

2001

# Karen Nielsen v. Hartford Insurance Company of the Midwest : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE ESTATE OF DOROTHY BERKEMEIR, by and through its Executor, KAREN NIELSEN,	:	
	:	
	:	
Plaintiff/Appellee,	:	Appellate Court No. 20010437-CA
	:	
v.	:	
	:	
HARTFORD INSURANCE COMPANY OF THE MIDWEST,	:	Priority No. 10
	:	
Defendant/Appellant.	:	
	:	

BRIEF OF APPELLEE THE ESTATE OF DOROTHY BERKEMEIR,  
by and through its Executor, KAREN NIELSEN

On Appeal from an Interlocutory Order  
of the Third Judicial District Court of Salt Lake County, State of Utah  
The Honorable Timothy R. Hanson, District Judge

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Executor, Karen Nielsen

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Utah Court of Appeals  
  
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Clerk of the Court

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BERKEMEIR, by and through its	:	
Executor, KAREN NIELSEN,	:	
	:	Appellate Court No. 20010437-CA
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	Priority No. 10
HARTFORD INSURANCE	:	
COMPANY OF THE MIDWEST,	:	
	:	
Defendant/Appellant.	:	
	:	

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	Executor, Karen Nielsen

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## **JURISDICTION**

Pursuant to Utah Code Ann. § 78-2a-3(2)(j), the Utah Court of Appeals has appellate jurisdiction in this matter. The Honorable Timothy R. Hanson granted The Estate's Motion for Partial Summary Judgment on the issue of liability, holding Hartford Insurance Company of the Midwest ("Hartford") liable to The Estate of Dorothy Berkemeir, by and through its Executor, Karen Nielsen (the "Estate"), for the damages of Dorothy Berkemeir ("Ms. Berkemeir") under the provisions of an underinsured motorist insurance policy.

In holding that Hartford is contractually liable to the Estate, the Honorable Timothy R. Hanson determined that, after the cause action accrued, Utah's Personal Injury Survival Statute, Utah Code Ann. § 78-11-12, is inapplicable to the first-party contractual relationship between Hartford and its insured, Ms. Berkemeir, and subsequent to her death, the Estate, for a number of reasons.

Hartford appeals from the District Court's Order Granting the Estate's Motion for Partial Summary Judgment and Denying Hartford's Motion for Summary Judgment dated March 7, 2001, and filed on May 7, 2001. (R. 189-196).

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW AND THE STANDARDS OF REVIEW**

Was the Honorable Timothy R. Hanson correct in ruling that, after the cause of action against Hartford accrued, the Personal Injury Survival Statute, Utah Code Ann. § 78-11-12, does not apply to the Underinsured Motorist Coverage contained



in the first-party insurance contract issued by Hartford to its insured, Mrs. Berkemeir, where neither Mrs. Berkemeir nor her Estate have fully recovered for the damages Mrs. Berkemeir sustained in an automobile accident?

**Issue Preserved for Appeal:** On May 22, 2001, Hartford filed a Notice Regarding Filing of Petition to Appeal from Interlocutory Order (R. 207-08), appealing from the District Court's Order Granting the Estate's Motion for Partial Summary Judgment and Denying Hartford's Motion for Summary Judgment dated March 7, 2001, and filed on May 7, 2001. (R. 189-196)

**Standard of Review:**

The application of the Personal Injury Survival Statute, Utah Code Ann. § 78-11-12, to the accrued cause of action under the insurance contract presents a question of law, which is reviewed for correctness. See *Bearden v. Croft*, 31 P.3d 537, 538, ¶ 5 (Utah 2001); *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636-37 (Utah 1989). The interpretation of Utah Code Ann. § 78-11-12 also presents a question of law, which is reviewed for correctness. See *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 519 (Utah 1997).

In addition, a trial court's summary judgment ruling is reviewed for correctness. *Bearden v. Croft*, 31 P.3d 537, 538, ¶ 5 (Utah 2001); *Surety Underwriters v. E & C Trucking, Inc.*, 10 P.3d 338, 340, ¶ 14 (Utah 2000); see also *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1277 (Utah 1998); *Certified Sur. Group, Ltd. v. UT Inc.*, 960 P.2d 904, 905-06 (Utah 1998).

## DETERMINATIVE STATUTES AND RULES

Section 78-11-12 of the Utah Code provides:

**Survival of action for injury to person or death upon death of wrongdoer or injured person—Exception and restriction to out-of pocket expenses.**

(1)(a) Causes of *action arising out of personal injury to the person or death caused by the wrongful act or negligence of another* do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal representative or heirs of the person who died have a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to subsection (1)(b).

(b) If prior to judgment or settlement the injured person dies as a result of a cause of action other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of the injured person as the result of his injury.

Utah Code Ann. § 78-11-12 (1996)(emphasis added).<sup>1</sup>

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<sup>1</sup> Because the motor vehicle accident occurred in Wyoming (R. 19), Wyoming's survival statute would apply to any tort claim against Mr. Alexander. Wyoming Code Ann. § 1-4-101. Although this is a unique survival statute, its interpretation indicates essentially the same result as would be achieved as by the application of Utah Code Ann. § 78-11-12 (1996) to this case. *E.g.*, *Parsons v. Roussalis*, 488 P.2d 1050, 1052 (Wyo. 1971).

Section 31A-21-313 of the Utah Code provides:

**Limitation of actions.**

(1) An action on a written policy or contract of first party insurance must be commenced within three years after the inception of the loss.

Utah Code Ann. § 31A-21-313 (1996)(emphasis added)(Addendum #1).

**STATEMENT OF THE CASE**

**A. Nature of the Case**

This is an appeal from an Order Granting the Estate's Motion for Partial Summary Judgment and Denying Hartford's Motion for Summary Judgment dated March 7, 2001, and filed on May 7, 2001. (R. 189-196)

**B. Course of Proceedings**

On November 2, 1999, the Estate filed its Complaint against Hartford. The Complaint sought damages for Hartford's breach of the Underinsured Motorist coverage provisions in the insurance policy Hartford issued to Ms. Berkemeir. The case was assigned to the Honorable Timothy R. Hanson, who on January 29, 2001, entertained oral argument on Defendant Hartford Insurance Company of the Midwest's Motion for Summary Judgment and the Estate's Motion for Partial Summary Judgment. (R. 120-122)

At the conclusion of oral argument, Judge Hanson granted the Estate's Motion for Partial Summary Judgment and denied Hartford's Motion for Summary Judgment. (R. 155) At the conclusion of his ruling, Judge Hanson instructed

counsel for the Estate, Mark A. Larsen (“Mr. Larsen”), to prepare the Order. Mr. Larsen prepared the Order in accordance with the instruction of Judge Hanson and submitted it to counsel for Hartford, Mark L. Anderson, for review. (R. 155) On March 5, 2001, Hartford objected to the proposed Order, asserting the Order impermissibly expanded the scope of Judge Hanson’s ruling. (R. 129-148) On March 23, 2001, the Estate filed its Response to Hartford’s Objection, asserting that the proposed Order was consistent with Judge Hanson’s oral ruling and instruction regarding Rule 52(a) of the Utah Rules of Civil Procedure. (R. 153-58) On May 7, 2001, Judge Hanson ruled that the proposed Order “properly set forth the basis for granting summary judgment,” and accordingly, overruled Hartford’s objections. (Minute Entry dated May 7, 2001, R. 203; Addendum #2)

On May 22, 2001, Hartford filed a petition with the Supreme Court of Utah to appeal from Judge Hanson’s interlocutory Order. (R. 207) On July 23, 2001, this appeal was transferred from the Utah Supreme Court to the Utah Court of Appeals for disposition. (R. 213-14).

