

NO. A05-0874

State of Minnesota  
In Court of Appeals

ILLINOIS FARMERS INSURANCE COMPANY,  
*Plaintiff/ Appellant,*

v.

MARIESE MARVIN AND JEFFREY MARVIN,  
*Defendants/ Respondents.*

APPELLANT'S REPLY BRIEF

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## LEGAL ARGUMENT

### Occupancy

First, Respondents' Brief mistakenly asserts that Appellant's counsel stipulated to the factual claim that Ms. Marvin was in the processing of alighting from the Explorer when she was struck from behind by the Betz vehicle. (Respondents' Brief at p. 4) Appellant's counsel clearly disputed this factual claim in its briefing on the cross-motions for summary judgment. Specifically, Appellant's counsel noted at the hearing: "[E]ven if we would concede for purposes of today's argument only that there is no factual issue, it simply doesn't matter." (A-183) Appellant's counsel did not stipulate to Respondents' version of the facts; Appellant's counsel instead argued that even if Ms. Marvin's version of the facts was true, it would not matter because notwithstanding occupancy, Respondents cannot prove maintenance or use. Even if Respondents prove occupancy, their claim for UIM benefits fails because they cannot satisfy the three-part maintenance or use test.

The hearing before the trial court involved cross-motions for summary judgment. In deciding whether to award a party summary judgment, absent a stipulation the court must take the opposing party's version of facts as true. That meant in considering Appellant's motion, it was proper for the trial court to treat Respondents' version of the facts as true. Therefore, if the court determined that under Respondents' version of the facts Ms. Marvin was occupying the vehicle, then it was proper for the court to deny Appellant's motion as to the occupancy issue.

However, in considering Respondent's motion for summary judgment on the occupancy issue, the court was required to treat Appellant's version of the facts as true, and would have needed to treat Ms. Marvin as a pedestrian merely standing behind the Explorer when she was struck by the tortfeasor. While in the Order and Memorandum the trial court indicated that it was viewing the facts most favorable to Plaintiff/Appellant, the trial court clearly took Respondents' version of the facts as true, a version Appellant contested. (A-210) As such, it was plain error for the trial court to grant Respondents summary judgment on the occupancy issue, and the trial court must be reversed on this issue.

Even if this Court properly finds that there is a material fact in dispute which would have precluded the trial court from granting either motion for summary judgment on the occupancy issue, Appellant's motion for summary judgment should have been granted based on Respondents' inability to satisfy the maintenance or use test set forth in Klug. The trial court erred when it granted Respondents' motion for summary judgment on this issue and denied Appellant's motion for the same.

### **Maintenance or Use**

Regardless of occupancy, Respondents must also prove the elements of maintenance or use to be entitled to UIM benefits. Galle v. Excalibur Ins. Co., 317 N.W.2d 368, 369 (Minn. 1982), *parens added*, quoting Minn.Stat. §65B.43, subd. 3. ("We do not believe, however, that all loading and unloading injuries incurred while occupying, entering into or alighting from a vehicle are necessarily compensable under

the No-Fault Act. The injury must also arise out of the ‘maintenance or use of a motor vehicle as a vehicle.’)

Respondents incorrectly cite Cont’l Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987) as relating to the occupancy issue. (Respondents’ Brief at p. 8). Respondent then correctly cites Klug for the maintenance or use issue, with the three-part test consisting of active accessory, no act of independent significance, and the purpose for which vehicle was being used.<sup>1</sup> Klug, 415 N.W.2d at 878. Respondents argue that the facts of Klug support maintenance or use in the present matter. This is impossible given that the analysis in Klug focused on the tortfeasor’s vehicle, not the claimant’s. See, Id. This is the exact opposite of the present case where the underinsured vehicle in question is the Ford Explorer, not the tortfeasor’s vehicle (the truck driven by Mr. Betz).

Thus the question in the present matter is not whether Mr. Betz’s vehicle was an active accessory in causing the accident and whether an act of independent significance intervened between Mr. Betz’s use of his vehicle and the accident. Instead, the question is whether the Explorer was an active accessory in causing the accident, and whether an independent actor intervened in Respondent Marvin’s use of the Explorer to cause the accident.

