v. Dyer, 19 F.3d 514 (10th Cir. 1994) (applying Wyoming law); Brewer v. U.S. Fire. Ins. Co., 446 Fed.Appx. 506 (3rd Cir. 2011) (applying Pennsylvania law).

coverage existed under the circumstances.

Erroneously, the Court of Appeals rejected Brown's applicability here for the purported reason that Brown did not consider the effect of an identical severability clause upon the applicability of an identical employee exclusion clause. COA Opinion at p. 8-9.

However, and as noted above, an identical severability clause was indeed at issue in Brown. In fact, and just as Mr. Horn argues now, it was specifically argued to this Court in Brown that as a result of the severability clause, the employee exclusion clause should be read separately as to the named insured and the additional insured:

> Additionally, Indiana ignores the severability clause in the policy and fails to apply the exclusions separately as to each insured. The policy provides that, "The coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought." Therefore, the court must construe this policy as if [the additional insured] and [the named insured] were being sued in separate actions.

Brief on Behalf of Appellant CSX Transportation, Inc., filed 12/14/2004, 2004-SC-0070-DG, at page 4, 2004 WL 6237263 (Ky.).[26]

> The policy also contains a severability clause, located at Section V.F:
>
> > "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. *Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.*
>
> This clause establishes that any coverage determination must involve Indiana's duties to Willowbank, its named insured, but also its duties to persons such as Darren Akers, whose permissive use of the vehicle renders them additional or omnibus insureds. The inclusion of this severability clause places the burden on Indiana to establish that it has no duty to indemnify either Willowbank or Darren Akers.

Brief on Behalf of Appellant Wendy O'Banion, as Administratrix of the Estate of Chase O'Banion, 2004-SC-0071-DG, 2004 WL 6237264 at *2 (Ky., Appellate Brief, filed

[26] *See,* Appellate Brief filed by CSX Transportation **[APPENDIX EXHIBIT 6]**.

12/14/2004) (emphasis in original).[27]

The dissent in Brown also acknowledged the severability argument, and opined that the employee exclusion clause must be applied separately to the named insured and the additional insured, such that coverage should be afforded to the additional insured:

> Akers is also entitled to be indemnified and defended by Indiana Insurance. According to the policy, the exclusions to each "insured" should be read separately. In Section II(A)(1) of the Business Auto Coverage Form, "insured" is defined to include the named insured and "anyone else while using with your permission a covered 'auto' you own, hire or borrow." The exclusions for "employees" and "fellow employees" would not apply to either Garcia or O'Banion as against Akers because neither of them were "employees."

Brown at 544 (J. Wintersheimer, dissenting).

Thus, Brown involved the same pertinent factual scenario, identical coverage and exclusion provisions, identical definition of an insured, and an identical severability clause, and this Court held that under such circumstances the employee exclusion applied to both the named-insured employer and the additional-insured non-employer.

While the ruling in Brown implicitly rejects the severability argument, this Court should now make such ruling express, as the Northland Court did.

This Court's prior precedent supports this position. Previously, in addressing whether an exclusion should be applied differently from the standpoint of an "additional insured" as opposed to a "named insured," this Court held that the exclusion applies equally to both and that "it is not reasonable to afford greater coverage to an *additional insured* under the omnibus clause, who has paid no premium for the coverage, than to the *named insured* who did pay the premium for the policy." Liberty Mut. Ins. Co. v. State

[27] *See,* Appellate Brief filed by Wendy O'Banion, as Adm'x of the Estate of Chase O'Banion **[APPENDIX EXHIBIT 7]**.

Farm Mut. Auto. Ins. Co., 522 S.W.2d 184 at 186 (Ky. 1975) (emphasis added).[28] Additionally, this Court held that a severability clause is designed to guarantee the same protection to all persons insured under the policy "and not to take exclusions out of the policy." Id. at 186.

