

A10-2090

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State of Minnesota  
In Supreme Court

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Tammy Pepper,

Respondent,

v.

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

Petitioner.

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**BRIEF AND ADDENDUM OF PETITIONER STATE FARM  
MUTUAL AUTOMOBILE INSURANCE COMPANY**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUE

WHERE AN AUTOMOBILE INSURANCE POLICY STATES THAT AN UNDER-INSURED MOTOR (UIM) VEHICLE DOES NOT INCLUDE A MOTOR VEHICLE INSURED UNDER THE LIABILITY COVERAGE OF THE POLICY, IS THAT POLICY PROVISION ENFORCEABLE UNDER MINNESOTA LAW SO AS TO PRECLUDE A CLAIM FOR UIM COVERAGE IN A ONE-VEHICLE ACCIDENT WHERE THE VEHICLE IS INSURED UNDER THE LIABILITY COVERAGE OF THE POLICY?

The trial court granted Petitioner State Farm summary judgment based on the UIM insured vehicle exclusion. The Court of Appeals reversed with Judge Toussaint dissenting.

Latterell v. Progressive N. Ins. Co., 801 N.W.2d 917 (Minn. 2011).

Am. Family Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983).

Thommen v. Ill. Farmers Ins. Co., 437 N.W.2d 651 (Minn. 1989).

## STATEMENT OF THE CASE AND FACTS

Appellant/Defendant State Farm Mutual Automobile Insurance Company a/k/a State Farm Fire and Casualty Company a/k/a State Farm Insurance Companies (State Farm) seeks reversal of the Court of Appeals ruling that State Farm's policy definition of underinsured motor vehicle, which excludes a motor vehicle insured under the liability coverage of the policy, is unenforceable under Minnesota's No-Fault Act as applied to the undisputed facts of this case. State Farm requests that the trial court, the Honorable Donna K. Dixon's, grant of summary judgment to it be reinstated.

**A. State Farm Paid the Liability Policy Limits of the At-Fault Vehicle Owned by Tracie Drew.**

Plaintiff/Respondent Tammy Pepper (Pepper), while a pedestrian, was struck by a vehicle driven by Frank Matlachowski (Matlachowski), Pepper's stepfather. (A. 92-93). This vehicle is owned by Tracie Drew (Drew), Pepper's sister. (A. 93, 104). Drew's vehicle is insured by State Farm, State Farm Policy No. 003 0488-F28-23N (1994 Ford 150 Pickup). (A. 104).

State Farm's auto policy, in accord with Minnesota law, provides liability coverage to an insured who becomes legally obligated to pay damages because of bodily injury to others caused by an accident resulting from the ownership, maintenance or use of the insured car. (A. 19). Under State Farm's auto policy's liability coverage, an insured includes not only the owner of the vehicle but any other person while operating such

vehicle with the owner's consent. (A. 20). In December 2009, State Farm paid Pepper the Drew policy liability limits of \$100,000.<sup>1</sup> (A. 90, 91).

**B. State Farm Paid the Liability Policy Limits of the State Farm Policies Issued to Matlachowski.**

The vehicles owned by Matlachowski are also insured by State Farm under State Farm Policy Nos. C23 2362-C15-23S (1998 Subaru Legacy) and 73 0739-E11-23E (1999 Chevrolet Lumina). (A. 8, 49). Because Matlachowski, the driver of the Drew at-fault vehicle, was not its owner, under the terms of State Farm insurance policies insuring Matlachowski's own vehicles, his liability coverage extended to his use of this non-owned vehicle. The policies state:

**Coverage for the Use of Other Cars**

The liability coverage extends to the use, by an *insured*, of a *newly acquired car*, a *temporary substitute car* or a *non-owned car*.

(A. 19, 60) (emphasis in the original).

State Farm's policies define a non-owned car.

*Non-Owned Car* — means a *car* not

1. owned by or leased to,
2. registered in the name of; or
3. furnished or available for the regular or frequent use of *you*,<sup>2</sup> *your spouse* or any other *relatives*.

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<sup>1</sup> The Court of Appeals states with no record basis that the policy limits were paid on the recognition that Drew was primarily at fault because of poor maintenance of the truck. (Add. 2).

<sup>2</sup> The term "you" under the policy means the named insureds shown on the declarations page. (A. 15, 56). Matlachowski and his wife Dawn are the named insureds. (A. 8, 49).