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<sup>1</sup> As previously stated, Appellant concedes that Respondents would meet the third prong of the Klug test regarding use of the vehicle for transportation purposes. As such, only the first two Klug factors are relevant to the instant appeal.

Respondents argue that the Explorer was an active accessory in causing Ms. Marvin's injuries. Specifically they argue that: "Her injuries were directly connected to the fact that she was crushed against the bumpers of the vehicles at the unique elevation which crushed her legs." (Respondents' Brief at p. 12) As noted in Appellant's Brief, the active accessory requirement requires that "The vehicle must be an '*active* accessory' in causing the injury." Cont'l Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987), quoting Holm v. Mut. Service Cas. Ins. Co., 261 N.W.2d 598, 603 (Minn. 1977), emphasis added. "Courts generally require proof of the active involvement of the vehicle." State Farm Fire & Cas. Co. v. Strobe, 481 N.W.2d 853, 856 (Minn. Ct. App. 1992), rev. den'd (May 15, 1992). Initial causation is satisfied if the claimant can show that: "the injury is a natural and reasonable incident or consequence of the vehicle's use." Medicine Lake Bus Co. v. Smith, 554 N.W.2d 623, 624 (Minn. Ct. App. 1996), quoting North River Ins. Co. v. Dairyland Ins. Co., 346 N.W.2d 109, 114 (Minn. 1984) (internal quotations omitted).

The Explorer was not an active accessory, but was passively struck just like the Respondent by Mr. Betz's vehicle, as was the case in Allied Mutual v. Western Nat'l Mutual, 552 N.W.2d 561, 562, 564 (Minn. 1996). Ms. Marvin's injuries were not caused by her *use* of the Explorer. Her injuries were caused by the Betz vehicle. Active causation requires that the vehicle, or some part thereof, cause the injury in response to being acted upon by the insured. Respondent Marvin was not injured by the Explorer or as a result of acting upon the Explorer. The fact that Respondent Marvin was crushed against the Explorer does not prove active involvement on the part of the Explorer. Ms.

Marvin could have been crushed against any object causing the same injuries. Ms. Marvin's loading of the Explorer had nothing to do with her injuries. It was not the loading of the Explorer that caused the injuries. Thus Respondents cannot prove that the Explorer was an active accessory in causing the injuries and their claim for UIM benefits fails as a matter of law.

### **Act of Independent Significance**

It is undeniable that in the present case an outside tortfeasor who was uninvolved with the Respondent's use of the Explorer, interceded and broke the causal link between Respondent's use of the Explorer, and the injuries sustained. Mr. Betz was not assisting Respondent in loading the Explorer. Rather, he unexpectedly backed his truck into the rear portion of the driveway, and interrupted Ms. Marvin's loading of the Explorer by crushing her against the Explorer. Mr. Betz's actions constituted an act of independent significance breaking any causal chain between Ms. Marvin's use of the Explorer and her injuries. Accordingly, pursuant to Klug this precludes Respondents from recovery in the present case as a matter of law.

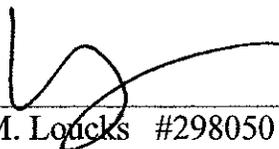
Respondent cites the unpublished Minnesota Court of Appeals case of Minkel v. Progressive Ins. Co., Slip No. C5-98-1177 (Nov. 24, 1998). Minkel is both non-precedential (See, Minn. Stat. § 480A.08) and easily distinguishable from the instant matter. As conceded by Respondents, in Minkel the third-party who arguably caused the claimant's injuries was actively assisting the claimant in loading the vehicle in question. In the present matter, it is undisputed that the tortfeasor Mr. Betz was not assisting Respondent in her loading activity when he caused the accident. This makes Mr. Betz an

independent actor, breaking the causal chain that is vital per Klug to Respondents' recovery in this matter.

**CONCLUSION**

Respondents must prove both occupancy and the three-part maintenance and use test. Because Respondents cannot prove occupancy and maintenance and use, their claim for UIM benefits fails. Accordingly, the trial court erred in granting Respondents' motion for summary judgment and should properly be reversed. Judgment should be entered for Appellant.

Respectfully submitted,



Dated: July 11, 2005.

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