### **C. Disposition of Trial Court**

Judge Hanson entered his ruling in an Order Granting the Estate’s Motion for Partial Summary Judgment and Denying Hartford’s Motion for Summary Judgment dated March 7, 2001, and filed on May 7, 2001. (R. 189-196)

## **STATEMENT OF FACTS**

The parties stipulated to the facts upon which Hartford and the Estate based their respective Motions for Summary Judgment. The facts to which the parties stipulated are contained in the Stipulation as to Facts and Legal Positions (“the Stipulation”)(Addendum #3), which was filed with the District Court on August 11, 2000. (R. 18-27) In addition to the facts set forth in the Stipulation, there was one additional fact the Estate presented to the District Court: Hartford did not object to Berkemeir’s settlement of all claims against Mr. Alexander for the \$50,000 limit of his policy with Allstate.<sup>2</sup>

Given this setting, it should have been easy for Hartford to recite for this Court all of the relevant facts presented to Judge Hanson. Despite the ease with which this task could be accomplished, Hartford chose instead to attempt to distort the factual record. Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, the Estate will not recite the facts contained in Appellant’s brief, but wishes to direct the Court’s attention to the following:

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<sup>2</sup> Letter from Kristine Edde, former counsel for Plaintiff, to Jeffrey Powell of Hartford dated October 8, 1996. Attached as Exhibit 1 to the Estate’s Memorandum in Support of its Motion for Partial Summary Judgment and in Opposition to Hartford’s Motion for Summary Judgment. (R. 104A) Letter from Kristine Edde, former counsel for Plaintiff, to Mark Anderson, counsel for Hartford dated October 28, 1996. Attached as Exhibit 2 to the Estate’s Memorandum in Support of its Motion for Partial Summary Judgment and in Opposition to Hartford’s Motion for Summary Judgment. (R. 104B) Hartford did not dispute this fact, which became admitted pursuant to Utah Code of Judicial Administration 4-501(2)(B).

**A. Hartford's Statement of Facts Contains Facts Which Are Not Based upon the Record.**

In its Statement of Facts, on page 7 of its brief, Hartford states: "Hartford did not agree that Berkemeir's damages exceeded \$100,000. However, it agreed that such damages exceeded \$50,000, and made a settlement offer. The matter was not settled, and the parties agreed to resolve the dispute over UIM benefits through binding arbitration." Contrary to Utah R. App. P. 24(a)(7)&(e), Hartford does not support these statements with a citation to the record because these facts are not contained in the record. This information was not before Judge Hanson when he ruled on Hartford's Motion for Summary Judgment and the Estate's Motion for Partial Summary Judgment.

Moreover, facts concerning settlement negotiations are inadmissible and could not be considered in deciding a Motion for Summary Judgment. Pursuant to Rule 408 of the Utah Rules of Evidence, such facts are inadmissible. Rule 408 provides in relevant part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

If not admissible, these facts cannot be considered on a Motion for Summary Judgment in any event. U.R.C.P. 56(e). Because facts concerning settlement negotiations were not properly before Judge Hanson, this Court should disregard

this portion of Hartford's Statement of Facts, which are an inaccurate, incomplete, unsupported report of inadmissible negotiations, distorted in such a manner as to suggest that Hartford, at some time, was reasonable.

**B. Hartford's Statement of Facts Does Not Contain Relevant Facts Which Are Set Forth in the Stipulation and Supported by the Record.**

There are facts relevant to the determination of this appeal which surprisingly are not contained in Hartford's Statement of Facts. These facts were before Judge Hanson when he denied Hartford's Motion for Summary Judgment and granted the Estate's Motion for Partial Summary Judgment on the issue of liability. In compliance with Rule 24 of the Utah Rules of Appellate Procedure, the Estate sets forth the following additional facts:

1. Paragraph 15 of the Stipulation, which is not set forth in Hartford's Statement of Facts, provides:

Ms. Berkemeir's auto policy from Hartford (the "Policy") extended coverage for medical payments and personal injury protection (Policy, Part B). Hartford paid the medical limit of \$5,000 under this coverage provision of the Policy. Hartford also paid the personal injury protection limit of \$5,000 under this coverage provision. Payments made by Hartford under Part B of the Policy totaled \$10,000. All Part B payments were directed to reimbursement of medical expenses incurred by Mrs. Berkemeir as a result of the automobile accident of October 16, 1995.

(R. 21)

2. In addition to provisions set forth on pages 6 and 7 of Hartford's Statement of Facts, Paragraph 16 of the Stipulation refers to a provision in the Policy which provides: "We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible. (Policy, Section III, Limit of Liability, paragraph C, at p. 16)" (R. 22)

3. Paragraph 17 of the Stipulation provides as follows:

Ms. Berkemeir made demand upon Hartford for payment of the \$100,000 under her UIM coverage, resulting in an arbitration proceeding originally scheduled to begin on July 21, 1997. The hearing was subsequently rescheduled for September 23, 1997 because of an independent medical examination of Ms. Berkemeir that had to be rescheduled.

(R. 22)

4. Paragraph 19 of the Stipulation states: "After Ms. Berkemeir's death and prior to the rescheduled arbitration proceeding, the Berkemeir Estate demanded payment from Hartford of \$45,580.40 under the UIM coverage as a contractual claim against the Policy." (R. 22)

5. In addition, Paragraph 20 of the Stipulation provides:

Hartford denied the Berkemeir Estate's contractual claim against the Policy in light of its interpretation of applicable Utah Law, and Ms. Berkemeir's death. In part, Hartford's denial of the claim was based on Utah Code Ann. § 78-11-12(1), which states:



(a) Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal representative or heirs of the person who died have a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to subsection (1)(b).

(b) If prior to judgment or settlement the injured person dies as a result of a cause of action other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of the injured person as the result of his injury.

(R. 23)

6. Finally, Paragraph 21 of the Stipulation states: "After Ms. Berkemeir's demise Hartford withdrew its demand to arbitrate, believing there was no benefit owing to the Berkemeir Estate because of Ms. Berkemeir's death from causes unrelated to the accident. The Berkemeir Estate then filed this action." (R. 23)

### **SUMMARY OF ARGUMENTS**

There is an extraordinarily strange anomaly in this case: If the arbitration occurred as originally scheduled, Hartford unquestionably would have paid most, if not all, of its \$100,000 policy limits to Ms. Berkemeir. Only the delay or

postponement of the arbitration scheduled prior to Ms. Berkemeir's untimely death creates even an arguable position for Hartford in this case. The issue presented in this case is when the damages under the underinsured motorist coverage contained in the policy should be measured: On the date of the settlement with the underlying tortfeasor, on the date Hartford refused to pay Ms. Berkemeir the underinsured motorist coverage based upon her demand, or on the date of the arbitration award.

On October 16, 1995, Ms. Berkemeir sustained personal injuries in an automobile accident. On October 9, 1996, Ms. Berkemeir settled her personal injury claim against James Alexander ("Mr. Alexander"), the driver of the other vehicle involved in the collision, for the \$50,000 limit of his liability insurance policy with Allstate Insurance Company ("Allstate"). However, the proceeds of the settlement agreement, coupled with the \$10,000 in personal injury and medical benefits Hartford paid to Ms. Berkemeir under her insurance policy, did not fully compensate the damages she sustained as a result of the collision.

As a result, Ms. Berkemeir demanded that Hartford pay the \$100,000 in underinsured motorist benefits. An arbitration proceeding under the policy originally was scheduled for July 21, 1997. It was continued until September 23, 1997, to allow Hartford an opportunity to conduct an Independent Medical Examination of Ms. Berkemeir. Ms. Berkemeir died in the interim on August 15, 1997, of causes unrelated to the injuries she sustained in the October 16, 1995, collision. Prior to Ms. Berkemeir's death, Hartford paid the medical limit and the personal injury

protection limit of the Policy. After Ms. Berkemeir's death, Hartford refused the claim, asserting Utah Code Ann. § 78-11-12(1)(b) precludes the Estate from collecting under the insurance contract.