A *non-owned car* must be a *car* in the lawful possession of the *person* operating it.

(A. 15, 56) (emphasis in the original).

Pepper submitted a claim to State Farm for excess liability coverage under Matlachowski's policies. Matlachowski qualified for excess liability coverage under both of his State Farm policies. But under the policies' terms, State Farm is only required to pay the limits of the policy with the highest liability limit. Liability coverage cannot be stacked. (A. 22, 63). Both policies provide:

**If There Is Other Liability Coverage**

**1. Policies Issued by Us to You, Your Spouse or Any Relative**

If two or more vehicle liability policies issued by us to *you*, *your spouse* or any *relative* apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

(A. 22, 63) (emphasis in the original).

Since both of Matlachowski's State Farm policies had a \$100,000 liability limit, State Farm paid \$100,000 to Pepper. (A. 8, 49). Pepper signed releases of all claims against Matlachowski and Drew, but reserved "my claim for underinsured motorist benefits against State Farm Insurance." (A. 90, 91).

**C. Pepper Brought This Lawsuit Against State Farm for UIM Coverage.**

Pepper then commenced this action against State Farm seeking underinsured motorist (UIM) coverage under a State Farm policy issued to Matlachowski. (A. 1). In her Complaint, Pepper asserts she "was involved in an automobile accident with an

underinsured at fault vehicle” and as a result she is entitled to “receive excess and or underinsured motorist benefits” from State Farm. (A. 1).

**D. State Farm Denied UIM Coverage Under the Matlachowski Policies and Sought Summary Judgment.**

State Farm denied that Pepper was entitled to UIM coverage. (A: 3). In addition to asserting Pepper does not qualify as an insured under the Matlachowski policies, State Farm denied that the Drew vehicle driven by Matlachowski falls within the definition of an underinsured motor vehicle.<sup>3</sup> (A. 3-4). State Farm’s policies provide UIM coverage – Coverage W – as follows:

We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured* and caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle*.

(A. 31, 72) (emphasis in the original).

The policies define an “Underinsured Motor Vehicle” as a “*motor vehicle* . . . the ownership, maintenance or use of which is insured or bonded for bodily injury liability in amounts that:

1. meet the requirements of the laws of the state where *your car* is mainly garaged; and

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<sup>3</sup> Insured is defined under Coverage W. (A. 32, 73). There is a dispute as to whether Pepper qualifies as an insured under the policy. However, discovery on this issue was reserved until after State Farm’s motion for summary judgment was decided. For purposes of summary judgment only, State Farm assumed that Pepper qualified as an insured under the Matlachowski policies. (State Farm Memorandum of Law in Support of Motion for Summary Judgment, n. 2, p. 4, dated August 23, 2010).

2. are less than the amount needed to compensate the *insured* for damages.

(A. 31, 72) (emphasis in the original).

The policies also contain an insured vehicle exclusion. It states:

An *underinsured motor vehicle* does not include a *motor vehicle* or *motorcycle*:

1. insured under the liability coverage of this policy;

...

(Id.) (emphasis in the original) (hereafter referred to as the insured vehicle exclusion).

In this case, there is only one “at-fault” vehicle: the pickup truck owned by Drew and driven by Matlachowski. Because this at-fault, non-owned vehicle has liability coverage for this accident under the State Farm policies issued to Matlachowski, State Farm asserted the insured vehicle exclusion applied. Liability coverage had been extended by State Farm under the Matlachowski policies for his operation of the Drew vehicle. To allow Pepper to recover UIM coverage under a policy issued to Matlachowski would convert less expensive UIM coverage to more expensive liability coverage. State Farm’s insured vehicle exclusion which prevents such conversion is in full conformity to Minnesota’s No-Fault Act as interpreted by this Court and is enforceable. Therefore, State Farm asserted it was entitled to summary judgment.

As previously stated, Pepper asserted in her Complaint that she was entitled to UIM coverage because she “was involved in an automobile accident with an underinsured at fault vehicle.” (A. 1). In response to summary judgment, Pepper contended that when Matlachowski was using Drew’s truck, the accelerator stuck. (A. 92-93). Pepper claimed

Drew knew of and should have warned Matlachowski of that possibility. (Id.) Pepper claimed she was a pedestrian and that Drew was also negligent. On that set of facts, Pepper claimed she was entitled to UIM coverage under a Matlachowski policy regardless of the insured vehicle exclusion.

