2-2-1976

American Automobile Insurance Company v. Jerry Bartlett, Administrator of the Estate of Mary C. Bartlett

Appellant's Brief 1975-SC-1110

APPELLANT'S BRIEF

560 SW 2d 6
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SUPREME COURT OF KENTUCKY

File No. 75-1110

AMERICAN AUTOMOBILE INSURANCE COMPANY - - - - - - - Appellant

versus

JERRY BARTLETT, Administrator of the Estate of Mary C. Bartlett - - - Appellee

APPEALED FROM THE JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FOURTH DIVISION
GEORGE B. RYAN, JUDGE

BRIEF FOR APPELLANT, AMERICAN AUTOMOBILE INSURANCE COMPANY

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This is to certify that a copy of the foregoing was mailed to Mr. Carl J. Bensinger, Attorney for the Appellee, Jerry Bartlett, Administrator of the Estate of Mary C. Bartlett, 1509 Kentucky Home Life Building, Louisville, Kentucky, 40202, and Hon. George B. Ryan, Jefferson Circuit Court, Common Pleas Branch, Fourth Division, Court House, Louisville, Kentucky 40202, this the 23rd day of January, 1976.

Attorney for Appellant, American Automobile Insurance Company

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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B. Defendant, American, was further entitled to Judgment upon its Motion for Directed Verdict as well as upon its Motion for Judgment Notwithstanding the Verdict because of the provisions of said policy as follows:

"(b) Any amount payable under the terms of this Part because of bodily injury (death) sustained in an accident by a person who is an insured under this Part shall be reduced by

(1) all sums paid on account of such bodily injury (death) by or on behalf of

STATEMENT OF QUESTIONS PRESENTED

A. **The uninsured motorist portion of the insurance policy of the Defendant insurer, American Automobile Insurance Company, of the insured, Plaintiff's decedent, did not apply because it is uncontroverted that neither the representative nor counsel nor anyone for and on behalf of the Plaintiff's decedent obtained the consent of this Defendant, American Automobile Insurance Company, as required by the provisions of said policy holding that the uninsured motorist portion does not apply to bodily injury (death) to an insured with respect to which such insured, his legal representative, or any person entitled to payment under this section shall, without written consent of the Company, make any settlement with any person or organization who may be legally liable therefor; and Plaintiff's proof and Defendant's proof through avowal show conclusively that the Plaintiff received a settlement of $25,000.00 from the insurer of the host driver of the Plaintiff's decedent without any knowledge of this Defendant or any of its representatives at said time and not until after said settlement and no consent was ever given.**

B. **Defendant, American, was further entitled to Judgment upon its Motion for Directed Verdict as well as upon its Motion for Judgment Notwithstanding the Verdict because of the provisions of said policy as follows:**

> "(b) Any amount payable under the terms of this Part because of bodily injury (death) sustained in an accident by a person who is an insured under this Part shall be reduced by
>
> (1) all sums paid on account of such bodily injury (death) by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A . . ."

Since $25,000.00 was admittedly paid by the insurer, Aetna Life & Casualty Company, of decedent's host, Thacker, the insured, there is no sum due under the uninsured motorist portion of Defendant's (American's) policy by reason of this "reducing clause."

C. The uncontradicted proof showed that the Plaintiff had received a settlement of $25,000.00 and by reason of said settlement and the proof showing that the limit of liability of the insurer of the Decedent's host, Thacker, being $25,000.00 for a single personal injury or death in a single accident and was the limit of the obligation of said insurer to pay on behalf of said insured the sum which the insured shall become legally obligated to pay as damages because of said injury (death) of the Plaintiff's decedent by reason of the operation of said insured vehicle, and there was additional coverage of uninsured motorist with said Company with the insured being the host, Thacker, and consequently the Plaintiff having collected and settled the $25,000.00 claim against the host, Thacker, by reason of her alleged negligent operation of the said vehicle, Plaintiff is estopped to claim that the uninsured motorist provision of the Defendant's policy comes into play since the two positions are irreconcilable and in conflict.

D. Decedent's host, Thacker, had with Aetna Life and Casualty Company $10,000.00 uninsured motorist coverage and $25,000.00 liability limit coverage for personal injury to one person or for death to one person in each occurrence and settled said total exposure of $35,000.00 if there had been joint negligence for the sum of $25,000.00, and Defendant is entitled to a credit of $35,000.00 being the $10,000.00 uninsured motorist coverage and the $25,000.00 bodily injury coverage of the host, Thacker, as primary insurance before the secondary uninsured motorist coverage of the Defendant as the insurer of the Plaintiff's decedent comes into effect.

E. **Under the undisputed facts in this case American Automobile Insurance Company was entitled to have its Motion for Directed Verdict sustained by the Trial Court as well as its Motion for Judgment Notwithstanding the Verdict sustained. The Trial Court abused its discretion in not permitting to be filed the Amended Answer tendered one month before trial or the Supplemental Answer tendered to conform to the proof.**

SUPREME COURT OF KENTUCKY

File No. 75-110

AMERICAN AUTOMOBILE INSURANCE COMPANY - - - - - - - - - *Appellant*

v.

JERRY BARTLETT, Administrator of the Estate of Mary C. Bartlett - - *Appellee*

APPEALED FROM THE JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FOURTH DIVISION
GEORGE B. RYAN, JUDGE

BRIEF FOR APPELLANT, AMERICAN AUTOMOBILE INSURANCE COMPANY

May it please the Court:

I. STATEMENT OF THE CASE

A. Statement of the Nature of Proceedings

This is a breach of contract and bad faith action brought upon the uninsured motorist provisions of an insurance contract issued by the American Automobile Insurance Company with Jerry Bartlett as the named insured upon an automobile not involved in the collision stated in the Complaint. The uninsured motorist

provisions of the policy provided a limit of $10,000.00 for each person and $20,000.00 for each accident (Ptf's Ex. 4, T.E. 51). Through not using the words bad faith on the part of the insurance company, it was alleged (T.R. 4) in the Complaint by the Plaintiff that American Automobile Insurance Company declined payment under the policy and that its declination was wrongful and willful. Whereupon the Plaintiff sought judgment against American in the amount of $104,-500.00. The Complaint alleged that on October 29, 1973, Mary C. Bartlett was a passenger in the automobile of Mary Thacker which was being operated East on Chestnut Street when at 2300 West Chestnut Street, Louisville, Kentucky, an unknown vehicle caused the automobile driven by Mary Thacker to strike a utility pole causing injuries to Mary C. Bartlett and later resulting in her death. Jerry Bartlett was alleged to be the duly appointed Administrator of the Estate of Mary C. Bartlett (T.R. 3). It was alleged that Mary Bartlett died on October 29, 1973, and damages were sought for pain and suffering in the amount of $50,000.00, funeral and burial expenses in the amount of $2,500.00 (T.R. 3). It was further alleged that as a result of the accident referred to Mary C. Bartlett's power to labor and earn money had been damaged in the amount of $50,000.00, and that her Estate had incurred medical and hospital expenses in the sum of $2,000.00 (T.R. 3). The Complaint further alleged that the American Automobile Insurance Company had issued and there was in full force and effect an insurance policy in favor of Jerry Bartlett and Mary

C. Bartlett providing coverage among other things for medical payments and for uninsured motorist coverage (T.R. 3). It was then alleged that the accident referred to is an uninsured motorist claim within the meaning and definition of said policy issued by American Automobile Insurance Company; that the damages complained of by the Plaintiff are properly covered in the American Automobile Insurance Company Policy issued to Jerry Bartlett, and that the American Automobile Insurance Company has declined payment under said policy and said declination is wrongful and unlawful (T.R. 3-4).

The American Automobile Insurance Company (T.R. 5) answered moving that the Complaint did not state a claim by which relief could be granted; that one year Statute of Limitations as contained in KRS 413.140 as to wrongful death; admitting that both Jerry Bartlett and Mary C. Bartlett are residents of Jefferson County, Kentucky, and denying the remaining paragraphs of the Complaint with the exception of admitting that at one time American had issued an insurance policy to Jerry Bartlett and that said policy had uninsured motorist provisions in it in accordance with the terms and conditions of said policy which was in the possession of said Jerry Bartlett, but denied the uninsured motorist provisions, terms and conditions under the circumstances alleged in the Complaint were covered.

On May 19, 1975, the Defendant, American, moved the Court to file an Amended Answer and a Third Party Complaint against Aetna Casualty & Surety Company (T.R. 10). In the Amended Answer (T.R.

12) it was alleged by American that the automobile in which the Plaintiff' decedent, Mary C. Bartlett, was riding at the time of the accident which is the subject matter of the suit, was covered by a policy of liability insurance issued by Aetna Casualty & Surety Company covering the owner and operator of said vehicle. In addition, the policy of Aetna contained an uninsured motorist coverage in the sum of $10,000.00 (T.R. 12). It was further alleged in the tendered Amended Answer that the uninsured motorist coverage of Aetna Casualty & Surety Company since it covered the automobile which the Plaintiff's decedent was occupying at the time of the accident in question is primary coverage and the American uninsured motorist coverage, if applicable at all, is only secondary to the uninsured motorist coverage of Aetna (T.R. 12). It was further set forth that Aetna Casualty & Surety Company as primary uninsured motorist carrier, is a indispensable party to this action and Plaintiff's Complaint should be dismissed for failure to join an indispensable party (T.R. 13).

The tendered Amended Answer further alleged (T.R. 13) that Jerry Bartlett as Administrator of the Estate of Mary C. Bartlett has settled his claim against Henry Louis Thacker and Mary Thacker for the sum of $25,000.00 in accordance with the Release in full attached hereto and that said Release constituted a release of all alleged joint tort-feasors by failure to reserve rights against other alleged joint tort-feasors, thereby releasing and discharging the Defendant, American Automobile Insurance Company, from all

liability, if any it would have otherwise (T.R. 13). In the alternative (T.R. 13) it was alleged in the tendered Amended Answer that American is entitled to reduction of its liability by all sums paid by or on behalf of any other person, jointly or severally liable, along with an alleged uninsured motorist and this Defendant is, therefore, entitled to have its liability reduced by all sums paid or owing by Aetna Casualty & Surety Company under its liability and/or uninsured motorist coverages. In addition (T.R. 13) in the Amended Answer American Automobile Insurance Company specifically denied that its uninsured motorist coverage is applicable to or for the benefit of the Plaintiff in the within action on the ground that there was no physical contract between the vehicle in which the Plaintiff's decedent was riding and the alleged hit-and-run uninsured vehicle at the time of the accident in question. The tendered Amended Answer (T.R. 14) prayed that the Plaintiff's Complaint and all of its amendments be dismissed; in the alternative, credit against any Judgment entered against it for the Aetna Caualty & Surety Company payments and coverages totaling $35,000.00; its costs and all other proper relief (T.R. 14). The Release by Jerry Bartlett, Administrator of the Estate of Mary C. Bartlett in favor of the Thackers may be found at (T.R. 15). The Third Party Complaint tendered by American against Aetna Casualty & Surety Company (T.R. 16) sought a declaration of rights concerning which of the uninsured motorist coverage was applicable as primary or secondary. On June 2, 1975

(T.R. 11), the Trial Court overruled the Motion to file the Amended Answer and Third Party Complaint.

