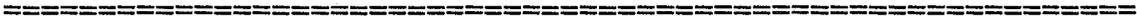


APPELLATE COURT CASE NUMBER A10-2090

TRIAL COURT CASE NUMBER 68-CV-10-180



State of Minnesota  
**In Court of Appeals**



Tammy Pepper,

*Appellant,*

v.

State Farm Mutual Automobile Insurance Company  
a/k/a State Farm Fire and Casualty Company  
a/k/a State Farm Insurance Companies,

*Respondent.*



APPELLANT'S REPLY BRIEF



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I.

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Cases Cited

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<u>Kelly v. State Farm Mut. Auto. Ins. Co.,</u> 666 N.W. 2d 329 (Minn. 2003) .....	Pg. 1
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## ARGUMENT

Respondent cites the case Johnson v. St. Paul Guardian Insurance Co., (Minn. Ct. App. 2001) , *rev. denied* (Minn. Sept. 11, 2001), which was an attempt by Johnson to receive UIM benefits to make up for the "tortfeasor's inadequate liability coverage" *id.* at 734. However, in this case, the Appellant is not attempting to make up for the tortfeasor's inadequate liability coverage. In fact, only the fact-finder could determine whether Frank Matlachowski indeed, had any liability at all. Therefore, there is at a minimum, an factual dispute as to whether there is indeed any "tortfeasor's inadequate liability coverage". Both Tracie Drew's and Frank Matlachowski's liability and damage contributions needs to be determined first. Likewise, the Court in Kelly v. State Farm Mut. Auto. Ins. Co. 666 N.W. 2d 328,329,331,332 (Minn. 2003) also citing Myers v. State Farm Mut. Auto. Ins. Co., 336 N.W. 2d 288 (Minn. 1983) determined that there was an attempt to convert UIM coverage to liability only because of the "tortfeasor's negligence was the *exclusive* cause of the damages". Likewise, in Myers, which would be the most close analogy to the case at hand, there was no negligence claimed by the auto-owner.

Respondent unsuccessfully attempts to distinguish Lahr v. Am. Family Mut. Ins. Co. 528 N.W.2d 257, 258 (Minn. Ct. App 1975) from the facts of the instant case. Obviously, flawed in the argument

of the Respondent, is that there is no such thing as an at-fault "vehicle". Only people can be sued for negligence. The term of art used by the Court of Appeals in *Lahr* clearly refers to another at-fault party. In *Lahr*, the Court noted the following "Lahr argues that cases prohibiting an injured passenger from claiming UIM benefits from the driver's insurer after obtaining liability coverage from that insurer are confined to situations where only the passenger/driver is liable, either because only that vehicle is involved or because the other vehicle involved is not at fault." We agree.

*Lahr* correctly notes that in the prior UIM cases disallowing a passenger's recovery of UIM benefits from her driver's insurer, only a single vehicle was potentially at fault.

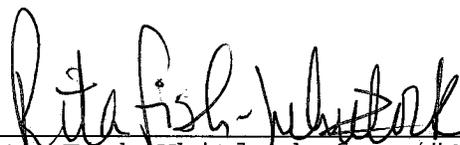
The Court went on to state "we again note that there has been no determination yet of *Lahr's* total damages or any apportionment of fault between Peura and Kivisto. Actual recovery of UIM benefits from American will depend upon a determination of total damages and in apportionment of fault that renders Kivisto "underinsured" with respect to her share of liability. *Lahr* infra.

CONCLUSION

The previous equitably Court permitted exclusions to receiving UIM coverage, where it would be a pure conversion of liability coverage do not apply to the instant case. Such an application would create an inequitable windfall to the insurer for the separately contracted for insurance. Further, Respondent has failed to address the fact that both policies simply cannot provide liability coverage to the Appellant, nor did they. Accordingly, the District Court's Order of Summary Judgment should be reversed, and the case rematted for trial.

Respectfully Submitted

ALAN B. FISH, P.A.



Dated: February 8, 2011

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