**E. The Trial Court Grants Summary Judgment to State Farm.**

The trial court, the Honorable Donna K. Dixon, granted State Farm summary judgment. (Add. 15). Since the plain language of Matlachowski's auto policy states there can be no UIM coverage for Pepper because the Drew at-fault vehicle is insured under the Matlachowski liability coverage by way of insuring the driver, State Farm was entitled to summary judgment. (Add. 19). The trial court concluded there is no Minnesota authority which overrides State Farm's insured vehicle exclusion under the undisputed facts of this case. (Add. 19).

The trial court rejected Pepper's argument that the insured vehicle exclusion is unenforceable based on Pepper's assertion that Drew, the vehicle's owner, was at fault because she did not properly maintain her vehicle and/or sufficiently warn users of an alleged vehicle defect. (Add. 19). Also rejected was any argument based on the premise Pepper was a pedestrian. (Add. 20-21).

In so holding, the trial court recognized similar policy exclusions, which exclusions operate to prohibit the conversion of less expensive UIM coverage into more expensive liability insurance, have been consistently upheld, citing this Court's decisions in Kelly v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 328 (Minn. 2003); Myers v. State

Farm Mut. Auto. Ins. Co., 336 N.W.2d 288 (Minn. 1983); Thommen v. Ill. Farmers Ins. Co., 437 N.W.2d 651 (Minn. 1989); and Petrich v. Hartford Fire Ins. Co., 427 N.W.2d 244 (Minn. 1988). (Add. 19). Only where the insured makes a claim for UIM benefits under the drivers/tortfeasors' policy, and that claim is for the purposes of protecting against the insufficient liability coverage of another at-fault vehicle, is there no conversion. (Add. 19-20). Since this case is a single-vehicle accident, there is no UIM coverage. (Add. 20).

**F. The Court of Appeals Reversed the Grant of Summary Judgment, Concluding the UIM Insured Vehicle Exclusion Is Unenforceable.**

Pepper appealed that grant of summary judgment to State Farm to the Court of Appeals. The Court of Appeals, with Judge Toussaint dissenting, reversed. (Add. 1). The Court of Appeals does agree the plain language of State Farm's policy does not provide UIM coverage to Pepper. (Add. 3). The Court of Appeals then held this insured vehicle exclusion unenforceable under Minnesota law based on the facts of this case. The Court of Appeals reasoned that "[h]ere, we have a second tortfeasor, whose liability is grounded in her ownership of a motor vehicle, but we have no second vehicle." (Add. 7). The majority holds the plain language of the UIM insured vehicle exclusion is unenforceable as "overbroad" under these circumstances and Pepper is being denied the UIM benefits "which she would otherwise receive, despite the underinsured status of the second tortfeasor, Drew." (Add. 8). It ordered the case remanded for determination of the merits of Pepper's claim for UIM benefits. (Add. 9).

Judge Toussaint, in dissent, concludes under the facts of this case the insured vehicle exclusion does not violate Minnesota’s No-Fault Act or any case law so interpreting. (Add. 10-14). Recognizing the Court of Appeals had repeatedly stated “that, where only one car is involved or at fault, an injured passenger may *not* obtain UIM benefits from the driver’s insurer,” it follows that “even if the owner of the vehicle was at fault and some portion of Pepper’s injuries were attributable to the negligence of the vehicle’s owner, the vehicle’s owner is not a *motoring* tortfeasor.” (Add. 12) (emphasis in the original). Although the Court of Appeals majority did not address Pepper’s additional argument that her status as a pedestrian entitled her to UIM benefits, Judge Toussaint, in dissent, so addressed. (Add. 13). Judge Toussaint concludes, based on this Court’s decision in Carlson v. Allstate Ins. Co., 749 N.W.2d 41 (Minn. 2008), Minn. Stat. § 65B.49, subd. 3a(5) does not entitle Pepper to UIM benefits. (Id.)

State Farm petitioned this Court, and this Court granted further review.