Utah Code Ann. § 78-11-12, however, does not apply to the facts of this case because the Estate's claim is based in contract law rather than personal injury tort law. Moreover, Ms. Berkemeir's cause of action against Hartford accrued, and the statute of limitations on her claim against Hartford began running, on the date of her settlement with Alexander, on the date Hartford refused to pay Ms. Berkemeir the underinsured motorist coverage based upon her demand, or upon Hartford's refusal to pay underinsured motorist benefits to Berkemeir in breach of the insurance contract. The damages would be measured as of the date of the breach of the contract, when the cause of action accrued, and would not change based upon subsequent events. When the cause of action accrues drives the interpretation of the "**legally entitled** to recover" phrase in the insurance contract's underinsured motorist provision.

Even if this Court were to apply Utah Code Ann. § 78-11-12 in the interpretation of the "legally entitled to recover" phrase in the insurance contract's Underinsured Motorist Provision, this would not eliminate the Estate's ability to recover against Hartford. Utah Code Ann. § 78-11-12 explicitly states: "**Causes of action arising out of personal injury to the person** . . . caused by the wrongful act or negligence of another **do not abate upon the death of** the wrongdoer or **the**

**injured person**. . . .” Consequently, Ms. Berkemeir’s death would not dictate that she was not “legally entitled to recover” against the underlying tortfeasor. That is why Utah Code Ann. § 78-11-12 is referred to as a “Survival Statute.”

Hartford sponsors two illogical positions, the adoption of both of which are necessary to reach the conclusion that the Estate has no claim against Hartford:

1. The Estate’s damages are measured at the time the arbitration award is entered, not at the time the cause of action against Hartford accrues, causing Utah Code Ann. § 78-11-12(1)(b) to apply to the interpretation of the “legally entitled” phrase in the underinsured motorist provision of the insurance policy.
2. Even though Utah Code Ann. § 78-11-12(1)(b) applies, the underinsured motorist provision of the insurance policy entitles Hartford to dictate that any recovery obtained by an insured must first be applied to out-of-pocket expenses and subsequently to all other damages incurred.

## **ARGUMENT**

### **POINT I**

#### **UTAH CODE ANN. § 78-11-12 DOES NOT DIRECTLY APPLY TO THE ESTATE'S CLAIM FOR BREACH OF THE INSURANCE CONTRACT**

This is a contract, not a tort, claim. Utah Code Ann. § 78-11-12 applies to causes of action based upon personal injury claims and alters the available damages where the victim of a tort dies from unrelated causes prior to the entry of a judgment. It, however, does not directly alter the available damages where the claim is contractual in nature, as opposed to a personal injury tort claim. The litigation in this case against Hartford is based upon the Estate's succession to Ms. Berkemeir's breach of contract claim against Hartford. Utah Code Ann. § 78-11-12, therefore, does not directly apply to this case.

Hartford now belatedly concedes that the claim in this case is a contract claim based on the first-party insurance contract between Ms. Berkemeir and Hartford under which Hartford agreed to provide insurance to Ms. Berkemeir, including underinsured motorist coverage. See *Bergera v. Ideal Nat'l Life Ins. Co.*, 524 P.2d 599, 600 (Utah 1985)(an insurance policy is "merely a contract between the insured and the insurer"). Prior to Ms. Berkemeir's death, Hartford refused to pay Ms. Berkemeir her underinsured motorist benefits. Later, Hartford denied the Estate's claim under the underinsured motorist provisions of the contract, asserting that Utah Code Ann. § 78-11-12(1)(b) precludes the Estate from collecting on the insurance

contract. Utah Code Ann. § 78-11-12, however, does not directly apply to the facts of this case because Ms. Berkemeir's claim against Hartford sounds in contract, not in tort.

Utah Code Ann. § 78-11-12(1) specifically applies to “[c]auses of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another . . . .” (Emphasis added). Ms. Berkemeir's personal injury claim against Mr. Alexander was settled for the limits of his insurance policy with Allstate. What remains is the Estate's claim against Hartford based on the insurance contract between Ms. Berkemeir and Hartford.

In addition, the Utah Supreme Court in *Beck v. Farmers Insurance Exchange*, held: “[I]n a first-party<sup>3</sup> relationship between an insurer and its insured, the duties and obligations of the parties are *contractual* rather than fiduciary. Without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not tort.” *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 800 (Utah 1985)(emphasis added). In *Beck*, the insured raised a bad faith claim against the insurer based upon the insurer's failure to investigate the claim and settle it, in breach of the insurer's duty to deal with the insured fairly and in good faith. In holding the breach gave rise to a cause of action in contract, the Court expressly rejected such a cause of action based in tort, stating:

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<sup>3</sup> The Court used the term “first-party” to refer to an insurance contract under which the insurer agrees to pay claims submitted to it by the insured for losses the insured has sustained.

We recognize that a majority of states permit an insured to institute a tort action against an insurer who fails to bargain in good faith in a “first-party” situation . . . . Apparently these courts have taken this step as a matter of policy in order to provide what they perceive to be an adequate remedy for an insured wronged by an insurer’s recalcitrance. **These courts have reasoned that under contract law principles, an insurer who improperly refuses to settle a first-party claim may be liable only for damages measured by the maximum dollar amount of the insurance provided by the policy,** and such a damage measure provides little or no incentive to an insurer to promptly and faithfully fulfill its contractual obligations. Accordingly, these courts have adopted a tort approach in order to allow an insured to recover extensive consequential and punitive damages, which they consider to be unavailable in an action based solely on a breach of contract. **We conclude that the tort approach adopted by these courts is without a sound theoretical foundation and has the potential for distorting well-established principles of contract law.**

*Beck v. Farmers Ins. Exch.*, 701 P.2d at 798-99 (citations omitted)(emphasis added).

Unlike the courts that have adopted the tort approach as a means of providing an insured with an *adequate* remedy for an insurer’s recalcitrance, Hartford seeks to *eliminate* any further liability to the Estate by applying the tort provisions of Utah Code Ann. § 78-11-12 to the insurance contract. Hartford seeks this result despite stipulating that Berkemeir was not fully compensated for the damages she incurred as a result of the accident. To directly apply Utah Code Ann. § 78-11-12 to the Estate’s breach of contract claim is not only contrary to the policy concerns set forth above, but a distortion of contract law.

## POINT II

**UTAH CODE ANN. § 78-11-12 APPLIES, IF AT ALL, ONLY INDIRECTLY IN INTERPRETING THE “LEGALLY ENTITLED” PHRASE IN THE CONTRACT.**

Once Hartford acknowledged, as it did in the appeal of this case for the first time, that the Estate’s claim is contractual in nature, the interpretation of the “legally entitled” language in the underinsured motorist provision of the insurance contract became the only issue in this case. The underinsured motorist provision of the insurance policy provides in pertinent part:

- **We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:**
  1. Sustained by an insured; and
  2. Caused by an accident.

The owner’s or operator’s liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle. Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

(Emphasis added.) Ms. Berkemeir cannot claim underinsured motorist coverage against Hartford until she can establish that Mr. Alexander was driving an “underinsured motor vehicle,” a defined term in the insurance contract.<sup>4</sup> Based upon

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<sup>4</sup> Policy, Part C, Section III, paragraph C at p. 15 defines this term as follows:

“Underinsured motor vehicle” means a land

(continued...)



that definition, she cannot establish that Mr. Alexander was driving an “underinsured motor vehicle,” until she either (i) obtains a judgment against Mr. Alexander for in excess of his policy limits or (ii) settles the claim against him for his full policy limits. The definition of “underinsured motor vehicle” requires Mr. Alexander’s insurer, Allstate, to make a payment of its policy limits to trigger underinsured motorist coverage under Hartford’s policy.