This action was tried before a Court and Jury June 19 and 20, 1975 (T.E. 1).

In conformity with the proof of the introduction of the insurance policy on June 20, 1975, American filed its Supplemental Anwer (T.E. 130, T.R. 22) stating that American had paid to the Plaintiff the sum of $1,000.00 under the medical pay provisions of its policy and reiterated each and every allegation of its original Answer and Amended Answer. In addition (T.R. 22), it was alleged that under American's uninsured motorist coverage provisions as uninsured motorist is defined as requiring contact before the uninsured motorist provisions of the policy are effective, and there was no contact in this accident with the alleged hit-and-run driver. It was further alleged (T.R. 22) that Aetna, insurer of Thacker herein, had paid $25,000.00 to the Plaintiff without the written consent by American, and therefore, exclusion (b) of the uninsured motorist coverage is breached and no coverage extended under the uninsured motorist provisions of said policy. In the alternative (T.R. 22) it was alleged that the sum of $25,000.00 paid by Aetna to Bartlett must reduce the coverage of $10,000.00 in the herein action and therefore under this provision a reduction of the alleged $10,000 due under the uninsured motorist coverage by $25,000.00 leave no coverage due and owing (T.R. 22-23). The Court on June 20, 1975, refused the Supplemental Answer (T.R. 23).

At the conclusion of all the proof (T.E. 178) the Defendant, American, moved for a Directed Verdict on the grounds previously stated to the Court (T.E. 164-168). The Court would permit no evidence to be introduced as to the settlement between Aetna and the Plaintiffs under Aetna's policy. American maintained (T.E. 164) that it was an abuse of discretion not to permit it to file its Amended Answer and Supplemental Answer. American maintained that it was entitled to a directed verdict because there was no competent evidence to justify the submission to the jury of the case that there was a contact between the vehicle in which the decedent was riding and the alleged hit-and-run vehicle, thus placing the uninsured motorist portion of the policy in operation (T.E. 165). Further ground for a Directed Verdict is that the provision of the uninsured motorist endorsement excluding coverage when the insured without the consent of the insurer settles his claim against the uninsured motorist or other person who may be legally liable for his injuries is valid and enforceable (T.E. 165). As an additional ground for a Directed Verdict it was urged that American's policy is in effect only as to its terms and conditions. One of the terms and conditions is that where the insured is paid by some other party who may be legally liable therefor without the consent of the insurer, said uninsured motorist provision is not applicable. This clause is valid as it prevents the insured from collecting twice contending at one time that the insured, as in this case, Thacker, was negligent and the uninsured motorist provisions in Thacker's policy did not apply, and then

turning around and contending through the same attorney for the same estate through the same individuals that there was a hit-and-run uninsured motorist coverage on the Bartlett policy, a separate policy with this Defendant, American Automobile on a car not involved in the accident. Thus, American has no opportunity to defend itself and to determine what is right and that is the very purpose of that exclusionary clause (T.E. 167).

The Court submitted a special interrogatory as to contact between vehicles to the jury (T.E. 185), a damage instruction in case the interrogatory was answered "yes" (T.E. 186); and an instruction in the event the first interrogatory was answered "no" that is to say that if you believe the vehicle did not actually collide, you will find for the Defendant, American Automobile Insurance Company and say so by your verdict (T.E. 187). After argument of counsel (T.E. 187-203) the case was submitted to the jury. The jury retired at 1:55 P.M. At 6:30 P.M. they were brought out (T.R. 4) at which time they were asked if they thought they could make a verdict. The Defendant moved (T.E. 205) to discharge the jury which was overruled. The jury (T.E. 205) answered the special interrogatory "Yes" and it was signed by nine jurors awarding damages in the sum of $34,000.29 to the Plaintiff (T.E. 207).

On July 18, 1975, the Court entered Judgment stating (T.E. 31) that the jury having returned a verdict for the sum of $34,000.29 against American Automobile Company, and the Plaintiff having received a settlement from Aetna Life & Casualty Company in the sum

of $25,000.00, the American Automobile Insurance Company is entitled to a credit of $25,000.00 on the verdict of $34,000.29. Therefore, Judgment was entered that the Plaintiff recover of the Defendant, American Automboile Insurance Company the sum of $9,000.29 with interest at the rate of six per cent per annum from the date of Judgment until paid (T.E. 31).

On July 22, 1975 (T.E. 32), the Defendant, American Automobile Insurance Company, filed its Motion for Judgment for the Defendant Notwithstanding the Verdict. The grounds for the Motion were that there was no competent evidence to substantiate the jury verdict and Judgment in favor of the Plaintiff herein as to contact between the hit-and-run automobile and hence the uninsured motorist portion of the policy did not cover this Plaintiff; that the uninsured motorist provisions of American Automobile Insurance Company's policy did not apply because it is uncontroverted that no consent was ever obtained from American for the Plaintiff's settlement with Aetna as required by the provisions of the policy providing that no person entitled to payment under this section shall, without the written consent of the Company, make any settlement with any person or organization which may be legally liable therefor; and that the Plaintiff's proof and Defendant's proof showed conclusively through avowal that the Plaintiff received a settlement of $25,000.00 from the insurer of the host driver of the Plaintiff's decedent without any knowledge of this Defendant or any of its representatives at said time and no consent was ever gvien. Moreover, it was stated that under

the terms of the policy of American it was entitled to Judgment because said policy provided that any amount payable under the terms of the uninsured motorist provisions who is an insured shall be reduced by all sums paid on account of bodily injury by any other person jointly or severally liable with such owner or operator. Thus, because of said "reducing clause" and the admitted payment of $25,000.00 by Aetna Insurance Company, the insurer of the Plaintiff's host, Thacker, there was no sum due under the uninsured motorist provision of the policy. It was further set forth that the positions of the Plaintiff are inconsistent in attempting to collect liability payments from the liability carrier of the host driver and to collect uninsured motorist coverage payments under a policy covering an automobile not involved in the accident; thus, there is estoppel as the two positions are irreconcilable and in conflict (T.R. 33). Another ground for the Motion for Directed Verdict was that the Defendant's host, Thacker, had $10,000.00 uninsured motorist coverage and $25,000.00 limit coverage for personal injury to one person or to death to one person in each occurrence and settled such total exposure for $35,000.00 if there had been joint negligence, for the sum of $25,000.00 and the Defendant is entitled to credit of $35,000.00 being $10,000.00 uninsured motorist and $25,000.00 B.I. coverage of the host, Thacker, is primary insurance before the secondary uninsured motorist coverage of American as insurer of the Plaintiff's decedent comes into effect.

On July 25, 1975, American filed its Motion to Reconsider the Court's Order of June 2, 1975, overruling the Defendant's Motion to file a Third Party Complaint making the Aetna Casualty & Surety Company a Third Party Defendant and moved the Court to enter an Order permitting said Third Party Complaint to be filed in accordance with the Kentucky Rules of Civil Procedure. The Motion for Judgment Notwithstanding the Verdict was overruled September 30, 1975 (T.R. 34), and the Motion to Reconsider was overruled September 30, 1975 (T.R. 35) and entered in Court on October 1, 1975.

The American Automobile Insurance Company filed its Notice of Appeal on October 17, 1975, and its Designation of Record on the same date (T.R. 37-39).

The American Automobile Insurance Company filed its Supersedeas Bond (T.R. 41) on October 17, 1975. The Record on Appeal was filed and docketed with the Clerk of the Court of Appeals of Kentucky on December 10, 1975.

B. Statement of Facts

On May 29, 1975, when the deposition of Jerry Barlett was taken, demand was made by the Attorney for American for the production of the Agreement which was revealed in the course of taking Mr. Bartlett's deposition. There was some type of Agreement in addition to the Release. Upon the opening day of trial demand was made for the Agreement (T.E. 3) but same was not produced and not until the Court ordered

production was the Indemnification Agreement between Aetna, the Bartlett Estate and Mr. Bensinger produced and filed as Def's Ex. 1 (T.E. 13).

On October 29, 1973, at approximately 6:43 A.M. the Plaintiff's decedent, Mary C. Bartlett, was a passenger (T.E. 99) in the car of Mary Thacker which was being operated east on Chestnut Street when at about 2300 West Chestnut Street, Louisville, Kentucky, an unknown vehicle caused the automobile driven by Mary Thacker to strike a utility pole causing injury to Mary C. Bartlett which later resulted in her death. Mrs. Bartlett was (T.E. 101) seated in the right front seat. Another passenger in the vehicle at the time of the accident was Janie Lou Washington. Neither Mrs. Thacker, the driver of the vehicle in which the decedent was a passenger, nor Mrs. Washington, the other passenger in the vehicle, testified at the trial.

American Automobile Insurance Company had issued to Jerry Bartlett, as named insured, husband of the decedent, Mary C. Bartlett, an automobile liability (Plf. Ex. 4, T.E. 51) policy which contained an uninsured motorist provision. The vehicle belonging to Jerry Bartlett upon which this policy of insurance was issued was not involved in the accident. The American's policy provided uninsured motorist coverage in the amount of $10,000.00 for each person and $20,000.00 for each accident. The vehicle involved in the accident belonging to Mrs. Thacker who was insured by Aetna Life & Casualty Company with liability (T.E. 152) coverage as to bodily injury in the amount of $25,000.00 per person with $50,000.00 maximum, as well as

Coverage G — Uninsured Motorists (Damages for Bodily Injury). To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the Company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the Company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the Company.

Definitions. The definitions under Part I, except the definition of "insured," apply to Part IV, and under Part IV:

"insured" means:

(a) the named insured and any relative;

(b) any other person while occupying an insured automobile; and

(c) any person, with respect to damages he is entitled to recover because of bodily injury to which this Part applies sustained by an insured under (a) or (b) above.

The insurance afforded under Part IV applies separately to each insured, but the inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability.

"insured automobile" means:

(a) an automobile described in the policy for which a specific premium charge indicates that coverage is afforded.

(b) a private passenger, farm or utility automobile, ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an insured automobile as defined in (a) above, or

(2) the Company insures under this coverage all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the Company during the policy period or within 30 days after the date of such acquisition of his election to make the Liability and Uninsured Motorists Coverages under this and no other policy issued by the Company applicable to such automobile,

(c) a temporary substitute automobile for an insured automobile as defined in (a) or (b) above, and

(d) a non-owned automobile while being operated by the named insured; and the term "insured automobile" includes a trailer while being used with an automobile described in (a), (b), (c) or (d) above, but shall not include:

(1) any automobile or trailer owned by a resident of the same household as the named insured,

(2) any automobile while used as a public or livery conveyance, or

(3) any automobile while being used without the permission of the owner.