### **ARGUMENT**

#### **THE STATE FARM POLICY PROVISION EXCLUDING A MOTOR VEHICLE INSURED UNDER THE LIABILITY COVERAGE OF THE POLICY IS ENFORCEABLE AND PRECLUDES PEPPER’S CLAIM FOR UIM COVERAGE.**

##### **A. This Court’s Standard of Review Is *De Novo*.**

Interpretation of an insurance contract is a legal question subject to *de novo* review. Latterell v. Progressive N. Ins. Co., 801 N.W.2d 917, 920 (Minn. 2011).

Likewise, the interpretation of the Minnesota No-Fault Act involves a question of law

that this Court views *de novo*. Auto Owners Ins. Co. v. Forstrom, 684 N.W.2d 494, 497 (Minn. 2004).

This case comes before the Court on a grant of summary judgment which was reversed by the Court of Appeals. In an appeal from a summary judgment where there are no genuine issues of material fact, this Court determines whether the lower court erred in its application of the law. Scheibel v. Ill. Farmers Ins. Co., 615 N.W.2d 34, 36-37 (Minn. 2000). Such determination is made *de novo*. Id.

**B. The Terms of State Farm’s UIM Coverage Are Unambiguous.**

A basic precept of insurance contract law is that the extent of the insurer’s liability is governed by the contract into which it entered so long as the policy does not omit coverage required by law and does not violate applicable statutes. Am. Family Mut. Ins. Co. v. Ryan, 330 N.W.2d 113, 115 (Minn. 1983). No one disputes the plain language of State Farm’s policy does not provide UIM coverage to Pepper. The Court of Appeals held, however, that this plain language is unenforceable as “overbroad” and that Pepper is being denied UIM benefits “which she would otherwise receive, despite the underinsured status of the second tortfeasor, Drew.” (Add. 8). In other words, the Court of Appeals concludes State Farm’s UIM insurance omits coverage required by Minnesota law. State Farm disagrees.

**C. This Court Has Held UIM Policy Provisions Which Prevent Conversion of Inexpensive UIM Coverage Into Liability Coverage Enforceable.**

Insurance coverage falls into one of two categories: first-party coverage or third-party coverage. Latterell, 801 N.W.2d at 922. Liability coverage is third-party coverage

which “compensates a third party who is injured in an automobile accident for which the insured is liable.” Id. Third-party coverage generally follows the vehicle. Id.

First-party coverage includes UIM coverage. Id. at 922. UIM benefits “compensate an insured under his own policy if he is legally entitled to recover damages from the owner or operator of an underinsured motor vehicle.” Id. at 922-23 (citation omitted). Since Pepper was a pedestrian, she is entitled to seek such coverage under any policy in which she qualifies as an insured. Minn. Stat. § 65B.49, subd. 3a(5).<sup>4</sup> Pepper claimed she was insured under a Matlachowski State Farm policy and therefore entitled to UIM coverage in addition to the liability limits already paid to her for Matlachowski’s operation of the Drew vehicle.

It is axiomatic that before a UIM claim may be asserted, the motor vehicle which caused the injuries must be underinsured. Minn. Stat. § 65B.43, subd. 17 reads as follows:

“Underinsured motor vehicle” means a motor vehicle or motorcycle to which a bodily injury liability applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages.

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<sup>4</sup> Pepper’s status as a pedestrian struck by a motor vehicle means that the priority provision contained in Minn. Stat. § 65B.49, subd. 3a(5) does not limit Pepper to the occupied vehicle’s policy. Rather, a pedestrian is permitted to turn to any policy under which she qualifies as an insured for UIM benefits. But this principle does not allow her to convert UIM coverage into excess liability coverage. See Carlson, 749 N.W.2d at 46 (subd. 3a(5) is intended as a list of priorities, rather than as a basic definition of the scope of mandated coverage). The trial court appropriately rejected Pepper’s argument to the contrary, which was not addressed by the Court of Appeals majority opinion. (Add. 20). The Court of Appeals dissenting opinion did address and agreed with the trial court. (Add. 13). State Farm asserts the trial court’s ruling is correct.

As this Court has observed, “[t]hat the motor vehicle which caused the injury falls within [this] . . . definition is, of course, necessary to invoke UIM.” Broton v. W. Nat’l Mut. Ins. Co., 428 N.W.2d 85, 89 (Minn. 1988).

