

A10-2090

State of Minnesota
In Supreme Court

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.

**REPLY BRIEF OF PETITIONER STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY**

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This Court has held the UIM insured vehicle exclusion is “proper and consistent with the purposes of the No-Fault Act.” Kelly v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 328, 330 n.1 (Minn. 2003). Appellant State Farm Mutual Automobile Insurance Company (State Farm) respectfully requests this Court therefore reverse the Court of Appeals’ ruling to the contrary and reinstate the grant of summary judgment to State Farm.

A. No Windfall Is Obtained by State Farm by Enforcement of the Language of Its Insurance Contracts With the Matlachowskis.

Contrary to Respondent Tammy Pepper’s (Pepper) assertions in her Respondent’s brief, no windfall is bestowed on State Farm by enforcement of the Matlachowski State Farm policies’ terms. And contrary to Pepper’s assertion at pages 10-11 of her Respondent’s Brief, Pepper was certainly not excluded from the benefit of the Matlachowski State Farm issued liability insurance. She, instead, obtained the liability limit of those policies.¹

When the Matlachowskis purchased the State Farm policy for their 1998 Subaru Legacy, Policy No. C23 2362-C15-23S, and the policy for their 1999 Chevrolet Lumina, Policy No. 73 0739-E11-23E, they purchased auto insurance policies that contain an explicit anti-stacking clause. That clause explicitly states the Matlachowskis cannot stack the liability limits of these two policies for the same accident. (A. 22, 63). The policies

¹ Only Frank and Dawn Matlachowski are the named insureds on their State Farm policies covering their motor vehicles. (A. 8, 49). Pepper claims insured status as a Matlachowski relative. (A. 20, 73). There is no evidence that Pepper, age 50, paid for the Matlachowski insurance policies. (Supplemental Appendix [S.A.] 1). To be a “relative” Pepper must reside in the same household with the Matlachowskis. (A. 15, 56). That issue has not yet been determined, but for purposes of State Farm’s motion for summary judgment only it was assumed she had insured status as a resident relative.

provide if two or more liability policies issued to the Matlachowskis 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.” (Id.) This anti-stacking limit of liability language is applicable to non-owned vehicle liability insurance. (Id.) Since both policies purchased have an applicable \$100,000 each person liability limit, that is the limit of liability that applies, regardless of the number of policies purchased by the Matlachowskis from State Farm. That limit of liability has been paid to Pepper. There is no Matlachowski policy that did not pay liability benefits, as Pepper asserts.

Pepper does not and cannot argue that the anti-stacking clause contained in the Matlachowski State Farm policies is somehow contrary to Minnesota law. As this Court has held, an insurer can limit the stacking of third-party automobile liability coverage. Hilden v. Iowa Nat’l Mut. Ins. Co., 365 N.W.2d 765, 769 (Minn. 1985) (permitting insurer to limit stacking of liability coverage); see also 7A Am. Jur. 2d Automobile Insurance § 429 (describing stacking and citing cases where an insurance policy contains express anti-stacking language, stacking should not be permitted).

There is no windfall to the insurer by application and enforcement of an anti-stacking clause. In Hilden, the Court upheld a policy exclusion that prevented the stacking of liability coverage limits from a family’s two vehicles when a third vehicle was involved in the accident giving rise to liability. 365 N.W.2d at 769. There this Court reasoned that “the declination to cumulate the limits of liability applicable to various automobiles does not result in the insurer reaping a windfall in premiums paid for

coverage not honored.” Id. This Court has rejected the very “windfall” argument being made now by Pepper for the first time on appeal.

B. To Rule the Insured Vehicle Exclusion Unenforceable Is to Convert UIM Coverage into Additional Liability Coverage.

Pepper, having received the maximum benefit under the Matlachowski policies’ non-owned vehicle liability insurance coverage, is not entitled to additional compensation under the same policies. State Farm’s policies issued to the Matlachowskis specifically state “[a]n underinsured motor vehicle does not include a motor vehicle . . . insured under the liability coverage of this policy.” (A. 31, 72). What Pepper seeks is an additional \$100,000 under the same policies which provide liability coverage for the Drew motor vehicle as a non-owned motor vehicle but limit it to \$100,000. To so order, as the Court of Appeals has now done, is to convert UIM coverage into additional liability coverage for this one-vehicle accident.

