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

REPLY BRIEF FOR APPELLANT, TOWER INSURANCE COMPANY OF NEW YORK

Respectfully submitted:

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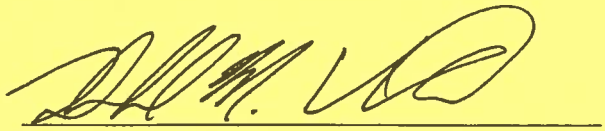
CR 76.12(6) CERTIFICATE

This is to certify that the record was not withdrawn by the party filing this brief, and that on this the 23rd day of February, 2015, service has been made in accordance with the Certificate of Service contained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.



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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The Appellant, Tower Insurance Company of New York ("Tower") seeks this Court to reverse the decision of the Court of Appeals and reinstate the Summary Judgment entered by the Circuit Court declaring that Tower had no duty under a commercial automobile insurance policy (the "Tower Policy") to defend or indemnify the Appellee, Brent Horn ("Mr. Horn"), who was a permissive driver of Tower's named insured, B&B Contracting, LLC ("B&B"), as against claims for the wrongful death of Bradley E. Stafford ("Mr. Stafford").

Tower has argued that such coverage is excluded by virtue of an employee exclusion contained in the Tower Policy; that a severability clause contained in the Tower Policy does not negate the exclusion; and that the employee exclusion does not violate the Kentucky Motor Vehicles Reparations Act, KRS 304.39-010 *et seq.* ("KMVRA").

In Response, Mr. Horn argues that the Policy does not exclude coverage since Mr. Horn and Mr. Stafford were not fellow employees, and Mr. Horn was not the employer of Mr. Stafford. Further, Mr. Horn argues that a severability clause in the policy requires that the policy be read separately with regard to Mr. Horn as if he were the only insured under the Policy, and implores this Court to follow the decisions of several other jurisdictions which have held likewise, such that the severability clause would in effect take exclusions out of the policy. Finally, Mr. Horn argues that if the employee exclusion is found to apply, then the Tower Policy would run afoul of the KMVRA's primary purpose of requiring an owner of an automobile to secure at least minimum coverage for injuries which may arise out of the use of the automobile.[1]

[1] Mr. Horn's brief also both a worker's compensation exclusion and a fellow employee exclusion which are contained in the Tower Policy. The Circuit Court held both of these exclusions to be inapplicable,

ARGUMENT IN REPLY

I. STANDARD OF REVIEW

The parties primary briefs sufficiently address the standard of review.

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

Tower has argued that since Mr. Stafford was an employee of the named insured, B&B, the employee exclusion serves to exclude coverage for any insured with respect to Mr. Stafford's injuries. In support of this argument, Tower has referenced the case of Brown v. Indiana Ins. Co., 184 S.W.3d 528 (Ky. 2005), and has further submitted the case of Northland Ins. Co. v. Zurich Amer. Ins. Co., 743 N.W.2d 145 (S.D. 2007), as supporting authority. Both cases involved an identical coverage provision, an identical definition of an insured, an identical employee exclusion, and an identical severability clause. Further, both cases held that under such circumstances, the employee exclusion was applicable and thus excluded coverage for an additional insured who was a permissive driver of the named insured, with respect to claims for injuries suffered by an employee of the named insured. The only factual difference between the two cases is that in Brown, the additional insured was also an employee of the named insured, whereas in Northland, the additional insured was not.

In response, Mr. Horn submits that the fact that he was not an employee of the named insured, B&B, is "a major reason" that Brown does not apply to this matter.[2] Mr. Horn then proceeds to argue that Brown is also inapplicable because he and Mr. Stafford

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however, Tower has chosen not to attack such rulings in this appeal, and Mr. Horn's arguments with respect to these other exclusions are not germane to this appeal.

[2] *See,* Mr. Horn's Response Brief at p. 8.

were not "fellow employees."[3] However, in so arguing, Mr. Horn cites to and quotes from portions of the Brown decision that discuss a "worker's compensation" exclusion and a "fellow employee" exclusion; neither of which is pertinent to the applicability of the subject employee exclusion. Mr. Horn's reliance upon these portions of the Brown decision is thus misplaced for these portions of the decision address exclusions not pertinent to this appeal.

With regard to the subject employee exclusion, Mr. Horn argues that since Mr. Stafford is not his employee, the employee exclusion should not be applicable to exclude coverage for Mr. Horn. In so arguing, Mr. Horn submits that the Northland decision should be disregarded because it relied, in part, on Bernard v. Wisconsin Auto. Ins. Co., Ltd. Mut., 245 N.W. 200 (Wisc. 1932), and that the Wisconsin Court of Appeals has since "abandoned" the Bernard decision in Gulmire v. St. Paul Fire and Marine Ins. Co., 674 N.W.2d 629 (Wisc. 2003). However, and notwithstanding that Gulmire never even references Bernard, Gulmire is nonetheless based on a "separation of protected persons" provision in the policy stating as follows:

> We'll apply this agreement:
>
> - to each protected person named in the Introduction as if that protected person was the only one named there; and
> - separately to each other protected person.
>
> However, the limit of coverage shown in the Coverage Summary is shared by all protected persons....

Gulmire at 636. The severability clause contained in the Tower Policy is quite different. Rather, the facts and policy provisions herein are the same as in Northland, which declined to adopt Gulmire.

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[3] *See,* Mr. Horn's Response Brief at p. 9.