As this Court recently reiterated in Latterell, 801 N.W.2d at 925, n.4, “[c]overage conversion arises when an individual attempts to convert inexpensive UIM coverage into additional liability coverage by trying to recover both third-party liability benefits and first-party UIM benefits from the same insurance policy . . . .” Almost every standard automobile policy contains provisions that are designed to prevent this conversion. See, e.g., Myers v. State Farm Mut. Auto. Ins. Co., 336 N.W.2d 288, 291 (Minn. 1983). In a one-car accident, a grant of UIM coverage under an auto policy that provides liability coverage for the same vehicle has the effect of increasing the vehicle’s liability limits. To so allow would be to grant additional liability coverage for which the owner or operator has not paid equivalent premium.

To preclude such conversion, the auto insurance industry has included an insured vehicle exclusion in its UIM coverage. Accordingly, under State Farm’s policy, the term “underinsured motor vehicle” does not include a vehicle insured for liability coverage under this policy; instead, some other vehicle must be involved in order to trigger the UIM risk. Policy provisions preventing such conversion have been held enforceable by this Court. Latterell, 801 N.W.2d at 925, n.4.

This Court first addressed the concept of coverage conversion in Myers v. State Farm Mut. Auto Ins. Co., 336 N.W.2d 288 (Minn. 1983). There this Court held that the

owned vehicle exclusion<sup>5</sup> did not violate the No-Fault Act and could validly be applied to bar UIM coverage because the effect of the exclusion was to prevent a conversion of UIM coverage into liability coverage not contemplated by the No-Fault Act. This Court explained:

Underinsured motorist coverage is first-party coverage and, in that sense, the coverage follows the person not the vehicle. Here, however, the decedent passenger's heirs have already collected under the liability coverage of the insurer of the Stein car. To now collect further under the same insurer's underinsured motorist coverage would be to convert the underinsured motorist coverage into third-party insurance, treating it essentially the same as third-party liability coverage. The policy definition . . . properly prevents this conversion of first-party coverage into third-party coverage.

Id. at 291.

The Court next addressed the UIM to liability coverage conversion in Meyer v. Ill. Farmers Ins. Group, 371 N.W.2d 535 (Minn. 1985).<sup>6</sup> There, this Court specifically held that UIM coverage would not be imposed in a one-vehicle accident under the same policy that insured the vehicle for liability coverage because

[t]he statute at issue requires that underinsured coverage be offered to compensate damages that are uncompensated because they exceed “the residual bodily injury liability limit of the owner of the other vehicle.” From this language, it is apparent

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<sup>5</sup> An owned vehicle exclusion excluded from the definition of “underinsured motor vehicle” any vehicle owned by or available for the regular use of the insured or any family member. 336 N.W.2d at 290.

<sup>6</sup> In Meyer, the policy contained no UIM coverage because the insurer had not made the mandatory offer of UIM coverage then required under the No-Fault Act. Id. at 536-37.

that the statute contemplates that a vehicle upon which underinsured benefits are to be paid is not to be the same vehicle that sets the limits of liability coverage.

Id. at 536 (emphasis in the original) (quoting Minn. Stat. § 65B.49, subd. 6(e)).

This Court pointed out that its interpretation of the “other vehicle” limitation in UIM coverage was “consistent with the position and purpose of underinsurance in the general scheme of insurance coverage.” Id. at 537. As this Court explained, UIM and liability coverage are intended to insure different risks and that

[a]n insured wishing to provide greater protection from his own negligence for himself and his passengers should purchase additional liability insurance coverage; allowing underinsured coverage in the instant case would, in essence, be allowing an individual to increase liability coverage by purchasing less expensive underinsured coverage.

Id.

Accordingly, this Court held this was the same concern it expressed in Myers in upholding the validity of the owned vehicle exclusion. Id.

The issue came before this Court again in Thommen v. Ill. Farmers Ins. Co., 437 N.W.2d 651 (Minn. 1989), and after the Legislature in 1985 had amended the No-Fault Act UIM provisions. One of the changes was the “other vehicle” language in the definition of UIM coverage relied on in Myers was eliminated. Lynch v. Am. Family Mut. Ins. Co., 626 N.W.2d 182, 187, n.3 (Minn. 2001). Nonetheless, this Court concluded this statutory change was not intended to change “the fundamental character of UIM coverage” and that the rationale of Myers remained valid, reiterating that “to hold the insurer liable to pay damages resulting from the negligent use of the insured motor

vehicle pursuant to both the liability coverage and the UIM coverage is to convert the first-party UIM coverage into third-party insurance, ‘treating it essentially the same as third-party liability coverage.’” Thommen, 437 N.W.2d at 654 (quoting Myers, 336 N.W.2d at 291).