In this case, Allstate paid Ms. Berkemeir Mr. Alexander’s full policy limits, giving Ms. Berkemeir for the very first time the right to assert an underinsured motorist claim because, as Hartford stipulated in this case, “[d]ue to the amount of Ms. Berkemeir’s damages, if she were still alive, the settlement with Allstate would not have fully compensated her for her loss.” Stipulation ¶ 14 (R.21). Ms. Berkemeir could not even make a claim under the Hartford policy until Allstate paid its policy limits to Ms. Berkemeir.

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<sup>4</sup>(...continued)

motor vehicle . . . of any type to which a bodily injury liability bond or policy applies at the time of the accident **but the amount paid for bodily injury under that bond or policy to an insured is not enough to pay the full amount the insured is legally entitled to recover as damages.**

Stipulation ¶ 16 (emphasis added)(R. 22).

Whether Ms. Berkemeir is “legally entitled” to recover from Mr. Alexander for the personal injuries she sustained in the automobile accident must be measured at some point in time. There are three potential candidates:

1. On the date of Ms. Berkemeir’s settlement with Alexander’s insurer, Allstate;
2. On the date Hartford refused to pay Ms. Berkemeir the underinsured motorist coverage based upon her demand; or
3. On the date of the arbitration award.

The Estate contends that either the first or the second dates are appropriate, while Hartford in effect, although never articulating it, seems to argue for the third date. This seems to be the point in the analysis where the parties diverge.

**A. Utah Code Ann. § 78-11-12 Does Not Apply to the Estate’s Claim Because the Claim Accrued on Hartford’s Breach of the Insurance Contract.**

Berkemeir’s claim for breach of contract accrued on the date of her settlement with Mr. Alexander or the date Hartford refused to pay Ms. Berkemeir based upon her demand. By at least the latter date, she had a claim against Hartford for underinsured motorist benefits. No one ever questioned Alexander’s obvious liability, to which the parties in this case stipulated. Stipulation ¶ 11 (R. 20) The damages for that breach of contract are measured on the date of the breach, which is when the cause of action accrues, not at some later date after Ms. Berkemeir’s death. In *Becton Dickinson & Co. v. Reese*, 668 P.2d 1254, 1257 (Utah 1983), the

Utah Supreme Court held that a claim accrues on the occurrence of the last event necessary to complete the cause of action.

Prior to her settlement with Mr. Alexander and Hartford's refusal to pay underinsured motorist benefits, Ms. Berkemeir did not have a claim against Hartford. When Hartford breached the insurance contract, however, the last event necessary to create Ms. Berkemeir's cause of action against Hartford occurred.

**B. The Statute of Limitations on the Estate's Claim Began Running on either the date of the Alexander Settlement or Hartford's Refusal to Pay the Underinsured Motorist Benefits in Breach of the Insurance Contract.**

The statute of limitations on Berkemeir's claim began running on either the date of the Mr. Alexander settlement or Hartford's refusal to pay Berkemeir the underinsured motorist benefits, in breach of the insurance contract. Utah Code Ann. § 31A-21-313 sets forth the statute of limitations for bringing a claim on an insurance policy, stating: "An action on a written policy or contract of first part insurance must be commenced within three years after the inception of the loss."

In *Lang v. Aetna Life Insurance*, 196 F.3d 1102, 1105 (10th Cir. 1999), the court discussed the "inception of loss" language of § 31A-21-313, stating: "The statute of limitations was triggered *not* by the personal injury giving rise to the suit but rather by the insurer's alleged breach [of contract] in refusing to defend against the suit." (emphasis added)

Similarly, the inception of Ms. Berkemeir's loss and the breach of contract claim was not triggered by the personal injury Ms. Berkemeir suffered but rather by Hartford's breach of contract in refusing to pay the underinsured motorist benefits. If Hartford's argument in this case were accepted, the statute of limitations would not be triggered until Mr. Alexander's liability was reduced to a judgment.

**C. The Interpretation of the Insurance Contract Is Strictly Construed Against Hartford, Who Easily Could Have Stated That UIM Coverage Becomes Limited or Terminates upon the Death of the Insured.**

If Hartford wanted underinsured motorist benefits to become limited or expire upon the death of the insured, when the insured dies before an arbitration award is entered, it could easily have said so directly in the insurance contract. In *U. S. Fidelity & Guaranty Company v. Sandt*, 854 P.2d 519 (Utah 1993), the Utah Supreme Court stated: "Insurance policies should be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by insurance companies." 854 P.2d 519, 522 (Utah 1993). The Court also explained that "insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance. *Id.* at 521-22 (citations omitted).

The interpretation of the "legally entitled" language in the underinsured motorist provision of the insurance contract is the only issue in this case. Applying the rules of interpretation established in *Sandt*, if there is any argument over whether

Utah Code Ann. § 78-11-12 applies to the Estate's Claim, that ambiguity should be resolved in favor of the Estate and against Hartford.

- D. Utah Code Ann. § 78-11-12 is a "Survival Statute": It Explicitly Prevents Personal Injury Claims from Abating Upon the Injured Victim's Death So That Regardless as to When Ms. Berkemeir Died, She Always Was "Legally Entitled" to Recover Against Mr. Alexander.**

If Ms. Berkemeir died prior her settlement with Mr. Alexander and prior to Allstate's payment of the policy limits to her, undoubtedly Utah Code Ann. § 78-11-12 would have applied to her cause of action against Mr. Alexander, limiting her recovery against him. Even in that event, however, she still would have been "legally entitled" to recover against Mr. Alexander. Utah Code Ann. § 78-11-12 explicitly states: "Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. . . ." Utah Code Ann. § 78-11-12 only impacts Ms. Berkemeir's remedy against Alexander, but does not impact whether she is "legally entitled" to recover against him.

### **POINT III**

#### **MS. BERKEMEIR AND HER ESTATE HAVE NOT BEEN FULLY COMPENSATED FOR THE DAMAGES SHE SUSTAINED IN THE COLLISION.**

Hartford argues Ms. Berkemeir, through the Estate, has been "more than fully reimbursed" for the out-of-pocket expenses she incurred as a result of the collision. Hartford argues that because Ms. Berkemeir received \$60,000 in insurance benefits

from Hartford and Allstate, and Ms. Berkemeir's medical expenses totaled \$38,249.29, plus interest,<sup>5</sup> the Estate has been more than fully compensated for the totality of the out-of-expenses Ms. Berkemeir incurred as a result of the collision.

Hartford, however, has not taken into account the attorneys' fees she paid from the \$50,000 settlement. Nor has Hartford taken into account the most significant element of her claim: Her general damages consisting of the pain and suffering Berkemeir endured as a result of the injuries she sustained in the collision.

Moreover, Hartford's argument assumes Ms. Berkemeir's out-of-pocket expenses were reimbursed by the settlement and insurance proceeds Ms. Berkemeir received. Neither the underinsured motorist provision of the insurance policy nor Utah Code Ann. § 78-11-12(1)(b), however, dictate that any recovery obtained by an insured must first be applied to out-of-pocket expenses and subsequently to all other damages incurred. Rather, compensation for attorneys' fees, continued medical treatment and pain and suffering could be recovered from the settlement, leaving out-of-pocket medical expenses uncompensated. The fact that Ms. Berkemeir died should not somehow force the Estate to apply the settlement proceeds to out-of-pocket expenses first, so as to alleviate any further claim for underinsured motorist

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<sup>5</sup> In conjunction with reimbursement for out-of-pocket medical expenses, the Estate is entitled to recover interest on the special damages Berkemeir incurred as a result of the collision. Utah Code Ann. § 78-27-44 provides that plaintiffs in personal injury actions brought to recover damages "may claim interest on the special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action."

benefits. Such an interpretation of the insurance contract would eliminate the opportunity for whole relief where Hartford has stipulated to the fact that the settlement proceeds did not fully compensate Ms. Berkemeir for her losses.