To allow Pepper to receive benefits under both the liability and underinsured motorist provisions of a State Farm Matlachowski policy amounts to a rewriting of the policies to increase liability coverage. This is a conversion of less expensive UIM coverage to more expensive liability coverage, which Minnesota law does not mandate. Petrich by Lee v. Hartford Fire Ins. Co., 427 N.W.2d 244, 246 (Minn. 1988) (noting that because first-party coverage and third-party coverage contemplate different risks they are assigned different premiums). State Farm’s exclusion is enforceable.

As this Court explained in Meyer v. Ill. Farmers Ins. Group, 371 N.W.2d 535, 536 (Minn. 1985), the Legislature, in essence, did not intend that a vehicle could be

underinsured with respect to itself. But that, in essence, is Pepper's argument. As this Court stated in Meyer, "[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.'" (Id.) (emphasis in original). An underinsured motor vehicle must by definition be an insured vehicle. Minn. Stat. § 65B.43, subd. 17. Thus, the UIM statute contemplates a policy or policies which are applicable to the vehicle which is at fault in causing the injury to the claimant and which are the source of liability coverage (which is ultimately deemed insufficient to fully compensate the victim) and a second policy under which the injured claimant is an insured but which cannot be the source of liability coverage. The Matlachowski policies cannot be that "second policy." Here, the statutory scheme contemplates recovery by Pepper of the available limits of liability applicable to the at-fault vehicle, but nothing more from the policies that provide such coverage.

It simply does not matter whether that accident resulted from the ownership, maintenance or use of Drew's vehicle. Matlachowski, as driver, cannot be separated from Drew, as owner, with regard to this one-car accident. There is one at-fault vehicle.²

² Pepper states that "[a]t the time of the accident, Drew knew the vehicle accelerator was defective, but Drew did not warn Matlachowski of the defect." (Respondent's Brief, p. 2). Actually, Drew has not so testified. That assertion is made by Dawn Matlachowski, who asserts that after the Pepper accident, and while Dawn was driving Drew's vehicle, she experienced "sudden unexplained acceleration." (A. 95-96). Her affidavit statements are contrary to her statement to the Lake of the Woods County Sheriff's Office. (S.A. 2). In any event, that assertion does not support any claim that Drew knew of this alleged problem prior to Pepper's accident, and Drew has not so testified.

Minnesota's Safety Responsibility Act, now codified at Minn. Stat. § 169.09, subd. 5a, specifically states “[w]henver any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.” As this Court explained, the emphasis of this statute is on “making sure that there would be [liability] coverage when the vehicle was the at-fault vehicle, even if the owner or named insured was not the driver.”

Progressive Specialty Ins. Co. v. Widness, 635 N.W.2d 516, 521 (Minn. 2001); see Minn. Stat. § 65B.48, subd. 1 (mandating owner maintain liability insurance insuring against loss caused by the ownership, maintenance, operation or use of the vehicle).

The undisputed fact is that State Farm paid to Pepper Drew's auto policy liability limits because of Pepper's injuries arising out of the “ownership, maintenance, operation or use” of the at-fault vehicle. And it is because of the inadequate liability limits purchased by Drew that the Matlachowskis' State Farm non-owned liability coverage was triggered and the liability limits of the Matlachowski State Farm policies were paid because of the ownership, maintenance, operation or use of the same at-fault vehicle. As Pepper must admit, the liability limits of the Matlachowskis' non-owned vehicle liability coverages have been exhausted.

Granting Pepper UIM coverage under a Matlachowski policy would be to provide the at-fault vehicle with even more liability coverage. This constitutes coverage conversion. Latterell v. Progressive Northern Ins. Co., 801 N.W.2d 917, 924 n.4 (Minn.

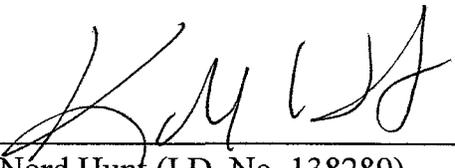
2011) (“Coverage conversion arises when an individual attempts to convert inexpensive UIM coverage into additional liability coverage by trying to recover both third-party benefits and first-party UIM benefits from the same insurance policy.”); Kelly, 666 N.W.2d at 331 (“Coverage conversion occurs when UIM benefits are used as a substitute for the tortfeasor’s inadequate liability coverage.”). 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: November 21, 2011

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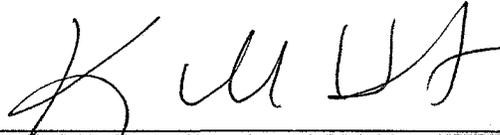
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 1,530 words. This brief was prepared using Word Perfect 10.

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