UIM coverage conversion was addressed again in Kelly v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 328 (Minn. 2003). There, this Court in a footnote acknowledged that the at-fault vehicle’s insurance policy excluded from the definition of underinsured motor vehicle a motor vehicle insured under the liability coverage of this policy. 666 N.W.2d at 330, n.1. This Court states “[w]e have upheld this exclusion as proper and consistent with the purposes of the No-Fault Act.” Id. at 330, n.1 (citing Meyer, 371 N.W.2d at 537).

In Kelly, Kelly’s husband was driving a Dodge Intrepid with the Plaintiff Kelly, his wife, riding as passenger. Id. at 329. At the time of the accident, Kelly’s husband was the sole owner of the Intrepid, which was insured by State Farm. Id. In addition, both Plaintiff Kelly and her husband were listed as owners of a Pontiac Grand Am which was also insured by State Farm. Id. As a result of the accident, Plaintiff Kelly brought a claim against her husband which State Farm settled by paying the \$100,000 liability limit on the policy insuring the Intrepid. Id. Because Plaintiff Kelly’s damages exceeded the \$100,000 liability limits, Plaintiff Kelly filed a claim with State Farm seeking UIM benefits under the separate policy covering the Grand Am. Id. State Farm denied her UIM claim, contending that under the Grand Am policy the Intrepid was not an

“underinsured motor vehicle.” Id. Furthermore, allowing Plaintiff Kelly to recover UIM benefits under the Grand Am policy which also provided liability coverage to her husband, the tortfeasor, would result in coverage conversion because the UIM policy would be used to supplement her husband’s inadequate liability insurance. Id.

The trial court ultimately held Plaintiff Kelly was not entitled to UIM benefits under a separate policy owned by the tortfeasor because it would result in impermissible coverage conversion, and the Court of Appeals affirmed. Id. at 229-30. Before this Court, Plaintiff Kelly argued that the Court should conclude that she was entitled to coverage under the Grand Am policy because the policy exclusion contravened the underlying purpose of the No-Fault Act. Id. at 330. There the policy excludes from UIM coverage an at-fault vehicle furnished for the regular use of Kelly’s husband. Id. Plaintiff Kelly argued her UIM claim should not be denied simply because her husband was listed as an insured on the Grand Am policy. Id.

State Farm contended that exclusions such as the one contained in the Grand Am policy were appropriate and consistent with Minnesota law. Id. To allow Plaintiff Kelly to recover UIM benefits under the Grand Am policy would permit the conversion of less expensive underinsured motorist coverage into more expensive liability coverage. Id. at 330-331.

In Kelly, this Court again explained “UIM coverage is designed to ‘protect against . . . the risk that the negligent driver of another vehicle will have failed to purchase

adequate liability insurance . . .” Id. at 331 (quoting Meyer, 371 N.W.2d at 537). This

Court continued:

When a liability claim is made on one policy and a UIM claim is made on a second policy, both of which list the tortfeasor as an insured, allowing the UIM claim would result in the payment of additional benefits for injuries caused by the negligence of the insured tortfeasor, which is, as we stated in Lynch, the “essence of liability coverage.”

Id. (citation omitted).

Thus, although the liability payment was made under the State Farm policy covering the Intrepid, Plaintiff Kelly could not seek UIM coverage under the State Farm policy covering the Grand Am. “To allow Kelly’s husband to benefit from providing inadequate liability coverage on the Intrepid by supplementing that coverage with cheaper UIM coverage from a separate policy that also names him as an insured result[ed] in coverage conversion,” which the Court stated insurance companies may exclude and this Court would enforce. Id. at 331.

In essence, in order to trigger liability coverage and UIM coverage under the same policy there must be another at-fault vehicle. Commentators, such as Theodore J.

Smetak, have similarly noted:

If there is another motoring tortfeasor, unrelated to the claimant, there is no obstacle to collecting both the liability coverage and the underinsured motorist coverage under one single policy because there are then two distinct, separately insured “risks” . . . . If there is a second, unrelated vehicle which is also at fault, that other unrelated vehicle involves a separate risk.