Furthermore, such an interpretation of Utah Code Ann. § 78-11-12(1)(b), reads into the statute meaning beyond its plain words. “The best evidence of the true intent and purpose of the legislature is the plain language of the statute.” *Lieber v. ITT Hartford Insurance Center, Inc.*, 15 P.3d 1030 (2000). Accordingly, if the legislature had intended to limit the provision in such a manner, it would have done so explicitly. There is no case law supporting such an interpretation of the “out-of-pocket” provision of the statute.

Finally, if Hartford had intended to limit underinsured motorist coverage to out-of-pocket expenses and require any insurance benefits received by the insured to be applied to out-of-pocket expenses first, it should have drafted such a provision into the insurance contract. As stated previously, in *Sandt*, the Utah Supreme Court stated: “Insurance policies should be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by insurance companies.” 854 P.2d 519, 522 (Utah 1993). The Court also explained that “insurance policies should be construed liberally in favor of the insured **and their beneficiaries** so as to promote and not defeat the purposes of insurance.” *Id.* at 521-22 (citations omitted)(emphasis added). To allow Hartford to limit the protection afforded an insured or her beneficiaries, is not only inconsistent with the insurance

policy Ms. Berkemeir purchased from Hartford, but contrary to the longstanding policy of the Utah Supreme Court, to interpret such contracts of adhesion liberally in favor of the insured and their beneficiaries.

Because Mr. Alexander's policy with Allstate did not fully compensate Ms. Berkemeir's out-of-pocket expenses, Mr. Alexander was an underinsured motorist, and Hartford is obligated to pay the Estate underinsured motorist benefits. Such payment would not result in a windfall for the Estate or an impermissible duplicate payment, where the parties have stipulated: "Due to the amount of Berkemeir's damages, if she were still alive, the settlement with Allstate would not have fully compensated her for her loss," and the insurance policy defines an "underinsured motor vehicle" as a "vehicle . . . to which a bodily injury liability bond or policy applies at the time of the accident but the amount paid for bodily injury under that bond or policy is not enough to pay the full amount the insured is legally entitled to recover." *Policy*, Part C Section III, Insuring Agreement, para. C, p.15 (emphasis added).

#### **POINT IV**

##### **HARTFORD'S POSITION IS CONTRARY TO PUBLIC POLICY, LEGISLATIVE HISTORY AND LOGIC.**

In its opening brief,<sup>6</sup> Hartford asserts the Estate is not "legally entitled to recover" on the insurance policy because the Estate cannot assert a "viable claim

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<sup>6</sup> Brief of Appellant Hartford at p. 23.



that is able to be reduced to a judgment in a court of law,” citing *Peterson v. Utah Farm Bureau Insurance Co.*, 927 P.2d 192, 195 (Utah App. 1996).<sup>7</sup> According to Hartford, the Estate is not entitled to recover underinsured motorist benefits because it cannot demonstrate there is an underlying personal injury which renders it legally entitled to recover. Therefore, Hartford asserts, the Estate does not have a viable claim.

**A. Hartford’s Position Is Contrary to the Public Policy Which Encourages Settlement.**

The fact that Alexander’s liability for personal injury was so clear, as not to require Ms. Berkemeir to obtain a judgment against Alexander, should not penalize the Estate, preventing it from securing underinsured motorist benefits where Ms. Berkemeir was not fully compensated for the damages she sustained as a result of the collision. Undoubtedly, Ms. Berkemeir had a viable claim against Mr. Alexander

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<sup>7</sup> In *Peterson*, the Utah Court of Appeals interpreted the “legally entitled to recover” language of the insurance policy at issue to mean “a viable claim that can be reduced to judgment in a court of law.” The Court of Appeals utilized this definition in conjunction with the Utah Workers’ Compensation Act to hold that the Utah Workers’ Compensation Act provides the exclusive remedy for an employee injured in an automobile accident. Subsequently, in *Lieber v. ITT Hartford Insurance Center, Inc.*, 15 P.3d 1030 (2000), the Utah Supreme Court adopted the *Peterson* definition of the “legally entitled to recover” language and utilized it to interpret the uninsured motorist provision of Title 31 of the insurance code. The Court analyzed the plain language of Utah Code Ann. § 31A-22-305(3) & (4) in conjunction with Utah Code Ann. § 34A-2-105(1), the exclusive remedy provision of the Workers’ Compensation Act, to overrule that portion of the Utah Court of Appeals’ holding in *Peterson* which prevented injured employees from making claims against parties other than the employer or its agents.

in light of the fact that the claim was reduced to a settlement for the limit of Alexander's policy with Allstate, and the parties in this case stipulated to his liability.

In addition, Hartford obviously believed Ms. Berkemeir had a viable claim for which she was legally entitled to recover underinsured motorist benefits because before Ms. Berkemeir died, Hartford agreed to enter into arbitration to resolve the matter. Hartford agreed to arbitrate *despite* the settlement agreement in place between Ms. Berkemeir and Alexander. *The settlement agreement, by its terms, would prevent Ms. Berkemeir from bringing a personal injury claim against Mr. Alexander which was capable of being reduced to a judgment. The settlement agreement, by its terms, contained a release, which would mean that, after it was entered, Ms. Berkemeir was not "legally entitled" to recover from Mr. Alexander. As a result, it appears Hartford recognized the possibility for Ms. Berkemeir to be entitled to underinsured motorist benefits under the insurance policy despite the fact that she no longer was "legally entitled" to recover from Mr. Alexander and her claim was incapable of being reduced to judgment.*

Also, in *U. S. Fidelity & Guaranty Company v. Sandt*, 854 P.2d 519 (Utah 1993), the Utah Supreme Court affirmed an award of underinsured motorist benefits to *Sandt*, an insured who already had received the limit of the insurance policy covering the tortfeasor's vehicle. Sandt's damages also exceeded the limit of the tortfeasor's policy. The opinion, however, *does not* indicate Sandt was only legally entitled to recover on the insurance policy because he asserted a "viable claim that

[wa]s able to be reduced to a judgment in a court of law,” or a viable claim that had been reduced to judgment. Nonetheless, the Court held Sandt entitled to recover underinsured motorist benefits because the amount of his damages exceeded the limit of the tortfeasor’s policy. Similarly, the Estate is entitled to receive underinsured motorist benefits because Ms. Berkemeir was not fully compensated by Alexander’s policy for the damages she incurred as a result of the collision.

In *Slusher v. Ospital by Ospital*, 777 P.2d 437, 441 (Utah 1989), the Utah Supreme Court stated, “The public policy is to encourage settlements.” *Id.* at 441 (Utah 1989)(citing *General Motors Corp. v. Lahocki*, 410 A.2d 1039, 1046 (Md. 1980); accord, *Alvin G. Rhodes Pump Sales v. Industrial Comm’n*, 681 P.2d 1244, 1248 (Utah 1984); *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497, 506 (Utah 1980)). In light of the public policy encouraging settlement of claims, it is unlikely that the state legislature, by including the “arising out of personal injury” language in the Personal Injury Survival Statute, intended to require an insured to assert a “viable claim that is able to be reduced to judgment in a court of law”, before being “legally entitled to recover” on a contract claim for underinsured motorist benefits against its insurer. Implementing such a requirement is not only contrary to the public policy encouraging settlement, but contrary to the fundamental paradigm governing the

practice of personal injury and insurance law.<sup>8</sup> The net effect of such a requirement is to discourage settlement of underlying personal injury claims.

**B. Hartford's Position Is Inconsistent with the Plain Language of Utah Code Ann. § 78-11-12 and its Legislative History.**

Furthermore, Hartford's interpretation of Utah Code Ann. § 78-11-12 reads into the statute meaning beyond its plain words. "The best evidence of the true intent and purpose of the legislature is the plain language of the statute." *Lieber v. ITT Hartford Insurance Center, Inc.*, 15 P.3d at 1034. Accordingly, if the legislature had intended Utah Code Ann. § 78-11-12 to apply to limit causes of action based

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<sup>8</sup> As an insurance company, Hartford is very familiar with the manner in which personal injury and insurance defense litigation proceed. Nonetheless, Hartford utilizes the "arising from" language of the Personal Injury Survival Statute to breathe life into the "legally entitled to recover" language contained in the Policy, Part C, Section III, Insuring Agreement, paragraph A, at p. 14 it issued to Ms. Berkemeir.