"uninsured automobile" includes a trailer of any type and means:

(a) an automobile or trailer with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law of the state in which the insured automobile is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such automobile, or with respect to which there is a bodily injury liability bond or

insurance policy applicable at the time of the accident but the Company writing the same denies coverage thereunder, or

(b) a hit-and-run automobile;

but the term "uninsured automobile" shall not include:

(1) an insured automobile or an automobile furnished for the regular use of the named insured or a relative,

(2) an automobile or trailer owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law,

(3) an automobile or trailer owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing,

(4) a land motor vehicle or trailer if operated on rails or crawler treads or while located for use as a residence or premises and not as a vehicle, or

(5) a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

"hit-and-run automobile" means an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided (a) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile"; (b) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the Company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof, and (c) at the Company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.

"occupying" means in or upon or entering into or alighting from.

"state" includes the District of Columbia, a territory or possession of the United States, and a province of Canada.

Exclusions. This policy does not apply under Part IV:

(a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile;

(b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall, without written consent of the Company, make any settlement with any person or organization who may be legally liable therefor;

(c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self insurer under any workmen's compensation or disability benefits law or any similar law.

Limits of Liability.

(a) The limit of liability for uninsured motorists coverage stated in the declarations as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

(b) Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by

(1) all sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A, and

(2) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law.

(c) Any payment made under this Part to or for any insured shall be applied in reduction of the amount of damages which he may be entitled to recover from any person insured under Coverage A.

(d) The Company shall not be obligated to pay under this Coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under Part II.

Other Insurance. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this Coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Arbitration. If any person making claim hereunder and the Company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Part, then, upon written demand of either, the matter or matters upon which such person and the Company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the Company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this Part.

Trust Agreement. In the event of payment to any person under this Part:

(a) the Company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;

(b) such person shall hold in trust for the benefit of the Company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this Part;

(c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;

(d) if requested in writing by the Company, such person shall take, through any representative designated by the Company, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the Company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith;

(e) such person shall execute and deliver to the Company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the Company established by this provision.

$10,000.00 property damage (T.E. 152) with uninsured motorist coverage in the amount of $10,000.00 for each person and $20,000.00 for each accident (T.E. 153). On October 25, 1974, as the insurance carrier for Mrs. Thacker, the driver of the vehicle, the Aetna Life & Casualty Company on behalf of itself as well as its insured, Henry Louis Thacker and Mary Thacker, settled with Jerry Bartlett, as Administrator of the Estate of Mary C. Bartlett for the sum of $25,000.00 (Defendant's Tendered Exhibit 15, T.E. 155), and executed a Release to that effect but stating that the Release did not release any claim of Jerry Bartlett and the Estate of Mary C. Bartlett for any uninsured motorist claim or any subrogation rights that may inure to the insured motorist carrier. On February 15, 1975, the Administrator of the Estate of Mary Bartlett and his Attorney, Carl J. Bensinger, executed an Indemnification Agreement in favor of the Aetna Life & Casualty Company for all sums in excess of the $25,000 payment made on October 23, 1974 which Aetna Life & Casualty Company incurs as a result of pending and/or future litigation arising out of the automobile accident above referred to. In addition, the Indemnification Agreement provided that the Administrator of the Estate of Mary C. Bartlett and Carl J. Bensinger agreed to idemnify the Aetna Life & Casualty Company for all payments and legal defense costs in excess of the $25,000 payment incurred as the result of the pending and future litigation brought by the Estate of Mary C. Bartlett against any alleged uninsured motorist and/or against Aetna Life & Casualty Company as uninsured

motorist carrier for Henry Louis Thacker and Mary Thacker (Defendant's tendered Exhibit 1, T.E. 14). The Attorney for the Administrator, Carl J. Bensinger, witnessed the above Release, as well as signed the Indemnification Agreement. It is undisputed that the American Automobile Insurance Company was not given notice of this settlement prior to the time that it was made nor was it given notice of the Indemnification Agreement, nor did American consent to the settlement made between the Administrator and Aetna in the sum of $25,000 (T.E. 169), nor the Indemnification Agreement.

It is also undisputed that the first knowledge had of a claim being made by the Administrator under the terms of the policy issued the two Bartletts was on December 16, 1974, when American received notice of the present lawsuit as well as the first knowledge of the incident (T.E. 170).

The first witness for the Plaintiff was Helen Bailey (T.E. 38), Personnel Director of Kentucky Baptist Hospital, where Mary C. Bartlett was employed as a nurse's aide. She testified that Mary Bartlett was a good employee and had been working there since February 6, 1967, as well as that at the time of her death her annual compensation was $4,489.00 (T.E. 38, 40, 43).

Jerry Bartlett, the Administrator of the Estate of Mary C. Bartlett, testified that he was the husband of the deceased (T.E. 44) and that she desired to attend the R.N. school at Kentucky Baptist Hospital after

their children were older (T.E. 45). He further testified (T.E. 46) that she had graduated from high school. He further testified (T.E. 48) that after he was notified of the accident he went immediately to General Hospital where he saw Mrs. Thacker who told him that they had had a wreck and when asked what happened she said ". . . a man hit her, ran me into a utility pole and that my wife was hurt real bad . . ." (T.E. 48). He testified that the bill of General Hospital was $736.25 (T.E. 49, Plaintiff's Exhibit 2) and that the funeral bill was $1,494.00 (T.E. 48, Exhibit 3). He further testified that at the time of the accident he had an automobile insurance policy with the American Automobile Insurance Company which included the uninsured motorist coverage, and the policy of insurance was introduced as Plaintiff's Exhibit 4 (T.E. 50-51). Mr. Bartlett's testimony was impeached by the reading to him of the answers given in his deposition (T.E. 54) to the effect that Mrs. Thacker told him ". . . she said a car caused her to lose control, another car. She didn't remember what happened after that she got upset" (T.E. 54-55). The uninsured motorist provisions of the American policy are attached hereto.

Police Officer Walter Paul Aberli, Jr., testified that he received a call on October 29, 1973, at approximately 6:23 A.M. to proceed to the scene of the accident. He arrived there about three or four minutes later (T.E. 57). When arriving at the scene of the accident (T.E. 58) Mrs. Thacker was hysterical and stated "he hit me and run me off the road" when asked about how the accident occurred. Also, the Officer testified (T.E. 59) that on the way to the hospital the driver, Mrs. Thacker, stated that she was hit by another automobile (T.E. 60) which would make it a hit-and-run accident. However, this Officer was not concerned with the investigation of the accident, but with getting the injured parties to the hospital.

Police Officer Wayne Hall (T.E. 64) answered the call as the partner of Officer Paul Aberli at the same time and in the same vehicle. He testified (T.E. 65) that Mrs. Thacker kept saying on the way to the hospital "I couldn't help it he hit me and run me off the road." Mrs. Thacker told him that she was the driver (T.E. 65). Officer Hall also testified that Mrs. Thacker at the time the statement was made was extremely emotionally upset, hysterical and in a state of shock (T.E. 67-68).

On behalf of the Plaintiff, Mr. Charlie P. Hickman testified that he knew the decedent and that she was a hard working and honest person (T.E. 83). Jessie Bartlett (T.E. 85) testified that she was the mother-in-law of the decedent and that she was a good wife and mother.

The Life Expectancy Table was then introduced (T.E. 87) on the basis that Mary Bartlett was 29 at the time of her death and under the Life Expectancy Table she would have lived another 44.12 years as far as the average life of someone who is 29 years old. The Court then admonished the jury as to the value of this testimony (T.E. 88). This concluded the Plaintiff's case (T.E. 88).

The Defendant's first witness was Jesse W. Cummins, an Officer in the Louisville Police Department, who had investigated the accident (T.E. 89). He was dispatched to the accident at 0643 A.M. hours (T.E. 90) and arrived at the scene within five to seven minutes thereafter. He found (T.E. 91) a 1972 Pontiac, with 1973 Kentucky License J36531 resting in the eastbound lane on the south side of the roadway. The direction of travel would be in a southeastwardly direction approximately six to eight feet from a utility pole which had been snapped off about half way up the pole. The utility pole was located directly in front of 2300 West Chestnut Street (T.E. 91). The roadway was an asphalt roadway that had not been relined (T.E. 93). The Defendant's Exhibits 2 through 11 consisting of pictures of the vehicle and the scene of the accident were then introduced (T.E. 94). The determined that the driver and the owner of the vehicle was Mary Thacker and he talked to her at General Hospital on October 29, 1973. She showed him her driver's license. She informed him (T.E. 101) that she was the driver of the vehicle and that Janie Lou Washington was sitting in the center of the seat and Mrs. Bartlett was

a passenger in the vehicle seated in the right front seat (T.E. 101). She stated she was 24 years old (T.E. 102) and had been operating a vehicle for five months at the time of the accident. She stated her approximate speed was 35 mph. She also informed him that seat belts were available but that they were not being worn (T.E. 102). When asked what happened she stated as follows:

> ". . . She stated to me a vehicle swerved or pulled in front of her, she tried to avoid this vehicle, for reasons unknown she panicked, the vehicle lurched over, went over to the southeast striking a utility pole with the right front end of her vehicle" (T.E. 102).

In other words (T.E. 102), she swerved to avoid a vehicle which was changing lanes in front of her causing her to panic thereby she caused her vehicle to lurch forward at a higher rate of speed and struck the utility pole (T.E. 102).

Officer Cummins testified that there were no witnesses to the accident that he could find other than Mrs. Thacker and the passenger in her vehicle (T.E. 108). At the time that he talked to Mrs. Thacker she did not indicate to him that there was any contact between the phantom vehicle and her vehicle (T.E. 102-103). There was nothing in the physical facts or the evidence that he found at the scene of the accident that indicated his reporting to his superiors and placing into motion the hit-and-run procedure of the Police Department for purposes of criminal prosecution (T.E. 104). There was no indication of any kind that he

found (T.E. 106) that the vehicle operated by Mrs. Thacker had come into contact with any other vehicle (T.E. 106). The Exhibits 2 through 11 were then introduced into evidence (T.E. 107).

The Officer was then cross-examined by Plaintiff's Attorney concerning the pictures and the traffic lane in which Mrs. Thacker was traveling (T.E. 107-115) as well as the damage to the vehicle (T.E. 119). The Officer testified that there was no indication of any contact on the left side of the vehicle (T.E. 116).

Upon redirect examination of Officer Cummins, the Police Report prepared by him and marked as Defendant's Exhibit 13 was tendered and refused by the Court (T.E. 124). It was contended that such an Exhibit was proper in that this case involved an allegation that the Defendant insurance company wrongfully and in bad faith turned down this claim. As to the Defendant's Exhibit 12, the memorandum of Officer Cummins to his superior, Captain Tong, was not permitted to be introduced, but the drawing prepared at the scene of the accident (Def's Ex. 12) and the notes prepared by the officer at the scene of the accident were admitted into evidence (T.E. 126).