Theodore J. Smetak, Underinsured Motorist Coverage in Minnesota: Old Precedents in a New Era, 24 Wm. Mitchell L. Rev. 857, 902 (1998).

Here, as Judge Toussaint noted in his dissent, “even if [Drew] the owner of the vehicle was at fault and some portion of Pepper’s injuries were attributable to the negligence of the vehicle’s owner, the vehicle’s owner is not a *motoring* tortfeasor.” (Add. 12). This case does not involve a multi-vehicle accident. The Court of Appeals, in addressing UIM coverage, failed to acknowledge this Court’s holding that the fundamental character of UIM coverage is to provide coverage for uncompensated damages that an insured is legally entitled to recover from the owner of the “other vehicle.” (Add. 8). Although the current UIM statute no longer contains “other vehicle” language, this Court has stated that this deletion “does not purport to change the fundamental character of UIM coverage.” Thommen, 437 N.W.2d at 654. State Farm’s exclusion of UIM coverage under these circumstances is in full accord with the No-Fault Act.

In other words, the No-Fault Act does not mandate UIM coverage be imposed in a one-vehicle accident under the same policy that provides liability coverage. The Court of Appeals ruling to the contrary ignores this Court’s holding in Thommen. In accord with the fundamental nature of UIM coverage, State Farm’s policy provision excluding from UIM coverage a motor vehicle insured under the liability coverage of that policy is enforceable.

Auto insurance insures against the risks associated with “motoring.” Classified Ins. Corp. v. Vodinelich, 368 N.W.2d 921, 923 (Minn. 1985). In the common case, such as here, where an owner allows another to drive her car, two liability insurance policies

may be available – that of the owner and that of the driver – and both covering liability arising out of the use of that at-fault vehicle. The claimed negligence of Drew, the vehicle’s owner, cannot somehow be separated from the vehicle’s operation, as the Court of Appeals concludes, so as to obligate as a matter of law the insurer which provides liability coverage for that solely at-fault vehicle’s operation to also provide UIM coverage. See, e.g., Faber v. Roelofs, 311 Minn. 428, 250 N.W.2d 817, 822 (1977), *reh’g denied* (injury sustained when student was run over by school bus arose out of the use of the bus within the meaning of auto liability policy, rejecting contrary contention that injury arose out of independent school district negligence with respect to bus route/procedures rather than out of use of the bus).

In her Complaint, Pepper asserted she was involved in an accident with an “underinsured at fault vehicle.” (A. 1). That did not change when Pepper later asserted the Drew vehicle was “at fault” because of a claimed mechanical defect, which fault Pepper now asserts can be attributed to Drew’s failure to warn the operator Matlachowski who was driving her car when the accident occurred. Pepper’s assertion that Drew, as owner, is also responsible does not change the fact that there is only one “at-fault” vehicle. It also does not change the fact that the vehicle on which Pepper seeks UIM coverage is the same vehicle that sets the limits of liability coverage.

Affording UIM coverage to Pepper under a Matlachowski State Farm policy does convert inexpensive UIM coverage into additional liability coverage. Drew controlled the amount of liability insurance her auto policy provided for the driver of her pickup truck.

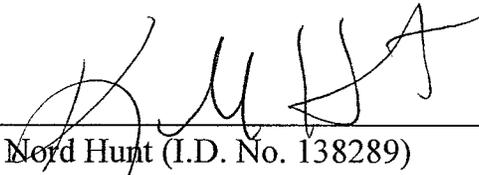
It is because of the inadequate liability limits purchased by Drew that Matlachowski's own State Farm liability coverage was triggered. Granting Pepper UIM coverage now under the Matlachowski policy would be to provide to Drew, as the owner of the at-fault vehicle, even more liability coverage for her at-fault vehicle. This constitutes coverage conversion and State Farm's UIM insured vehicle exclusion is enforceable.

**CONCLUSION**

Petitioner State Farm requests that the Court of Appeals be reversed and the trial court's grant of summary judgment to it be reinstated.

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Dated: October 20, 2011

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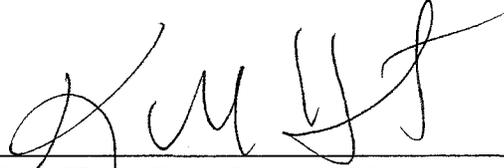
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,956 words. This brief was prepared using Word Perfect 10.

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