On the face of the Policy, it is impossible to discern that Hartford requires a judgment against the tortfeasor in order to recover underinsured motorist benefits under the Policy. If Hartford intended to require an insured to secure a judgment against the tortfeasor as a condition precedent to paying underinsured motorist benefits, it should have drafted such a provision into its Policy.

The fact of the matter is that Hartford did not draft such a provision into its Policy and now seeks to apply the Personal Injury Survival Statute to Ms. Berkemeir in such a way as to create a condition precedent which prevents the Estate from recovering for the damages for which Ms. Berkemeir and the Estate have not been compensated.

In all likelihood, this provision is not in the Policy because it is contrary to the practice of Hartford. Although facts concerning the business practices of Hartford are not in the record and properly before this Court, it is difficult to believe that Hartford requires all of its policyholders to secure judgments before receiving underinsured motorist benefits under its policies.

upon insurance contracts as Hartford suggests, the legislature would have done so explicitly. Ironically, there is no legislative history supporting such an interpretation of Utah Code Ann. § 78-11-12.<sup>9</sup> Rather, it appears that the legislature has consistently, and most recently in 2001, chosen not to include language regarding first-party insurance contracts when revising Utah Code Ann. § 78-11-12. In addition, the state legislature has not included provisions like those contained in Utah Code Ann. § 78-11-12 in Title 31 A, the Utah Insurance Code which governs underinsured motorist coverage.

Finally, if Hartford had intended to limit underinsured motorist coverage, it should have drafted such a provision into the insurance contract.<sup>10</sup> To allow Hartford to limit the protection afforded an insured or her beneficiaries, is not only inconsistent with the insurance policy Ms. Berkemeir purchased from Hartford, but contrary to the longstanding policy of the Utah Supreme Court and Utah Court of Appeals to

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<sup>9</sup> At pages 10-12 of its opening brief, Hartford provides a legislative history of Utah's Personal Injury Survival Statute, Utah Code Ann. § 78-11-12. This legislative history is noteworthy because of what it *fails to say*. Curiously absent from this legislative history is *any indication* that the state legislature intended the Personal Injury Survival Statute to apply to first-party insurance contracts.

<sup>10</sup> As previously stated twice, and we apologize for the redundancy, in *Sandt*, the Utah Supreme Court stated: "Insurance policies should be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by insurance companies." 854 P.2d 519, 522 (Utah 1993). The Court also explained that "insurance policies should be construed liberally in favor of the insured *and their beneficiaries* so as to promote and not defeat the purposes of insurance. *Id.* at 521-22 (citations omitted)(emphasis added).

interpret such contracts of adhesion liberally in favor of the insured and their beneficiaries.

**C. The Legal Analysis Set Forth in Hartford's Brief is Illogical.**

Hartford sponsors two illogical positions, the adoption of both of which are necessary to reach the conclusion that the Estate has no claim against Hartford:

1. The Estate's damages are measured at the time the arbitration award is entered, not at the time the cause of action against Hartford accrues, causing Utah Code Ann. § 78-11-12(1)(b) to apply to the interpretation of the "legally entitled" phrase in the underinsured motorist provision of the insurance policy; and
2. Even though Utah Code Ann. § 78-11-12(1)(b) applies, the underinsured motorist provision of the insurance policy entitles Hartford to dictate that any recovery obtained by an insured must first be applied to out-of-pocket expenses and subsequently to all other damages incurred.

Accepting either of these flawed positions would require this Court to ignore accepted standards for interpretation of insurance contracts and disregard when the cause of action accrued, which dictates when a vital element of the cause of action came into existence.

If driven to its logical conclusion, accepting the first premise would mean that no insured who settled with the underlying tortfeasor would be able to maintain a

claim under an underinsured motorist coverage. Every settlement with the underlying tortfeasor results in a full release of the tortfeasor, in this case Mr. Alexander. Stipulation ¶ 13 (R. 21) Once that release is signed, the insured is no longer “legally entitled” to recover from the underinsured tortfeasor. Only by measuring whether the insured is legally entitled to recover at the time the cause of action accrues against Hartford accrues and the statute of limitations begins to run does the interpretation of “legally entitled to recover” make any sense. Further, the fact that Hartford chose to participate in the arbitration proceeding indicates that, prior to her death, Hartford believed the cause of action against Hartford had accrued.

In support of these propositions, Hartford relies upon three cases:

1. *Peterson v. Utah Farm Bureau Ins. Co.*, 927 P.2d 192 (Utah Ct. App. 1996);
2. *Lieber v. ITT Hartford Ins. Center, Inc.*, 15 P.3d 1030 (Utah 2000); and
3. *State Farm Mut. Ins. Co. v. Clyde*, 920 P.2d 1183 (1996).

As discussed previously, *Peterson* is helpful for its interpretation of the “legally entitled to recover” language, the definition of which, was subsequently adopted by the Utah Supreme Court in *Lieber*, 15 P.3d at 1034. Although relied upon heavily by Hartford, *Lieber* does not support its position. Rather, *Lieber* provides an analytical framework indicating that Utah Code Ann. § 78-11-12, Utah’s Survival Statute, does not apply to the facts of this case.

*Lieber* involved an employee who was involved in an accident with uninsured motorists. *Id.* at 1032. The employee attempted to recover uninsured motorist benefits based upon an insurance policy Hartford issued to his employer. *Id.* Hartford denied the claim, asserting the Workers' Compensation Act provided the employee's exclusive remedy. *Id.* at 1033.

The Utah Supreme Court examined the application Utah Code Ann. § 31A-22-305(3) & (4)(1999),<sup>11</sup> which states in relevant part:

(3)(a) Uninsured motorist coverage . . . provides coverage for covered persons who are *legally entitled to recover* damages from owners or operators of uninsured motor vehicles because of bodily injury . . . .

(4)(b)(ii) This [uninsured motorist] coverage does not apply to an employee, who is injured by an uninsured motorist, whose exclusive remedy is provided by . . . the Workers' Compensation Act.

The Court interpreted these statutory provisions in conjunction with Utah Code Ann. § 34A-2-105(1) of the Workers' Compensation Act, which contains the following exclusive remedy provision: "The right to recover compensation pursuant to this chapter for injuries sustained by an employee, . . . shall be the *exclusive remedy against the employer* and shall be the *exclusive remedy against any officer, agent, or employee of the employer* . . . ." (Emphasis added.) Based upon the plain language of these statutes, the Court found that the Workers' Compensation Act provides the exclusive remedy for injured employees to recover *against their*

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<sup>11</sup> This statutory language changed in 2000.



*employers. Id.* at 1035. Accordingly, the Court held that an injured employee does not have a viable claim against their employer or its agents, but has a viable claim against third parties. *Id.* The clear statutory preclusion contained in the Workers' Compensation Act prevents an injured employee from having a viable claim against their employer and agents of their employer.

Similarly in *Clyde*, the Utah Supreme Court held that grandparents are not legally entitled to recover underinsured motorist benefits for the wrongful death of their grandchildren because under the plain language of Utah Code Ann. § 78-11-6, because without more, they are not the parents or guardians of their grandchildren. 920 P.2d at 1186. In Utah Code Ann. § 78-11-6, there is a clear statutory requirement that those bringing the claim for wrongful death of a minor child be the parent or guardian of the injured or deceased child. By the language of the statute, all others are precluded from having a viable claim which can be reduced to judgment.