The next witness for the Defendant was Mr. Deno Baltas, Claims Manager of the Aetna Life & Casualty Insurance Company (T.E. 130). Pursuant to a Subpoena Duces Tecum he had brought the Aetna file with him concerning the accident which file was prepared in the usual course of business (T.E. 131). The file contained a statement of Mary Thacker and a statement of Mrs. Janie Washington. The statements

were marked Defendant's Exhibit 14 (T.E. 131). When Mr. Baltas was asked to read these statements to the jury an objection was made and sustained with a right reserved to present the remaining part of Mr. Baltas' testimony by avowal (T.E. 133).

Mr. Mike Oaks (T.E. 143), Claim Representative and Staff Appraiser for Aetna Life & Casualty Company testified that he had examined the Thacker vehicle for any indication for any prior damage or any indication that the car had been struck during the time of this accident, or very recently to indicate uninsured motorist potential. He stated that he had. He examined his report which was kept in the usual course of business (T.E. 141) and testified that the report (T.E. 145) that he had written stated that he saw no sign of any previous damage or other paint to indicate the vehicle had been hit just before the accident (T.E. 145). On cross-examination (T.E. 149) he stated Aetna had uninsured motorist coverage on Mrs. Thacker and her car. He further stated the reason Aetna wanted him to investigate was that if there was contact Aetna would have to pay off under the uninsured motorist coverage (T.E. 150). The counsel for American (T.E. 150) pointed out to the Court that this opened up a whole line of questioning concerning Aetna's settlement as the insurance carrier for Thacker with the Plaintiff. Mr. Hobson pointed out that he had no objection, but the Court on his own Motion sustained an objection (T.E. 151).

In chambers out of the hearing of the jury (T.E. 125) Mr. Baltas, the Claim Manager of Aetna, testified

that his Company had an interest as to whether or not there was any contact between the vehicle driven by Mary Thacker and the unknown vehicle. Because, if there had been contact Aetna as Mrs. Thacker's uninsured motorist carrier would have approached the claim of Mrs. Bartlett's Estate on the basis that it was an uninsured motorist claim rather than on the basis of a liability claim against Thacker (T.E. 152). Mr. Baltas testified that Aetna on October 29, 1973, had a regular automobile liability insurance policy in effect which also included protection against uninsured motorist (T.E. 152). As to public liability, or in other words, the limit that the Company would pay if Mrs. Thacker or someone operating the vehicle with her permission became legally obligated by reason of an automobile accident would be in the amount of $25,000.00 to $50,000.00 maximum for bodily injury and $10,000.00 property damage (T.E. 152-153), and the limit of the uninsured motorist coverage was $10,000.00 for individual and $20,000.00 for accident (T.E. 153). Mr. Baltas testified that if it had been determined from the Aetna investigation that there was contact with the phantom vehicle, he would have paid no more than $10,000.00 under the uninsured motorist obligation of the policy. He further testified that Aetna did pay $25,000.00 (T.E. 153) to the Estate of Mrs. Bartlett. He further verified that Defendant's tendered Exhibit 15 was the Release given by Jerry Bartlett as the Administrator of the Estate of Mary Bartlett of Henry Louis Thacker and Mary Thacker the insured of Aetna (T.E. 153-154). He further testified that

upon the Release at Mr. Bensinger's direction as Attorney for the Bartlett Estate, additional language was added "It is specifically agreed and understood that this does not release any claim of Jerry Bartlett and the Estate of Mary C. Bartlett for any uninsured motorist claim nor any subrogation rights that may inure to the insured motorist carrier." The Release was Defendant's tendered Exhibit 15 and then presented in the record (T.E. 154), and the copy in the record was conformed to the original.

As to the circumstances of the Release as to Aetna's insured, he testified that the claim was settled by agreement with Mr. Bensinger and a draft in the amount of $25,000.00 accompanied by the Release was sent to Mr. Bensinger (T.E. 154). Sometime thereafter Aetna received the Release back with this insertion into it which Aetna had not put into the Release when sent. Based on the receipt of the Release as altered in this matter (T.E. 155) Aetna had discussions with Mr. Bensinger relative to providing Aetna with a properly signed Release as had been tendered or to return the $25,000.00 to Aetna. During these discussions Mr. Bensinger came to see Mr. Baltas as Claim Manager for Aetna at which time he became aware of the fact that the current litigation is pending, that Aetna's draft had been cashed, and it was agreed between Aetna and Mr. Bensinger as Attorney for the Bartlett Estate that if Aetna would allow this case to continue that Mr. Bensinger would give Aetna an Indemnification Agreement that there would be no further obligation on the part of Aetna for this case (T.E. 155).

Mr. Baltas further testified that Aetna as the insurer of Thacker was not given any consent by American Automobile Insurance Company or any other representative prior to the settlement made with the Bartlett Estate and its Attorney (T.E. 155). Mr. Baltas further testified that Aetna settled on the statements obtained by Aetna investigators from Mrs. Thacker and Mrs. Washington that they did not know anything about any contract between the phantom automobile and the Thacker automobile and that Aetna made payment of $25,000 to the Bartlett Estate and to Mr. Bensinger as its Attorney rather than limiting payment to the maximum uninsured motorist coverage of $10,000 (T.E. 155-156) which would have been in operation if there had been contact.

For the purposes of reviewing Court the Trial Court (T.E. 161) stated while he was keeping out the testimony about the settlement with Aetna and was not permitting the jury to hear same. The Court stated (T.E. 161) that he was trying the case in accordance with the principles of *Orr* v. *Coleman,* Ky., 455 S. W. 2d 79, and that case directed that testimouy concerning a settlement with one tort-feasor should be excluded and that the partial satisfaction received from one tort-feasor can be credited against the full amount of damages in the subsequent trial. The Court stated (T.E. 163) as follows: "That being the situation the only way to keep any prejudice out of this case is to inhibit any questions that have to do with this settlement. Now as this Court views it, before the Plaintiff in this case can receive $10,000 they must get a verdict of at least $35,000, because it has to be more

than the $25,000 which was settled, and for that reason this Court would like counsel to stay out of these gray areas and litigate it along the lines of—really, the only real issue in this case is whether or not physical contact was made between the two vehicles."

By way of avowal (T.E. 168) in compliance with the Court's Order concerning this case Mr. Chris Wakild testified that he was the Claim Representative of Fireman's Fund Insurance Company which is a member of the same group as American (Plf. Ex. 4). He had been handling the file for American since the inception of the claim file. Te testified (T.E. 169) as follows:

> "Q. At any time have you been consulted or your consent requested or anybody in our company, the defendant company, been requested to consent to the settlement of $25,000.00 by Aetna, the insurer, of Thacker in settling the claim made against Thacker and Aetna by Bartlett Administrator for Bartlett and Mr. Bensinger?
>
> A. No, sir. I was never consulted and to my knowledge no one else in our company was.
>
> Q. Was consent ever given to that settlement by our company?
>
> A. No, sir."

Mr. Wakild further testified that the suit was the first knowledge (T.E. 170) of the incident or the first notice that American had. The file did not reflect in anywise, any place, any consent to the settlement by Aetna. The Court, Attorneys and Witnesses then returned to the open Court where the jury was assembled and Mr. Wakild took the stand. The accident occurred

on October 29, 1973, and the first notice of the incident given to American was when they received notice of the suit on the uninsured motorist coverage on December 16, 1974 (T.E. 171). The file in this case of American is that maintained by Mr. Wakild and the entries are contemporaneous with his activities (T.E. 172). He secured a copy of the police report (T.E. 171) and contacted Mrs. Thacker, the driver of the automobile. A mechanical recording was made of his conversation with Mrs. Thacker and the tape was present in Court (T.E. 174). The transcription of the tape was tendered as Defendant's Exhibit 16 (T.E. 174), objection was made to the testimony as to what Mrs. Thacker stated to Mr. Wakild, and it was argued that this should be admitted as a prior inconsistent statement as Mrs. Thacker in view of the Court's ruling on permitting the policeman to testify concerning Mrs. Thacker's testimony under the res gestae rule (T.E. 175). The objection was sustained but the Exhibit was admitted for purposes of avowal.

The witness further stated that he attempted to contact Mrs. Washington, but he never received a reply. After learning from Mrs. Thacker that Aena was their insurance carrier, he contacted them concerning their investigation and they provided him with copies of written statements they had secured from Mrs. Thacker and Mrs. Washington (T.E. 176). He also secured a copy of the Police Report. When asked if from that investigation and investigation he had made did he determine whether or not there had been contact between the vehicle and an unknown vehicle and objec-

tion was sustained because he was making a conclusion that is really a conclusion of the jury (T.E. 176). An avowal was presented by the Attorney for American (T.E. 177) that the witness would answer that he had determined there was no contact between the two vehicles based upon all of the investigation that he had conducted and that this case was defended in absolute good faith upon the basis that there was no contact as required by the insurance policy under the hit- and-run between two vehicles (T.E. 177).

The Defendant, American Automobile Insurance Company, moved for a directed verdict (T.E. 178) on the basis that the terms and conditions of the uninsured motorist clause of the policy had not been met by the Plaintiff (T.E. 167). There was no competent evidence submitted by the Plaintiff as to the contact of the alleged hit-and-run automobile and hence under the uninsured motorist portion of the policy requiring contact the Plaintiff did not sustain the burden of proof. In addition, under the terms and conditions of the uninsured motorist portion of the policy said provision did not apply because it was uncontroverted that neither the representative nor counsel nor anyone on behalf of the Plaintiff's decedent obtain the consent of American as required by the provisions of said policy holding that the uninsured motorist portion does not apply to bodily injury (death) to an insured with respect to which such insured, his legal representative, or any person entitled to payment under this section shall, without the written consent of the Company make any settlement with any person or organization who may be

liable therefor. The Plaintiff's proof and the Defendant's proof through avowal showed conclusively that the Plaintiff received a settlement of $25,000 from the insurer of the host driver of the Plaintiff's decedent without any knowledge of American or its representatives at said time and no consent was ever given by American to said settlement. In addition, under the terms and conditions of the policy, it was provided that any amount payable under the uninsured motorist provision shall be reduced by all sums paid on account of such bodily injury (death) by or on behalf of the owner or operator of the uninsured automobile and any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under coverage A. Since $25,000.00 was admittedly paid by the insurer, Aetna Insurance Company, of the decedent's host, Thacker, there is no sum due under the uninsured motorist portion of the Defendant's policy by reason of this reducing clause. Moreover, the uncontradicted proof showed that the Plaintiff had received a settlement of $25,000.00 and by reason of said settlement and the proof showing that the limit of liability of the insurer of the decedent's host, Thacker, being $25,000.00 for single personal injury or death in a single accident and was the limit of the obligation of said insurer to pay on behalf of said insured the sum which the insured shall become legally obligated to pay as damages because of said death of the Plaintiff's decedent by reason of the operation of said vehicle, and that as an additional coverage of uninsured motorist with said Company

with the insured being the host, Thacker, and consequently the Plaintiff, having collected and settled $25,000.00 claim against the host, Thacker, by reason of her alleged negligent operation of said vehicle, is estopped to claim that the uninsured motorist provision of the Defendant's policy comes into play since the two positions are irreconciliable and in conflict. The Defendant's host, Thacker, had $10,000.00 uninsured motorist coverage and $25,000.00 limit coverage for personal injury to one person or to death of one person in each occurrence and settled said total exposure of $35,000.00 if there had been joint negligence, for the sum of $25,000.00 and Defendant is entitled to a credit of $35,000 being the $10,000 uninsured motorist and the $25,000 B.I. coverage of the host, Thacker, as primary insurance before the secondary uninsured motorist coverage of the Defendant as insurer of the Plaintiff's Decedent comes into effect.