Shortly following the Liberty Mutual decision, the Court of Appeals relied upon this holding to reject an additional insured's argument that as a result of a severability clause, a coverage exclusion should be negated with respect to an additional insured (as opposed to the named insured):

> Next, Flying Club argues that the policies underlying the severability clause would negate the plain language of the exclusion. The severability clause in Flying Club's policy provides that
>
> > "(T)he insurance afforded under Policy Part 1 applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability."
>
> This argument must fail in light of *Liberty Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, Ky., 522 S.W.2d 184 (1975). There it was held that: "The purpose of this clause is to guarantee the same protection to all persons named as insureds and not to take exclusions out of the policy." *The purpose of severability clauses is to spread protection, to the limits of coverage, among all of the named insureds. The purpose is not to negate bargained-for exclusions which are plainly worded.* See *American National Bank and Trust Co. v. Hartford Accident & Indemnity Co.*, 442 F.2d 995 (6th Cir., 1971), which held that unambiguous and clearly drafted exclusions which are not unreasonable or against public policy are enforceable.

National Insurance Underwriters v. Lexington Flying Club, Inc., 603 S.W.2d 490 at 492 (Ky.App. 1979) (emphasis added).[29] Clearly, the language of the severability clause at issue in Lexington Flying Club and as contained in the Tower Policy, while structured slightly differently, have identical effects—both limit the extent of the insurer's liability

[28] A copy of the Liberty Mutual decision is attached hereto as **APPENDIX EXHIBIT 8**.
[29] A copy of the Lexington Flying Club decision is attached hereto as **APPENDIX EXHIBIT 9**.

to policy limits, and both are directed toward "each insured against whom claim is made or suit is brought."

Mr. Horn, unlike B&B, paid no premium for the Tower Policy. There is no dispute B&B has no coverage for the subject claims under the provisions of the Tower Policy. The Tower Policy expressly excludes coverage for claims that relate to bodily injuries suffered by B&B's employees. The Brown, Liberty Mutual, and Lexington Flying Club cases thus mandate that the exclusions contained in the Tower Policy must be applied equally against Mr. Horn as they are against B&B, and that the severability clause in the Tower Policy does not "take the exclusions out of the policy."

Since the employee exclusion clause excludes coverage for claims pertaining to Mr. Stafford's injuries, there can be no coverage under the Tower Policy—for either B&B as a named insured or for Mr. Horn as an "additional insured."

The Court of Appeals chose not to adhere to this Court's holding in Liberty Mutual because the referenced portion of the Liberty Mutual opinion was purportedly *obiter dictum*.[30] That finding, however, was not dictum, but was rather *ratio decidendi*, and therefore binding precedent.

As Tower argued below, Liberty Mutual addressed whether an exclusion should be applied differently from the standpoint of an "additional insured" as opposed to a "named insured," and held that an exclusion applies equally to both, for "it is not reasonable to afford greater coverage to an additional insured under the omnibus clause, who has paid no premium for the coverage, than to the named insured who did pay the premium for the policy," and that the purpose of a severability clause is to protect all persons insured under the policy "and not to take exclusions out of the policy." Liberty

[30] COA Opinion at p. 11-12 [Appendix Ex. 3].

at 186.

As explained in Chief Judge Acree's dissent, this was not mere *obiter dictum*, but was a central holding of the *Liberty Mutual* case:[31]

> As support for the very point that it would be unreasonable to construe an insurance policy as affording greater coverage to an additional insured than to the named insured, the appellee cites *Liberty Mutual Insurance Co. v. State Farm Mutual Insurance Co.*, 522 S.W.2d 184 (Ky. 1975). The majority labels this citation obiter dictum. Looking at the long history of jurisprudence on this point, I cannot agree.
>
> ...
>
> Finally, rather than constituting obiter dictum, I believe the appellee's citation to *Liberty Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 522 S.W.2d 184 (Ky. 1975) is entirely on point. More importantly, this Court found it on point in *Lexington Flying Club*. When it was argued there, as it was here, "that the policies underlying the severability[-of-interests] clause would negate the plain language of the exclusion[,]" we rejected the argument, stating,
>
> > This argument must fail in light of *Liberty Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, Ky., 522 S.W.2d 184 (1975). There it was held that: "The purpose of this clause is to guarantee the same protection to all persons named as insureds and not to take exclusions out of the policy."
>
> *Lexington Flying Club*, 603 S.W.2d at 492. I believe this is the point the appellee is making, and that this language makes it clear that if under the exclusion clause there is no coverage for the named insured who purchased the policy of insurance, there can be none for any insureds whether they are named insureds or additional insureds.