While Hartford no longer disputes that a first party contractual relationship exists between the Estate and Hartford, in its analysis, Hartford fails to acknowledge that the Utah Supreme Court in *Lieber* and *Clyde* arrived at its holdings based upon the plain language of the statutes at issue. Utah's Personal Injury Survival Statute, Utah Code Ann. § 78-11-12, *by its very terms*, does not apply to the Estate's contract claim against Hartford for underinsured motorist benefits.

Moreover, in *Lieber and Clyde*, the Court did not engage in a conclusory analysis of the “viable claim” language implicated by the “legally entitled to recover” provision of the statute. Rather, the Court engaged in a careful analysis of the facts under the relevant statutory provisions and applicable case law. Here, Hartford asserts that “this court should reverse the trial court’s ruling on this issue, and find that the survival statute applies to limit any requisite ‘viable claim’ that the Estate could bring against the underinsured tortfeasor, and in turn, limits the Estate’s claim for UIM benefits.” Brief of Appellant Hartford at p. 20. Hartford cannot support this assertion, however, because the analytical framework of *Lieber and Clyde* in conjunction with the plain language of the Personal Injury Survival Statute, do not support this contention.

As a result, Hartford attempts to distort the requirements of the “legally entitled to recover” language, asserting: “If Berkemeir’s claim was settled while she was alive, then the Estate cannot make the requisite showing of a **continuing** “viable claim” against the underinsured tortfeasor that would permit them [sic] to seek UIM benefits.” Brief of Appellant Hartford at p. 23. There is no requirement in the case law requiring the claim to be “continuing.” The case law merely requires that Ms. Berkemeir, upon accrual of her claim, have a claim capable of being reduced to judgment. Hartford’s modification of the statutory requirement is merely a means of avoiding the fact that Ms. Berkemeir had a viable claim against Mr. Alexander which she reduced to settlement, qualifying her to invoke the underinsured motorist

provision in the insurance contract Hartford issued to her. Alternatively, Hartford asserts that “Berkemeir died prior to final ‘judgment or settlement’ of her **personal injury claim**.” Brief of Appellant Hartford at p. 23 (emphasis added). This assertion, however, is contrary to Hartford’s acknowledgment that the Estate’s claim against Hartford is based upon a first party contractual relationship. Brief of Appellant Hartford at p. 14. In addition, it is contrary to the stipulated facts of this case. Paragraph 13 of the Stipulation states: “On October 9, 1996, Ms. Berkemeir executed a *settlement agreement and release* with Mr. Alexander in exchange for the full \$50,000 policy limits of his liability insurance policy with Allstate Insurance Company (“Allstate”). (R. 22)(emphasis added).

Hartford also asserts “If Berkemeir’s receipt of Alexander’s policy limits fully concluded, or settled, her personal injury claim while she was alive, then Hartford’s contractual obligation to provide UIM benefits was never implicated at all, because Mr. Alexander would not have been underinsured.” Brief of Appellant Hartford at p. 23 (emphasis added). This assertion is also contrary to the Stipulated Facts in this case. Paragraph 14 of the Stipulation provides: “Due to the amount of Ms. Berkemeir’s damages, if she were still alive, the settlement with Allstate would not have fully compensated her for her loss.” (R. 21)(emphasis added).

Continuing with the tradition Hartford’s sister corporation established in *Lieber v. ITT Hartford Ins. Center, Inc.*, 15 P.3d 1030, 1038-39 (Utah 2000), Hartford tortures the analysis and holdings of these cases. The “inaccurate assertions in

Hartford's brief" referred to in *Lieber*, appear in this case in the form of an incomplete and inaccurate statement of facts, and an attempt to torture the analysis and holding of key cases in an effort to avoid paying underinsured motorist benefits.

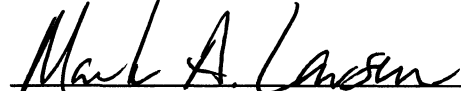
### **CONCLUSION**

This case presents an opportunity for this Court to interpret the underinsured motorist provision contained in most automobile insurance policies in the situation where the insured dies prior to the time an arbitration award under the policy is entered. Applying standards for the interpretation of insurance policies, and focusing upon when a cause of action for breach of contract accrues, it becomes clear that Ms. Berkemeir's damages are measured as of the date of Hartford's breach of the insurance policy, when Hartford refused to pay all or any portion of the insurance coverage to Ms. Berkemeir, despite her demand. As a result, Utah Code Ann. § 78-11-12 does not apply to the facts of this case, and the Estate was entitled to Summary Judgment as a matter of law.

This Court should affirm the District Court's Order Granting the Estate's Motion for Partial Summary Judgment and Denying Hartford's Motion for Summary Judgment dated March 7, 2001, and filed on May 7, 2001. (R. 189-196)

Dated: February 1, 2002.

LARSEN & MOONEY LAW



Mark A. Larsen

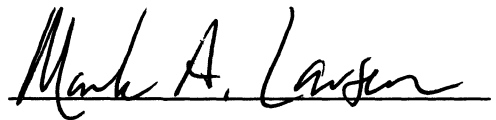
Lisa C. Rico

Attorneys for Appellee

**CERTIFICATE OF SERVICE**

I certify that on February 1, 2002, two true and correct copies of the foregoing Brief of Appellee were mailed, postage prepaid, to the following:

Mark L. Anderson  
Anneliese L. Cook  
CHRISTENSEN & JENSEN, P.C.  
50 South Main Street, Suite 1500  
Salt Lake City, Utah 84144

A handwritten signature in black ink, reading "Mark A. Larsen", is written over a horizontal line.

# **ADDENDUM**

## **TABLE OF CONTENTS**

Addendum Exhibit 1: Utah Code Annotated Section 31A-21-313

Addendum Exhibit 2: Minute Entry Dated May 7, 2001 (R. 203 - R. 204)

Addendum Exhibit 3: Stipulation as to Facts and Legal Positions of Parties  
(R. 18 - R. 27)

## **ADDENDUM EXHIBIT 1:**

**Utah Code Annotated Section 31A-21-313.**

**31A-21-313. Limitation of actions.**

(1) An action on a written policy or contract of first party insurance must be commenced within three years after the inception of the loss.

(2) Except as provided in Subsection (1) or elsewhere in this title, the law applicable to limitation of actions in Title 78, Chapter 12, Limitation of Actions, applies to actions on insurance policies.

(3) An insurance policy may not:

(a) limit the time for beginning an action on the policy to a time less than that authorized by statute;

(b) prescribe in what court an action may be brought on the policy; or

(c) provide that no action may be brought, subject to permissible arbitration provisions in contracts.

(4) Unless by verified complaint it is alleged that prejudice to the complainant will arise from a delay in bringing suit against an insurer, which prejudice is other than the delay itself, no action may be brought against an insurer on an insurance policy to compel payment under the policy until the earlier of:

(a) 60 days after proof of loss has been furnished as required under the policy;

(b) waiver by the insurer of proof of loss; or

(c) the insurer's denial of full payment.

(5) The period of limitation is tolled during the period in which the parties conduct an appraisal or arbitration procedure prescribed by the insurance policy, by law, or as agreed to by the parties.

1996



## ADDENDUM EXHIBIT 2:

Minute Entry dated May 7, 2001. (R. 203 - R. 204)

THIRD DISTRICT COURT SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

ESTATE OF DOROTHY BERKEMEIR Et	:	MINUTES
al,	:	MINUTE ENTRY
Plaintiff,	:	
	:	
vs.	:	Case No: 990911059 PI
	:	
HARTFORD INSURANCE COMPANY OF,	:	Judge: TIMOTHY R. HANSON
Defendant.	:	Date: May 7, 2001

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Clerk: evelynt

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HEARING

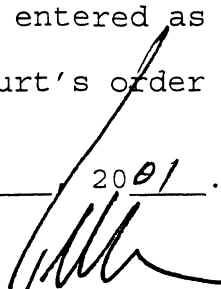
The Court has considered the parties positions on the scope of the order granting summary judgment to plaintiff, and is satisfied that plaintiff's original proposed order properly sets forth the basis for granting summary judgment.