The Motion by American for a directed verdict was overruled by the Court (T.E. 178).

No instructions were submitted by either party (T.E. 185) and the Court proceeded to instruct the jury by means of special interrogatory plus a determination of damages (T.E. 185-186). The special interrogatory submitted was "Do you believe from the evidence which you have heard in this case that the Thacker automobile in which the Plaintiff decedent, Mary C. Bartlett, was a passenger came into physical contact with the automobile operated by the unidentified driver?" The special interrogatory was answered by nine of the jurors "Yes" (T.E. 206).

The Court then instructed that if the jury (T.E. 186) answered "Yes" to the interrogatory, the jury was to award damages which would fairly and reasonably compensate the Estate of Mary C. Bartlett for her pain and suffering endured between 6:43 A.M. October 29, 1973, the time of the accident, and the time of her death of 11:00 A.M., October 29, 1973, as a direct result of the accident not to exceed $50,000; and for her reasonable medical expenses and funeral bill, as well as compensation to the decedent's Estate for the destruction of her power to earn money not to exceed $50,000 with the total award on all accounts not to exceed $102,230.25. Nine members of the jury signed a verdict (T.E. 206-207) awarding pain and suffering in the amount of $13,770.00; medical expenses in the amount of $736.25; funeral expenses in the amount of $1,494.00; destruction of power to earn money $18,000; for a total award of $34,000.

II. ARGUMENT

A. The uninsured motorist portion of the insurance policy of the Defendant insurer, American Automobile Insurance Company, of the insured, Plaintiff's decedent, did not apply because it is uncontroverted that neither the representative nor counsel nor anyone for and on behalf of the Plaintiff's decedent obtained the consent of this Defendant, American Automobile Insurance Company, as required by the provisions of said policy holding that the uninsured motorist portion does not apply to bodily injury (death) to an insured with respect to which such insured, his legal representative, or any person entitled to payment under this section shall, without written consent of the Company, make any settlement with any person or organization who may be legally liable therefor; and Plaintiff's proof and Defendant's proof through avowal show conclusively that the Plaintiff received a settlement of $25,000.00 from the insurer of the host driver of the Plaintiff's decedent without any knowledge of this Defendant or any of its representatives at said time and not until after said settlement, and no consent was ever given.

This is a breach of contract and bad faith action brought upon the uninsured motorist provisions of an insurance contract issued by the American Automobile Insurance Company with Jerry Bartlett as the named insured upon an automobile not involved in the collision stated in the Complaint. The Trial Court proceeded to try this case on the basis of a joint tort-feasor situation where there had been a partial settlement with less than all of the joint tort-feasors as set forth in *Orr* v. *Coleman,* Ky., 455 S. W. 2d 59, and, therefore, excluded from the jury any and all evidence concerning settlement with the Aetna Insurance Company, the

insurance carrier for the driver (T.E. 161). Thus, still following *Orr* v. *Coleman,* and treating the case as one of tort and not contract the Trial Court (T.R. 31) indicated in its Judgment that the jury having returned $34,000.29 as damages and that the Plaintiff had received settlement from Aetna Life & Casualty Company in the sum of $25,000.00, the American Automobile Insurance Company was entitled to credit in the amount of $25,000.00 thus giving Judgment against it in the amount of $9,000.29. The Court gave no effect at all to the provisions of the uninsured motorist policy as between Bartlett and American except as to the definition as to "hit-and-run driver." This is erroneous because if one condition was involved, all of the conditions of the policy were involved. Secondly, the information upon which a claim representative of American proceeded as to the police report, statements of witness, as well as the driver of the vehicle should be considered by the jury and were improperly excluded. Thirdly, it is important to recognize that uninsured motorist coverage is not intended to provide liability insurance for the uninsured motorist. The insured is protected by the coverage against the risk of inadequate compensation but the uninsured motorist is not insured against liability. The protection of the uninsured motorist coverage is restricted only to those persons falling within the policy definition of "insured." The insurer, under its uninsured motorist coverage, does not become the insurer of the uninsured motorist and therefore the obligation of the insurer to its insured thereunder does not arise out of tort. The

obligation of the insurer to the insured on the uninsured motorist coverage is a contractual liability which arises only on the contingency of an uninsured-motorist tort liability. *Motorist Mutual Insurance Co.* v. *Tomanski,* Ohio, 257 N. E. 2d 399, 403-404. However, it is clear that when all the evidence is considered the Trial Court should have granted the Defendant's Motion for a Directed Verdict and Judgment Notwithstanding the Verdict.

The following facts are uncontroverted:

1.) On November 30, 1974, the present action was filed (T.R. 1).

2.) Mrs. Bartlett was a passenger in a vehicle driven by Mrs. Thacker which was insured as to liability and uninsured motorist coverage with Aetna Life & Casualty Insurance Company (T.E. 152).

3.) The limit of liability under Aetna's policy was $25,000.00 per person and $50,000.00 per accident maximum for bodily injury and Aetna's uninsured motorist coverage was $10,000.00 for the individual and $20,000.00 for the accident (T.E. 153).

4.) On October 25, 1974, Aetna paid the sum of $25,000.00 to Jerry W. Bartlett, Administrator of the Estate of Mary C. Bartlett, and his Attorney, Carl Bensinger, on behalf of Henry Louis Thacker and Mary Thacker and executed a Release settling said claim (Defendant's tendered Exhibit 15). It is uncontradicted that there was no notice to and no consent, either oral or written, by American Automobile Insurance Company to said settlement (T.E. 169).

5.) That at the time of said settlement the claim representatives of Aetna did not know of the pending of this lawsuit and demanded from Bartlett and his Attorney an Indemnification Agreement. Said Indemnification Agreement without the knowledge and consent, either written or oral, of American was executed on February 15, 1975, whereby Bartlett as Administrator of the decedent's estate and Mr. Bensinger, his Attorney, agreed to indemnify Aetna for all sums in excess of $25,000.00 payment made on October 23, which it might have to pay as the result of litigation involving said automobile accident or involving legal fees or payments resulting from the uninsured motorist provision that Aetna Life & Casualty Company had as the uninsured motorist carrier for Henry Louis Thacker and Mary Thacker.

6.) A policy of automobile liability insurance existed at the time of the accident between Jerry Bartlett and the American Automobile Insurance Company which contained an uninsured motorist section known as Part IV:

> "EXCLUSIONS. This policy does not cover under Part IV:
>
> (b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall, without written consent of the Company, make any settlement with any person or organization who may be legally liable therefor."
>
> * * * * * * *
>
> "TRUST AGREEMENT. In the event of payment to any person under this Part:

(a) the Company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made.

(b) such person shall hold in trust for the benefit of the Company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this Part;

(c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;"

Clause (b) of the Exclusions is valid and enforceable releasing American from liability when there has been a settlement with one of the tort-feasors as set forth here. Aetna as the insurer of Thacker paid a policy limit under the liability section of its policy in order to receive a Release of claims against it as well as its insured, Thacker.

A case directly in point is *LaBove* v. *American Employers Insurance Company,* La., 189 So. 2d 315, 318. This was an action in which the Plaintiff LaBove sued its own liability insurance carrier under the uninsured motorist clause. LaBove was proceeding west on a highway. Mrs. McBroom stopped suddenly in the east-bound lane whereupon she was hit in the rear by a panel truck driven by Ardoin. Due to McBroom's sudden stop without signaling, Ardoin was unable to stop. Ardoin drove into the west-bound lane, colliding with the Plaintiff. LaBove received $9,500.00 from

Ardoin's liability insurance carrier. The Court held that since Ardoin may possibly be liable the settlement with Ardoin and his insurance carrier released LaBove's insurance carrier on its uninsured motorist provision. The Court held this provision was enforceable and that coverage was excluded. At page 318 the Court stated as follows as to the purposes for the exclusion:

> "The purposes of the exclusion also support defendant's view. One obvious purpose is to prevent settlements with parties who perhaps 'may be' liable, without first putting the insurer on notice of the proposed settlement. Under the terms of the policy, the amount payable under the uninsured motorists clause is reduced by any sum received from any person who is jointly liable. Hence, the defendant insurer is interested in having notice of any such settlements. Defendant also might possibly want to enter into the negotiations in an effort to make an advantageous settlement of its own coverage. Also, it is obvious that defendant's subrogation rights would probably be lost by such a settlement and, hence, defendant would lose this valuable right.
>
> The defendant insurer admits that one purpose of the exclusion is to prevent the insured from making a small settlement with the uninsured motorist, who might then testify admitting liability; or who may have assets which would, because of the settlement, because unavailable to indemnify the insurer for any payment it makes. Nevertheless, the language is not restricted to settlement with the uninsured motorist. It clearly and unequivocally states that a settlement with *any* person who 'may be' liable, made without the written consent of the insurer, precludes recovery."

The Court points out the reason for the clause and the interest of the insurer of the Plaintiff in the settlement is that any amount payable under the uninsured motorist clause is reduced by the sum received from any person who is jointly liable. In addition, the insurance company would want to enter into negotiations to make an advantageous settlement as to its own coverage. Moreover, the subrogation rights of the insurance company would probably be lost in the settlement as they are lost here. It is clear that the purpose also is to keep from entering a small settlement with the uninsured motorist who might then testify as to liability unfavorable to the insurance carrier under its uninsured motorist provision. However, the Court clearly notes that the language is not restricted to a settlement with the uninsured motorist, but is wide enough to include any person who "may be liable." Certainly, in this particular instance it is broad enough to cover a settlement with Thacker's insurance Company since she was the driver hitting a light pole and no one else seems to remember anything about the accident or the appearance of a "phantom car." Moreover, it is perfectly clear that such a clause is perfectly valid for it is to avoid just exactly what happened here and that is a person collecting twice on two inconsistent theories: at one time contending with Aetna as the insurer of Thacker that Thacker was negligent and it is liable under its liability provisions of the policy of the driver of the car and then turning around—the same attorney for the estate with the same individuals and contending there was a hit-and-run on

the Bartlett policy under the uninsured motorist provision, a separate policy with the American Automobile Insurance Company insuring Bartlett. Thus, American as the uninsured motorist carrier of the Bartletts has no opportunity to defend itself and to determine what is right as to the accident, and that is the very purpose of the exclusionary clause (T.E. 167).