Clearly, Tower's citation to Liberty Mutual should not have been discounted as reliance upon mere *obiter dictum*. In the prior published decision of Lexington Flying Club, which is not even mentioned in the majority opinion of the Court of Appeals, a previous panel of the Court of Appeals expressly relied upon the precedential value of this very same holding from Liberty Mutual for the very same proposition argued by Tower.

---

[31] COA Opinion at pages 15, 20-21 (J. Acree, dissenting) [Appendix Ex. 3].

As the dissent below correctly noted, the Court of Appeals may overrule one of its prior decisions only through a majority decision of the entire fourteen-judge court sitting *en banc*. *See,* SCR 1.030, and Com. v. Maynard, 294 S.W.3d 43 at 47 (Ky.App. 2009); *see also* Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metro. Sewer Dist., 72 S.W.3d 918 at 920 (Ky. 2002). Further, since Lexington Flying Club was not expressly overruled, the Court of Appeals' majority opinion only serves to create confusion as to the state of the law.

In accordance with the foregoing, this Court should settle any such confusion, and reaffirm the holdings of Liberty Mutual and Lexington Flying Club, by expressly holding what was implicit in Brown—that a severability clause does not operate to negate a policy exclusion.

IV. THE EXCLUSIONS ARE NOT IN DEROGATION OF THE KENTUCKY MOTOR VEHICLES REPARATIONS ACT.

Mr. Horn also argued that the Tower Policy exclusions violate the Kentucky Motor Vehicles Reparations Act, KRS 304.39-010, et seq. Mr. Horn correctly notes that the MVRA, which took effect in 1975, was enacted to protect "the interests of victims, the public, policyholders, and others" from the adverse consequences of motor vehicles accidents. KRS 304.39-010 (preamble). Mr. Horn cited below to several of the MVRA's enumerated purposes, including:

> (1) To require owners, registrants and operators of motor vehicles in the Commonwealth to procure insurance covering basic reparation benefits and legal liability arising out of ownership, operation or use of such motor vehicles;
>
> (2) To provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident in order to eliminate the inequities which fault-determination has created; ...
>
> (5) To reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the

> delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system;

KRS 304.39-010. Mr. Horn argued that public policy, including that embodied by the MVRA, supports broadening rather than narrowing or eliminating insurance coverage. The Court of Appeals did not address this argument in its Opinion.

Nonetheless, and contrary to Mr. Horn's argument, this Court has already held that the subject exclusion, as well as other exclusions, do not violate the MVRA:

> Our courts have long upheld automobile liability insurance exclusions for injuries to the insured's employees sustained while in the course and scope of employment, even in response to arguments that the exclusion violated the financial responsibility law.

Brown at 535 (enforcing, inter alia, an identical employee exclusion clause) (internal citations omitted).

Further, Mr. Horn overlooks another important detail: even if the employee exclusion is deemed applicable, the MVRA has still been fully complied with. Mr. Horn need not fear, as he states, that "accident victims, such as Stafford, will suffer serious financial hardship if this Court affirms the application of the Employee Indemnification and Employer's liability exclusion in cases like this." *See*, Horn's Appellant Brief at p. 16. It must be remembered that Mr. Stafford was a B&B employee, and his estate has received benefits under the workers compensation insurance policy B&B properly had in place with Bridgefield. Further, had Mr. Stafford not been injured in the course of employment, then none of the exclusions in the Tower Policy would apply (just as in Brown, the Tower Policy also contains the worker's compensation exclusion and the fellow-employee exclusion, in addition to the subject employee exclusion clause), for they are each and all dependent upon Mr. Stafford's status as an employee of B&B.

The purpose of the MVRA is not thwarted in this situation, and the requirements

of both the MVRA and the Workers Compensation Act have been complied with fully. An employee of B&B that suffers a work-related injury in a motor vehicle accident is covered by workmen's compensation as provided under KRS Chapter 342 and the Bridgefield workers compensation policy. Similarly, third parties who suffer injury in automobile accidents involving B&B's vehicles are covered by the automobile insurance provided by the Tower Policy. In either situation, the accident victim can receive recompense.