Mr. Horn also relies on Wilson v. State Farm Mut. Auto. Ins. Co., 540 So.2d 749 (Ala. 1989), in which the Supreme Court of Alabama held that an employee exclusion was ambiguous when there are multiple insureds and the injured party is not an employee of each of the insureds. However, the policy here is not ambiguous. The term "insured" is defined to mean "any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage."[4] Thus, the employee exclusion applies to exclude injuries to an employee of "any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage." Mr. Stafford was inarguably an employee of B&B, which qualified as an "insured," and thus the employee exclusion is applicable and excludes coverage for Mr. Horn.

Mr. Horn cites to other cases in other jurisdictions to support his argument that an employee exclusion should not be applied to a non-employer additional insured. Tower has previously cited this court to contrary authority from other jurisdictions. There is obviously a split of opinion in this regard. However, the Brown decision, coupled with Liberty Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 522 S.W.2d 184 at 186 (Ky. 1975), and National Ins. Underwriters v. Lexington Flying Club, Inc., 603 S.W.2d 490 (Ky.App. 1979) (discussed previously and below), reflect that under the existing state of Kentucky law the employee exclusion should apply to a non-employer additional insured.

III. THE SEVERABILITY CLAUSE DOES NOT NEGATE COVERAGE EXCLUSIONS.

Tower has argued that, while a severability clause is designed to afford coverage to all persons protected under an insurance policy, it does not operate to remove coverage exclusions from the policy, as was expressly held in Liberty Mut. Ins. Co. v. State Farm

[4] Tower Policy [Appendix Ex. 1 to Tower's primary Appellant Brief], Business Auto Coverage Form, Section V—Definitions, G., "Insured", page 10 of 11.

Mut. Auto. Ins. Co., 522 S.W.2d 184 at 186 (Ky. 1975). Further, even though the severability argument was presented to this Court in Brown v. Indiana Ins. Co., 184 S.W.3d 528 (Ky. 2005), this Court still ruled that the employee liability exclusion applied equally to the named insured and an additional insured.

In response, Horn relies upon the Court of Appeals' opinion that the above-referenced discussion in Liberty Mutual is mere *obiter dictum*, and thus not controlling, and submits authority from other jurisdictions holding that a severability clause requires a policy to be read separately as to each insured seeking coverage.

Tower acknowledges that jurisdictions throughout the country have come to opposite conclusions as to whether a severability clause requires that a policy be read separately with respect to each insured, and thus may or may not "take exclusions out of the policy."[5] However, prior Kentucky cases have favored Tower's position. As previously discussed, Tower submits that the subject discussion in Liberty Mutual decision was not obiter dictum but was rather *ratio decidendi*, and therefore binding precedent. National Ins. Underwriters v. Lexington Flying Club, Inc., 603 S.W.2d 490 (Ky.App. 1979), also serves to confirm the precedential value of Liberty Mutual and that in Kentucky the presence of a severability clause in a policy of insurance, while extending coverage to all persons protected under the policy, does not negate coverage exclusions.

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[5] Some cases from other jurisdictions that have found that a severability clause does not negate an employee exclusion include: Northland Ins. Co. v. Zurich American Ins. Co., 743 N.W.2d 145 (S.D. 2007); 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).

IV. THE EMPLOYEE EXCLUSION IS NOT IN DEROGATION OF THE KMVRA.

Mr. Horn argues that applying the employee exclusion in the context of this case would violate the primary purpose of the Kentucky Motor Vehicles Reparations Act, KRS 304.39-010 *et seq.* ("KMVRA"), which is ensure that insurance is in place so that victims of automobile accidents can receive prompt recompense for their injuries. Mr. Horn submits that to find no coverage under the Tower policy would frustrate this goal.

However, Mr. Horn continues to overlook that the primary purpose of the KMVRA is not to make sure that a non-owner operator of a vehicle is covered by the owner's insurance, but rather that there is insurance in place to cover the victim of an automobile accident. In this case, that policy was fulfilled since coverage was in place to recompense the injuries suffered by Mr. Stafford in the form of B&B's worker's compensation insurance—and had he not been an employee of B&B, coverage for both B&B and Mr. Horn would have existed under the Tower Policy. Even in the case of Brown v. Indiana Ins. Co., supra, this Court held the employee exclusion applied even though by doing so the accident victim was left with no insurance coverage (worker's compensation or automobile).

Further, the KMVRA places the duty of securing insurance coverage not only on the owner of a motor vehicle, but also on the *operator* of a motor vehicle (i.e., Mr. Horn). KRS 304.39-010 and KRS 304.39-080. Mr. Horn in fact did so by obtaining a policy of insurance through Bridgefield Casualty Insurance Company. Thus, the purposes of the KMVRA have been fully satisfied. Not only did B&B secure a policy of worker's compensation insurance which covered the injuries suffered by Mr. Stafford, but Mr. Horn, as a vehicle operator, also secured applicable coverage. Applying the employee exclusion contained in the Tower Policy to exclude coverage for Mr. Horn therefore does

not violate the purpose of the KMVRA.

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.

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This is to certify that a true and accurate copy of this brief was served on this the 24th day of February, 2014, by U.S. Mail, postage prepaid, to the following:

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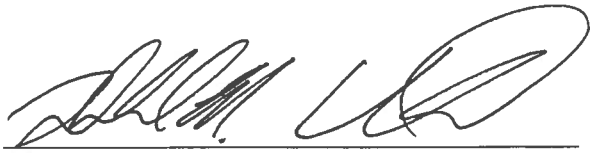

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