Another case directly in point is *Grissom* v. *Southern Farm Bureau Casualty Insurance Company,* Tex., 476 S. W. 2d 448. Grissom was a passenger in an automobile driven by Lee, when the Lee vehicle collided with a vehicle driven by Stafford. Mrs. Grissom and two other passengers in the Lee car were injured. Westchester Fire Insurance Company had the coverage on the Lee car. Without the consent of their insurance carrier the Grissoms settled with Westchester for the sum of $2,500.00. The insurance carrier for Grissom was not a party to the compromise settlement and gave no consent to the settlement. In denying uninsured motorist coverage because no such written consent was secured from the uninsured motorist carrier the Court stated as follows at page 450:

> "The above-quoted provision in each of the Southern Farm policies held by the Grissoms plainly states that if the insured makes any settlement with any person or organization who may be legally liable, without written consent of Southern Farm, that the insured has no coverage under the uninsured motorist part of the policy.
>
> No written consent of Southern Farm was obtained by the Grissoms before settlement was made between the Grissoms on the one hand and West-

chester and Lee on the other. Under the plain and clear provisions of this uninsured motorist coverage, if the insured elects to make a settlement with one of the other parties (who may be legally liable), without the written consent of Southern Farm, then this coverage does not apply.

[1, 2] Appellants contend that insurance contracts are to be strictly construed in favor of the insured and against the insurer. This rule applies in cases where the policy uses terms of doubtful meaning or where the language of the contract is ambiguous. Courts cannot make new contracts between the parties, but must enforce the contracts as written. Where the terms of an insurance policy are plain, definite and unambiguous, the courts cannot vary these terms. Royal Indemnity Co. v. Marshall (Sup. Ct. 1965), 388 S. W. 2d 176; American-Amicable Life Insurance Co. v. Lawson (Sup. Ct. 1967), 419 S. W. 2d 823.

[3] In the case at bar, we think the language of the contract is plain and must be enforced as made. Republic National Life Ins. Co. v. Spillars (Sup. Ct. 1963), 36 S. W. 2d 92.

Since the above-quoted provision was in each of the Southern Farm policies, and was approved by the State Board of Insurance prior to their issuance to the Grissoms, we believe it is enforceable as written. Therefore we do not deem is necessary to speculate upon any reason or reasons why the insurer chose to put this provision in these policies. However, the Court of Appeals of Louisiana in LaBove v. American Employers Insurance Co., 189 So. 2d 315, 25 A.L.R. 3d 1269, at page 1273 of the last-named citation, does discuss various purposes for such a provision. *LaBove* was a fact situation analogous to ours, with a

> policy provision the same as in the case at bar, as hereinabove quoted, and the Louisiana Court enforced the exclusion."

We have exactly the same situation here in the present case as was present in the *Grissom* case and the same result should have been reached in that the directed verdict and motion for judgment notwithstanding the verdict on behalf of American should have been sustained by the Trial Court.

In *Jesse* v. *Security Mutual Casualty Company,* Tex., 488 S. W. 2d 140 the same conclusion is reached wherein it was held that an uninsured motorist policy providing that uninsured motorist coverage did not apply if the insured, without the insurer's written consent, settled with any person or organization who might be legally liable for the insured's injuries prohibited the insured's settlement with the insured motorist who was jointly liable with the uninsured motorist for an automobile accident in which the insured was injured. The same policy provisions were involved as are involved in this action. At page 141 the Court stated:

> "[2] Plaintiff makes three contentions under this broad general point. He first contends that the proper construction to be given the clause in question is: The language of the policy means that the settlement forbidden by the clause is one made by the insured with a person legally liable for injuries caused by accident arising out of ownership or use of the 'uninsured' car. Therefore the exclusion clause does not prohibit a settlement with a joint tortfeasor liable for injuries

arising out of the ownership or use of his own insured car.

However, Texas courts that have considered the question have held just the opposite to the holding in the Karsten case. In the case of Grissom v. Southern Farm Bureau Casualty Ins. Co., 476 S. W. 2d 448 (Waco Tex. Civ. App., 1972, ref., n.r.e.) the same question that is involved here was before that court. That court said at page 450: 'No written consent of Southern Farm was obtained by the Grissoms before settlement was made between the Grissoms . . . and Westchester and Lee (who was an insured motorist). . . . Under the plain and clear provisions of this uninsured motorist coverage, if the insured elects to make a settlement with one of the other parties (who may be legally liable), without the written consent of Southern Farm, then this coverage does not apply.

'. . .

'In the case at bar, . . . the language . . . is plain and must be enforced as made. Republic National Life Ins. Co. v. Spillars (Sup. Ct. 1963), 368 S. W. 2d 92.'

The Waco Court held that the exclusion clause in question applies to settlements made with any person who may be legally liable for damages for the bodily injuries involve dand that such clause is not applicable to just those settlements made with persons responsible for the operation of the uninsured car.

The trial court in that case had held that the clause in question was valid and that by its clear terms the insurer was relieved from liability when the insured made the settlement 'with one who may be legally liable therefor.'

We are convinced that the Waco Court's holding is correct and we follow it here. The Supreme Court's ruling in that case was 'Writ refused, no reversible error.' Had the Waco Court erred by incorrectly construing the clause and had its holding that the clause is valid and enforceable been error, such errors would of necessity be reversible error because the result of them would be to let the wrong person win.

For other cases holding as does the Grissom case, supra, see Annotation in 25 A.L.R. 2d 1275, especially under Sec. 4(c), at page 1287 See also 'A Guide to Uninsured Motorist Coverage' by Widiss, Sec. 5.10.

[3] Plaintiff's second contention made under his point of error is that the clause in question is unreasonable and violates public policy and is therefore not enforceable.

We overrule this contention.

The Annotation in 25 A.L.R. 3d 1275, Sec. 3, shows that there are two lines of cases on this point. The great weight of authority holds the clause involved here to be valid and enforceable. As is shown in the Grissom case, supra, Texas is in line with the weight of authority on this point.

[4] Plaintiff's third contention under his single general point is that the provision in question relating to a settlement made without consent of the insurer is in fatal variance with the provisions of Art. 5.06-1 of the Insurance Code, V.A.T.S., in that it permits the insurer to devise a limitation under which the payment provided for by the uninsured motorist provision of the policy that is required to be in automobile insurance policies by the statute can be avoided.

We overrule this third contention also.

The parties stipulated that the insurance policy in question was the standard Texas family combination automobile policy promulgated by the State Board of Insurance of Texas at the time the policy was issued to plaintiff, and that the form of the policy had been approved by the State Board of Insurance prior to its issuance.

Article 5.06-1 of the Insurance Code provides in substance that no automobile liability insurance policy covering liability arising out of the ownership, maintenance or use of a car shall be delivered or issued in Texas unless it provides coverage (in certain limits), under provisions prescribed by the Board, for the protection of the insured therein who is legally entitled to recover damages from owners or operators of uninsured cars because of bodily injury (etc.) resulting therefrom.

The same statute, Art. 5.06-1, Sec. (3), provides further:

'In the event of payment to any person under the coverage required by this Section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person . . . legally responsible for the bodily injury, (etc.). . . .'

The insurance policy in question provided that the insurer would pay the plaintiff's damages for bodily injuries that were legally recoverable by him from an uninsured and that any amount so payable shall be reduced by all sums paid to the insured on behalf of (1) the uninsured motorist and (2) any other person jointly or severally liable

with the uninsured motorist for such bodily injuries.

The 'trust agreement' provision of the policy provided in substance that if a payment was made to any person that the insurer was entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person legally responsible for the bodily injury because of which such payment is made.

The trust provisions further provided that the insured shall hold in trust for the benefit of the insurer all rights of recovery that he might have against another person for damages that are the subject of claim made under this part, and that the insured shall do nothing after loss that would prejudice these rights.

These policy provisions providing for recoupment by the insurer of its losses under the policy are authorized by Sec. (3), Art. 506-1 of the Insurance Code, V.A.T.S. See Jobe v. International Service Insurance Company, 474 S. W. 2d 11 (Waco Tex. Civ. App., 1971, ref., n.r.e.).

Texas courts hold that the provisions of the policy providing for subrogation and for recoupment by the insurer of sums that it pays out under the uninsured motorist coverage of the policy are not invalid as being in conflict with, in derogation of, and incompatible with the provisions of Art. 5.06-1. See Jobe v. International Service Company, supra, and Traders & General Insurance Company v. Reynolds, 477 S. W. 2d 937 (Texarkana Tex. Civ. App., 1972, ref., n.r.e.).

It is true that Art. 5.06-1 does not specifically say that there will be no coverage in the event of a settlement such as the one involved here, but

> this result must follow, as is provided for in the heretofore quoted exclusion in the policy, where the plaintiff (insured) by his own conduct in settling with the joint tortfeasor, Warren, without the insurer's consent, has deprived the insurance company of the valuable right of recoupment that was given him by the statute and by the insurance policy being sued upon.
>
> We are convinced that the exclusion clause involved here is not invalid for the reasons urged by plaintiff. See cases listed under "Uninsured Motorist Clause—Settlement," 25 A.L.R. 3d 1281, Sec. 3(a)."

It is to be noted in the above quotation that the consent clause of the settlement was upheld as to settlement with a possible joint tort-feasor with the uninsured motorist which is exactly the situation we have here. In addition, the contention that the clause requiring consent for settlement with the person that may be liable was unreasonable and violates public policy was overruled in view of the fact that the great weight of authority sustained such a clause. In addition, the Court held that such a clause is not contrary to the uninsured motorist provisions of the Texas Statutes. It is to be noted that KRS 304.20-020 is the same as the Texas Statute and that subsection 4 of the Kentucky Statute is the same as Article 5.06-1-§3 of the Texas Statute. The policy involved in this case contains the same trust provision (Defendant's Exhibit 15) as quoted on page 143 to be contained in the policy involved in the Jesse case. This "Trust Agreement" provision provides:

> "TRUST AGREEMENT. In the event of payment to any person under this Part:
>
> (a) the Company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;
>
> (b) such person shall hold in trust for the benefit of the Company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this Part;
>
> (c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;"

It is clear that Bartlett by his own conduct in settling with the joint tort-feasor, Thacker, without the insurer's consent (American) has deprived American of the valuable right of recoupment that was given it by statute and by the insurance policy being sued upon. In addition, the $25,000.44 received from Aetna by the Estate of Bartlett is held in trust by the Bartlett Estate to the extent of $10,000.00 which reduces to zero any amount that might be due from American or its uninsured motorist coverage.