While one of the MVRA's purposes may be to broaden insurance coverage, "reasonable conditions, restrictions, and limitations on insurance coverage are not deemed per se to be contrary to public policy." Snow v. West Amer. Ins. Co., 161 S.W.3d 338 at 341 (Ky.App. 2004), *citing* Jones v. Bituminous Cas. Corp., 821 S.W.2d 798 at 802 (Ky. 1991). Accordingly, Kentucky's appellate courts have on many occasions upheld exclusions in automobile insurance policies as not violating public policy as embodied in the MVRA. *See, e.g.,* York v. Kentucky Farm Bureau Mut. Ins. Co., 156 S.W.3d 291 (Ky. 2005); Snow, supra; Baxter v. Safeco Ins. Co. of Amer., 46 S.W.3d 577 (Ky.App. 2001) (disc. rev. den'd); Brown v. Atlanta Cas. Co., 875 S.W.2d 103 (Ky.App. 1994).

And, most notably, this Court has already upheld the validity of the subject employee exclusion clause, despite the result that there was no insurance (workers compensation or automobile) to cover the wrongful death claims brought by the estates of two decedents who were killed in an automobile accident. Brown v. Indiana Ins. Co., supra.

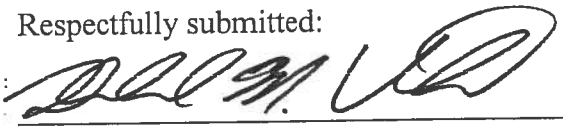
Further, by excluding coverage under the Tower Policy, Mr. Horn is not left

without insurance coverage from the Administratrix' s claims—he is covered under his own policy of automobile insurance issued by The Hartford. Coverage that Mr. Horn, no doubt, procured to comply with his duties under KRS 304.39-080(5), which requires every owner *or operator* of a motor vehicle to have proper security in place for payment, such as through insurance, of basic reparation benefits and tort liabilities.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the Opinion of the Court of Appeals and REINSTATE AND AFFIRM the Martin Circuit Court's ruling that the employee exclusion clause contained in the Tower Policy applies and excludes coverage for the claims asserted against Mr. Horn in this litigation.

Respectfully submitted:



J. STAN LEE, ESQ.
DONALD M. WAKEFIELD, ESQ.
BOWLES RICE LLP
333 West Vine Street, Suite 1700
Lexington, Kentucky 40507
Telephone: 859-252-2202
Facsimile: 859-259-2927
Email: slee@bowlesrice.com
dwakefield@bowlesrice.com
Website: www.bowlesrice.com
Counsel for Appellant,
Tower Insurance Company of New York

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of this brief was served on this the 15th day of December, 2014, by U.S. Mail, postage prepaid, to the following:

Gregory L. Monge, Esq.
VAN ANTWERP, MONGE, JONES, EDWARDS & MCCANN
1544 Winchester Avenue, Fifth Floor
Post Office Box 1111
Ashland, Kentucky 41105-1111
Counsel for Appellee, Brent Horn

J. Christopher Bowlin, Esq.
OSBORNE & BOWLIN, PLLC
Post Office Box 479
Paintsville, Kentucky 41240
Counsel for Appellee, Mickayla Sesco, as the Administratrix of the Estate of Bradley Stafford

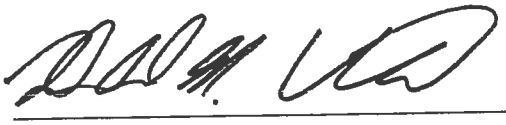
A.C. Donahue, Esq.
Forrest Brock, Esq.
DONAHUE LAW GROUP, P.S.C.
Post Office Box 659
Somerset, Kentucky 42502-0659
Counsel for Appellee, Bridgefield Casualty Insurance Company

Hon. John David Preston
Johnson County Judicial Center
908 Third Street, Suite 217
Paintsville, Kentucky 41240
Judge, Martin Circuit Court

Clerk, Kentucky Court of Appeals
360 Democrat Drive
Frankfort, Kentucky 40601

With the original and 10-copies via U.S. Registered Mail to:

Clerk, Supreme Court of Kentucky
State Capitol, Room 235
700 Capitol Avenue
Frankfort, Kentucky 40601



J. STAN LEE, ESQ.
DONALD M. WAKEFIELD, ESQ.