The conclusion that clause (b) of the Exclusions is in accordance with the Kentucky Statutes as to uninsured motorist is also supported by *Allen* v. *West American Insurance Company,* Ky., 467 S. W. 2d 123 which holds that the household exclusion contained in a policy prevails as to uninsured motorist coverage and

is not contrary to KRS 304.20-020. This Court at pages 125-126 points out that KRS 304.20-020(2) provides:

> "For the purpose of this coverage the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle . . ."

As pointed out by this Court the legislature recognized that there would be "terms and conditions of such coverage" to which the statute's application would be subject. As stated by this Court at page 126 "if the solons had intended that the UM provisions should be applicable with respect to an insured vehicle regardless of the policy provisions, it is difficult to discern why the words "subject to the terms and conditions of such coverage" were employed." For the same reason *Newark Insurance Company* v. *Ezell,* Ky., 520 S. W. 2d 318 is not in point. In that case this Court held as valid a consent clause as to an uninsured motorist provision requiring written consent to an action which might be binding as to issues of liability and the amount of damages upon the uninsured motorist carrier. This Court held that under the circumstances of the case prejudice must be shown from the failure to comply with the clause and no prejudice was shown. In the present case we have not only the loss of subrogation rights which are prejudicial to Ameriacn, but we also have this illustrated by the Indemnity Agreement demanded by Aetna (Defendant's Exhibit 1) from the Bartletts after learning of the action seeking to collect against the Bartletts recovering from their own insur-

ance carrier under the uninsured motorist provision. In addition, as illustrated in the testimony of the representative of Aetna, the insurance carrier for the host, that they examined and investigated the case to determine whether or not uninsured motorist coverage applied or their liability policy applied. They determined that since there was no "hit-and-run" evidence that they could ascertain their liability policy applied. If the uninsured motorist provision applied, Aetna's liability was only $10,000.00 under the terms of its uninsured motorist provision. If the liability applied under Aetna's policy, $25,000.00 was the limit of its coverage. As clearly shown here the Plaintiff has sought to go both ways with different insurance carriers to their prejudice. After having made settlement with the host insurance carrier, the estate then brings suit upon the Bartletts' uninsured motorist provision of their own policy. It is to prevent such double type coverage, and double type claims, and duplicity that such a provision is valid and necessary as well as not in contravention of the Kentucky Statutes or public policy.

Other cases from other jurisdictions determining that the settlement provision without the consent of the uninsured motorist carrier is valid and enforceable and will defeat recovery in the very situation here involved as to uninsured motorist coverage are: *Kisling* v. *MFA,* Mo., 399 S. W. 2d 245; *Dancy* v. *State Farm Mutual Auto. Ins. Co.,* Ala., 324 F. Supp. 964; *American Fidelity Ins. Co.* v. *Richardson,* Fla., 189 So. 2d 486, 489; *Griffin* v. *Aetna Casualty & Surety Co.,* La., 189 So. 2d 324 (note page 328 as to the right in the Release to

proceed against own uninsured motorist carrier that same is not prejudiced by any provision in the Release which it did not agree to or did not know about); *Sylvest, Jr.* v. *Employers Liability Assurance, Corp.*, La., 252 So. 2d 693; *State Farm Fire & Casualty Co.* v. *Rossini,* Ariz., 490 P. 2d 567; *Bauer* v. *Consolidated Underwriters,* Tex., 518 S. W. 2d 879.

Thus, clearly under the policy and under the undisputed proof in this case a Directed Verdict or the Motion for Judgment Notwithstanding the Verdict should have been sustained by the Trial Court because of the settlement made by the Plaintiff with the insurance carrier for the host driver without the knowledge or consent oral or written of the Defendant, American Insurance Company, as required under the provisions of its uninsured motorist coverage.

B. Defendant, American, was further entitled to Judgment upon its Motion for Directed Verdict as well as upon its Motion for Judgment Notwithstanding the Verdict because of the provisions of said policy as follows:

"(b) Any amount payable under the terms of this Part because of bodily injury (death) sustained in an accident by a person who is an insured under this Part shall be reduced by

(1) all sums paid on account of such bodily injury (death) by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A . . ."

Since $25,000.00 was admittedly paid by the insurer, Aetna Life & Casualty Company, of decedent's host, Thacker, the insured, there is no sum due under the uninsured motorist portion of Defendant's (American's) policy by reason of this "reducing clause."

The uninsured motorist provision of the policy issued by American to Bartlett contains the following provision:

"*Limits of Liability.*

(b) Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by

(1) all sums paid on account of such bodily injury by or on beahlf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A, and"

The Trust Agreement provisions of the policy provide as follows:

> "Trust Agreement. In the event of payment to any person under this Part:
>
> (a) the Company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;
>
> (b) such person shall hold in trust for the benefit of the Company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this Part;
>
> (c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;
>
> (d) if requested in writing by the Company, such person shall take, through any representative designated by the Company, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person, in the event of a recovery, the Company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith;
>
> (e) such person shall execute and deliver to the Company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the Company established by this provision."

Such a provision of the above "reducing clause" and "trust clauses," are authorized by KRS 304.20-020(4) to be included in such policy. Said Statute provides as follows:

> "(4) In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer."

Thus, since it is admitted that $25,000.00 was paid by Aetna, the insurance carrier for Thacker, the decedent's host, there is no sum due under the uninsured motorist portion of American's policy by reason of this "reducing clause." The $10,000.00 uninsured motorist exposure has been wiped out by the $25,000.00 payment by the liability insurance carrier for the host.

This question is answered in *Leatherman* v. *American Family Mutual Insurance Company,* Wisc., 190 N. W. 2d 904. In this case the insurance carrier for the host paid its policy limits of $10,000.00 in satisfaction of a judgment against its insured. Leatherman then brought an action against American Family Mutual Insurance Company on an uninsured motorist provision in a policy covering an automobile owned by Leatherman and not involved in the accident. The policy re-

quired the Defendant insurance Company to pay all sums which the insured was legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injuries, but also provided that any amount payable would be reduced by any recovery from anyone. The provisions in the present policy and that involved in the Leatherman case are the same (page 906). The Court held that there was no ambiguity in the "reducing clause" and applied same. Thus, having secured payment from the liability carrier of one of the tort-feasors that exceeded the amount of the insured motorist provision in the policy of the Plaintiff which was not involved in the accident, the "reducing clause" applied and there was nothing payable.

To the same effect see *Nelson* v. *Employers Mutual Casualty Company,* Wis., 217 N. W. 2d 670, 674, which sustained the "reducing clause" as in accordance with the statutes requiring uninsured motorist protection in effect at the time. By its release and indemnification agreement the Estate in this action has accepted $25,000.00 for complete settlement of its rights over and against the driver of the vehicle as well as its insurance carrier under its uninsured motorist provisions. Therefore, this is not a case of "stacking" the uninsured motorist provisions of two policies because of the release. The only question now is what is the responsibility of American under its uninsured motorist provision on its policy to Bartlett. See the following cases supporting the "reducing clause" as not being contrary ot statute:

Burcham v. *Farmers Insurance Exch.* (1963), 255 Iowa 69, 121 N. W. 2d 500; *Harris* v. *Southern Farm Bureau Casualty Ins. Co.* (1970), 247 Ark. 961, 448 S. W. 2d 652, relying on *M.F.A. Mutual Ins. Co.* v. *Wallace* (1968), 245 Ark. 230, 431 S. W. 2d 742, overturning two federal decisions reaching the opposite conclusion. *Childers* v. *Southern Farm Bursau Cas. Ins. Co.* (C.D. Ark., 1968), 282 F. Supp. 866, and *Safeco Ins. Co. of America* v. *Robey* (8th Cir. 1968), 399 F. 2d 330. *Mid-Century Ins. Co.* v. *Koch* (1970), 11 Cal. App. 3d 1019, 90 Cal. Rptr. 280; *Grunfield* v. *Pacific Automobile Ins. Co.* (1965), 232 Cal. App. 2d 4, 42 Cal. Rptr. 516; *Government Employees Ins. Co.* v. *Butt,* Fla., 296 So. 2d 599, 600.

The reasoning of *Meridian Mutual Ins. Co.* v. *Siddons,* Ky., 451 S. W. 2d 831 should not be extended to the provision (b) which we have referred to as the "reducing clause" because such a reducing clause is specifically authorized by the legislature in KRS 403.30-020. In the Meridian Mutual case subsection (4) was not involved and not considered. As noted previously, *Allen* v. *West American Ins. Co.,* Ky., 467 S. W. 2d 123 this court held that the "household exclusion" was not in derogation of the uninsured motorist statute. Thus, applying the reasoning held in that case, such a reducing statute is valid. Since by statute such a reducing clause is authorized, it is up to the legislative branch of the government and not the judicial branch to invalidate it as the reducing clause is an integral part of the policy and statute as a last resort protection. Thus, for this reason the Trial Court

should have sustained the Motion for Judgment Notwithstanding the Verdict, as well as the Motion for a Directed Verdict.

C. The uncontradicted proof showed that the Plaintiff had received a settlement of $25,000.00 and by reason of said settlement and the proof showing that the limit of liability of the insurer of the Decedent's host, Thacker, being $25,000.00 for a single personal injury or death in a single accident and was the limit of the obligation of said insurer to pay on behalf of said insured the sum which the insured shall become legally obligated to pay as damages because of said injury (death) of the Plaintiff's decedent by reason of the operation of said insured vehicle, and there was additional coverage of uninsured motorist with said Company with the insured being the host, Thacker, and consequently the Plaintiff having collected and settled the $25,000.00 claim against the host, Thacker, by reason of her alleged negligent operation of the said vehicle, Plaintiff is estopped to claim that the uninsured motorist provision of the Defendant's policy comes into play since the two positions are irreconcilable and in conflict.

The appraiser for Aetna, Mr. Oaks, was aware at the time of his investigation that Aetna had an uninsured motorist policy on the vehicle involved in the accident (T.E. 149). If there was contact between the phantom car and the Thacker car then Aetna was aware it would have to "pay off" under the uninsured motorist provision of its policy (T.E. 149-150). If there had been no contact, Aetna would have approached the claim of the Bartlett Estate on the basis of the uninsured motorist claim where its limit was $10,000.00. If the uninsured motorist provision did

not apply, it would approach the claim from a negligence standpoint on the part of its driver and its limit for $25,000.00 (T.E. 125). The claim was settled on the basis of $25,000.00 (T.E. 154). When the Releases were sent to Mr. Bensinger, attorney for the Bartlett Estate (T.E. 154), along with the draft, it contained no reservation for proceeding against uninsured motorist claim or any subrogation rights which may inure to the insured motorist carrier (T.E. 153-154). However, Mr. Bensinger, Attorney for the Bartlett Estate, returned the Release with the inclusion in it. This was not satisfactory to Aetna (T.E. 154), and Aetna demanded that there be a Release as originally tendered signed or that the $25,000.00 be returned (T.E. 155). Mr. Bensinger then called on Mr. Baltas (T.E. 155) at which time he first became aware of the pending litigation and that their draft had been cashed. If they were allowed to continue the suit an Indemnification Agreement would be given to Aetna by the Bartlett Estate and Mr. Bensinger that there would be no further obligation on the part of Aetna Casualty Insurance Company for this case (T.E. 154). Such an Indemnification Agreement was executed (Defendant's Exhibit 1, T.E. 14). Aetna did not discuss the settlement or Indemnification Agreement with American Automobile Insurance Company nor was any consent secured by Aetna from them (T.E. 155). The record is clear that no consultation was had with American about the settlement, nor was any consent given by American to the settlement (T.E. 154, 169). American's first notice of this uninsured motorist claim

was when the suit was filed. In the present action an entirely inconsistent position was taken by the Bartlett Estate to the effect that there was coverage under the uninsured motorist provision because there was contact between the phantom car and the Thacker car.

Reference is made to *Government Employees Insurance Company* v. *Butt,* Fla., 296 So. 2d 599, 600. Here Butt's daughter was fatally injured by an automobile negligently driven by Mosley. Butt had uninsured motorist coverage in the amount of $10,000.00 through a policy issued by Government Employees Insurance Company. Mosley was insured by an automobile liability policy issued by Safeco with a $10,000.00 limit applicable here. A wrongful death and survivorship action resulted against Mosely and his insurer and it was conceded that the claim was in excess of $20,000.00 in value. Mosely's insurance paid the claimant's policy limit of $10,000.00. Butt has individually and as Administrator of the Estate brought a Declaratory Judgment action seeking a determination of whether or not the claimants were entitled to recover from Butt's insurance carrier, Government Employees, under the uninsured motorist coverage of $10,000.00 in addition to receiving the $10,000.00 from the third party tort-feasor's liability insurer. It was held by the Court that where the liability coverage had been secured from the tort-feasor and the amount received from the liability insurer exceeded the uninsured motorist liability, no additional recovery could be had under the uninsured motorist provision of the policy covering the decedent's automobile.

Certainly (T.E. 167), we have the position where the Bartlett Estate is contending that Thacker was negligent in its negotiations with Aetna in order to secure the $25,000 limits upon liability, and making a settlement without the consent or knowledge of American, then turning around with American and contending that the uninsured motorist provision applied because there was contact. These inconsistent positions, without giving American a chance to defend itself, constitute an estoppel as well as unconscionable conduct. *Wisdom's Adm'r.* v. *Sims,* Ky., 144 S. W. 2d 232, 236.

D. Decedent's host, Thacker, had with Aetna Life and Casualty Company $10,000.00 uninsured motorist coverage and $25,000.00 liability limit coverage for personal injury to one person or for death to one person in each occurrence and settled said total exposure of $35,000.00 if there had been joint negligence for the sum of $25,000.00, and Defendant is entitled to a credit of $35,000.00 being the $10,000.00 uninsured motorist coverage and the $25,000.00 bodily injury coverage of the host, Thacker, as primary insurance before the secondary uninsured motorist coverage of the Defendant as the insurer of the Plaintiff's decedent comes into effect.

The American's uninsured motorist policy with the Bartletts upon which this action is brought contained the following provision as to "other insurance":

> "OTHER INSURANCE. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile

as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this Coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance."

The automobile involved in the accident in which the Plaintiff's decedent was a passenger belonged to Thacker and was covered by a policy of insurance covering bodily injury liability in the amount of $25,000.00 for a single person and uninsured motorist coverage in the amount of $10,000.00 (T.E. 152-153). Aetna admitted that it had a total exposure (T.E. 157) of $35,000.00 if there was joint negligence between Thacker and the phantom vehicle. It would have $25,000.00 exposure under Aetna's liability provisions and $10,000 exposure under Aetna's uninsured motorist provisions. Without any knowledge or consent from American, the Bartlett Estate settled this claim for $25,000 through the release (Defendant's Tendered Exhibit 15) and through the Indemnification Agreement (Defendant's Exhibit 1).

It is clear from the above quotation as to "other insurance" in American's policy with Bartlett that

Aetna's insurance on the vehicle involved belonging to Thacker in the amount of $35,000 was primary and that American's insurance with Bartlett was secondary. Certainly, there was available to the Bartlett Estate under a joint negligence situation the total sum of $35,000 under the Aetna policy. Since the total damage to the Bartlett Estate was determined by the jury (T.E. 207) to be $34,000, there should be no recovery against American because there was primary insurance from Aetna available to the Bartlett Estate in the amount of $35,000 which is more than the verdict of the jury. Under the above provisions of the policy, there would be nothing due from American to Aetna. It is no fault of American's that the Bartlett Estate did not proceed against Aetna for the full amount of its exposure. It was the Bartlett Estate's election to settle for less.

It is well settled law in Kentucky that the insurance carrier covering the vehicle involved in the accident is the primary carrier and its insurance must be exhausted before the excess carrier is liable. *State Farm Insurance Co.* v. *Hall,* Ky., 165 S. W. 2d 838. The insurer of the auto involved in the accident has primary liability. This view is also supported as to uninsured motorist coverage in *Motorist Mutual Insurance Co.* v. *Tomanski,* Ohio, 257 N. E. 2d 399, 404. Compare *Nelson* v. *Employers Mutual Casualty Co.,* Wis., 217 N. W. 2d 670; *Leatherman* v. *American Family Mutual Insurance Co.,* Wis., 190 N. W. 2d 904; *Scherr* v. *Drobac,* Wis., 193 N. W. 2d 14 as to reducing clauses.

In *Thompson* v. *Certified Indemnity Company,* Colo., 495 P. 2d 252, 253, the Court explicitly held that as between two policies of insurance containing uninsured motorist provisions the insurer of the automobile involved in the collision had the "primary" uninsured motorist coverage. The Court stated as follows:

> "The extent of Certified's liability depends upon the applicability of the 'other insurance' provisions in both policies. Under the terms of their respective contracts, Certified, as the insurer of the automobile used by plaintiff, is the 'primary' or 'pro rata' insurer and Alliance is the 'excess' insured. Whitmire v. Nationwide Mutual Insurance Co., 254 S. C. 184, 174 S. E. 2d 391; Safeco Insurance Co. v. Pacific Indemnity Co., 66 Wash. 2d 38, 401 P. 2d 205."

Whitmire v. *Nationwide Mutual Insurance Co.,* S. C., 174 S. E. 2d 391 is exactly in point. This was a Declaratory Judgment action to determine which of two policies of uninsured motorist coverage was primary or secondary. The Court concluded at page 396 that such a provision as contained in the present policy as to "Other Insurance" is valid and enforceable as it does not contravene the statute authorizing uninsured motorist coverage. The statute is similar to ours. The Nationwide Mutual Insurance Company had in effect an automobile liability policy covering the automobile in which the Plaintiff was a passenger. National Grain Insurance Company had in effect a similar policy insuring the Plaintiff on a different automobile. The Court held that Nationwide's policy upon the auto-

mobile involved in the accident in which plaintiff was a passenger was primary because the Grange's policy as to non-owned automobiles was expressly declared to be excess. American's policy declares exactly the same thing in its "Other Insurance" provisions.

In the *Thompson* case, *supra,* settlement was made with the excess uninsured motorist coverage carrier first and then suit was brought against the uninsured motorist primary carrier. The primary carrier was held still liable.

Thus, under the above authority, since both liability and uninsured motorist coverage were available from the primary carrier, Aetna, the insurer of the Thacker automobile which was involved in the accident in the amount of $35,000.00, and since the verdict of the jury was less than that sum there is no insurance in effect under American's uninsured motorist provisions. Certainly, "similar insurance available" is applicable here as admitted by Aetna's representative as to his exposure of $35,000.00 (T.E. 157). Thus, the Trial Court should have sustained the Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict under the "Other Insurance" provisions of the policy. Before the trial counsel and the Court agreed this was a question of law as to primary or secondary coverage that must be decided after the trial (T.E. 13), depending on the amount of the verdict.

E. Under the undisputed facts in this case American Automobile Insurance Company was entitled to have its Motion for Directed Verdict sustained by the Trial Court as well as its Motion for Judgment Notwithstanding the Verdict sustained. The Trial Court abused its discretion in not permitting to be filed the Amended Answer tendered one month before trial or the Supplemental Answer tendered to conform to the proof.

From the undisputed facts as set forth above, it is clear that the Plaintiff did not make a case for liability upon American Automobile Insurance Company under the terms and conditions of its policy. In the cases cited previously in the brief insurance carriers in a similar situation to American Autombile Insurance Company have been given either Directed Verdicts or Summary Judgments. This case was not pretried (T.E. 163) through some slip-up in the normal operation procedure of the Trial Court. The question of law as to policy defenses to be determined after the trial was discussed by counsel and the Court before the trial began (T.E. 13). Although demanded before the trial, the Indemnification Agreement was not produced by the Plaintiff until ordered to do so by the Court on the first day of trial before evidence was heard (T.E. 12-13, Defendant's Exhibit 1). Under these circumstances it was clearly an abuse of discretion to deny American's Motion to file its Amended Answer which was tendered to the Court and to opposing counsel May 19, 1975 (T.R. 12) approximately one month before the trial. CR 15.01 directs that leave to amend shall "be freely given when justice so requires." As pointed out in *Ashland Oil & Refining Co.* v.

Phillips, Ky., 404 S. W. 2d 449, 450, there is no showing that the delay in offering the amendment worsened the Appellee's position as same were based on the insurance policy. It made no change in the preparation of the case, as policy defense facts are undisputed and Plaintiff was the only one who at all times had possession of the policy (T.E. 164). "Justice" required a determination of these issues (T.E. 164). There is no suggestion of bad faith on behalf of the Defendant as noted by the Court (T.E. 163). Moreover, the Trial Court abused its discretion in denying the Supplemental Answer (T.R. 22) to be filed on June 20, 1975, when same was tendered pursuant to Rule 15.02 as to amendments to conform to the evidence. *Rietze* v. *Williams,* Ky., 458 S. W. 2d 313.

However, the policy of insurance was only in effect in accordance with its terms and conditions. It was denied by American that the terms and conditions of the policy were met (T.R. 5-6). The policy of insurance introduced by the Plaintiff as the Plaintiff's Exhibit 4 and clearly on the undisputed facts the terms and conditions of the policy have not been met. For these reasons the Trial Court should have sustained the Motion for Directed Verdict as well as the Motion for Judgment Notwithstanding the Verdict made by American.

III. CONCLUSION

For the reasons set forth above, justice has been denied, and the Judgment of the Trial Court in the amount of $9,000.29 against American Automobile Insurance Company should be reversed, and the Trial Court directed to enter a Judgment for the Defendant, American Automobile Insurance Company, dismissing the Complaint.

Respectfully submitted,

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