Defendant's objections are overruled.

The plaintiff's proposed order is entered as of the date of this minute entry.

The minute entry stands as the Court's order on objections to form of summary judgment.

Dated this 7 day of May 2001.

  
TIMOTHY R. HANSON  
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 990911059 by the method and on the date specified.

METHOD	NAME
Mail	MARK L ANDERSON ATTORNEY DEF 50 South Main, Suite 1500 SALT LAKE CITY, UT 84144
Mail	MARK A. LARSEN ATTORNEY PLA 50 West Broadway Suite # 100 SALT LAKE CITY UT 84101

Dated this 8 day of May, 2001.

  
Deputy Court Clerk

### **ADDENDUM EXHIBIT 3:**

**Stipulation as to Facts and Legal Positions of Parties. (R. 18 - R. 27)**

FILED  
THIRD DISTRICT COURT  
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SALT LAKE COUNTY  
*K. E. Steward*  
CLERK

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
COUNTY OF SALT LAKE, STATE OF UTAH

THE ESTATE OF DOROTHY	:	
BERKEMEIR, by and through its	:	
Executor, KAREN NIELSEN,	:	<b>STIPULATION AS TO FACTS</b>
	:	<b>AND LEGAL POSITIONS OF</b>
	:	<b>PARTIES</b>
Plaintiff,	:	
	:	
vs.	:	
	:	Civil No. 990911059
HARTFORD INSURANCE COMPANY	:	
OF THE MIDWEST,	:	Judge Timothy R. Hanson
	:	
Defendant.	:	

The Estate of Dorothy Berkemeir, by and through its Executor Karen Nielsen, ("Berkemeir Estate") and Hartford Insurance Company of the Midwest ("Hartford") stipulate to the following:

**PARTIES, JURISDICTION AND VENUE**

1. The decedent Dorothy Berkemeir ("Ms. Berkemeir") was a resident of Salt Lake County, Utah. Ms. Berkemeir died on August 15, 1997.
2. Plaintiff Karen Nielsen, a resident of Summit County, Utah, is the properly appointed executor of the Estate of Dorothy Berkemeir (the "Berkemeir Estate").
3. Defendant Hartford Insurance Company of the Midwest ("Hartford") is a foreign corporation conducting business as an insurance company and validly licensed to do business in Utah with the Utah Department of Insurance.
4. The matter in controversy is in excess of \$20,000.00, and the claims arose in Salt Lake County, although Hartford disputes that the Berkemeir Estate is entitled to recover any sums at all, including but not limited to sums in excess of \$20,000.00.
5. This Court has jurisdiction pursuant to Utah Code Ann. § 78-3-4, and venue is proper pursuant to Utah Code Ann. § 78-13-4 and § 78-13-7.

**FACTS**

6. On October 16, 1995, Ms. Berkemeir was a passenger in her vehicle, traveling in an easterly direction in the left lane of Interstate 80, approximately nine miles west of Cheyenne, Wyoming.

7. Ms. Berkemeir's vehicle was being driven by her daughter, Mary Davis.
8. Ms. Berkemeir's vehicle was covered by a personal automobile insurance policy issued by Hartford, effective January 24, 1995 to January 24, 1996, a true and correct copy of which is attached as Exhibit A to the Complaint filed herein.
9. James Alexander, a Washington resident, was operating his vehicle in an easterly direction in the right lane of Interstate 80, when he suddenly turned directly in front of Ms. Berkemeir's vehicle.
10. The driver of Ms. Berkemeir's vehicle was unable to avoid striking Mr. Alexander's vehicle.
11. As a direct and proximate result of Mr. Alexander's negligence, Ms. Berkemeir sustained personal injuries, incurred medical expenses, and was subjected to and endured pain and suffering.
12. The medical expenses incurred by Ms. Berkemeir as a proximate result of the accident total \$ 38,249.29.<sup>1</sup>

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<sup>1</sup> This is the amount claimed by the Berkemeir Estate in its Complaint. Hartford will assume that amount to be correct solely for purposes of its Motion for Summary Judgment that will be filed in this action. The parties cannot presently stipulate to the specific amount of medical expenses incurred by Ms. Berkemeir and her Estate that were covered and/or paid by insurance. If the Court determines that this figure is necessary to resolve the parties' motions for summary judgment, the determination of this issue is reserved for a later time.

13. On October 9, 1996, Ms. Berkemeir executed a settlement agreement and release with Mr. Alexander in exchange for the full \$50,000 policy limits of his liability insurance policy with Allstate Insurance Company ("Allstate").

14. Due to the amount of Ms. Berkemeir's damages, if she were still alive, the settlement with Allstate would not have fully compensated her for her loss.

15. Ms. Berkemeir's auto policy from Hartford (the "Policy") extended coverage for medical payments and personal injury protection (Policy, Part B). Hartford paid the medical payment limit of \$5,000 under this coverage provision of the Policy. Hartford also paid the personal injury protection limit of \$5,000 under this coverage provision. Payments made by Hartford under Part B of the Policy totaled \$10,000. All Part B payments were directed to reimbursement of medical expenses incurred by Mrs. Berkemeir as a result of the automobile accident of October 16, 1995.

16. The Policy also extended underinsured motorist (UIM) coverage to Ms. Berkemeir, with limits of \$100,000 per person (Policy, Part C, Section III). The following provisions applicable to UIM coverage are included in the Policy:

- We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury:
  1. Sustained by an insured; and
  2. Caused by an accident.



The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle.

(Policy, Part C, Section III, Insuring Agreement, paragraph A, at p.14)

- "Underinsured motor vehicle" means a land motor vehicle . . . of any type to which a bodily injury liability bond or policy applies at the time of the accident but the amount paid for bodily injury under that bond or policy to an insured is not enough to pay the full amount the insured is legally entitled to recover as damages.

(Policy, Part C, Section III, paragraph C, at p. 15)

- We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

(Policy, Section III, Limit of Liability, paragraph C, at p. 16)

17. Ms. Berkemeir made demand upon Hartford for payment of the \$100,000 limits under her UIM coverage, resulting in an arbitration proceeding originally scheduled to begin on July 21, 1997. The hearing was subsequently rescheduled for September 23, 1997 because of an independent medical examination of Ms. Berkemeir that had to be rescheduled.

18. Ms. Berkemeir died on August 15, 1997 of causes unrelated to the automobile accident of October 16, 1995.

19. After Ms. Berkemeir's death and prior to the rescheduled arbitration proceeding, the Berkemeir Estate demanded payment from Hartford of \$45,580.40 under the UIM coverage as a contractual claim against the Policy.

20. Hartford denied the Berkemeir Estate's contractual claim against the Policy in light of its interpretation of applicable Utah law, and Ms. Berkemeir's death. In part, Hartford's denial of the claim was based on Utah Code Ann. § 78-11-12(1), which states:

(a) Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal representative or heirs of the person who died have a cause of action against the wrong doer for special and general damages, subject to Subsection (1)(b).

(b) If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representatives or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that injured person as the result of his injury.

21. After Ms. Berkemeir's demise Hartford withdrew its demand to arbitrate, believing that there was no benefit owing to the Berkemeir Estate because of Ms. Berkemeir's death from causes unrelated to the accident. The Berkemeir Estate then filed this action.

#### **ISSUES PRESENTED FOR DECISION**

22. The disputes in this case focus on:

- a) whether Utah Code Ann. § 78-11-12(1) is controlling;
- b) whether Utah Code Ann. § 78-11-12(1) bars the Berkemeir Estate's UIM claim against the Policy;
- c) whether the Berkemeir Estate's claim is contractual in nature;

d) whether the claim arises out of personal injury within the meaning of Utah Code Ann. § 78-11-12(1);

e) whether the medical expenses incurred by Ms. Berkemeir are “out-of-pocket expenses” within the meaning of Utah Code Ann. § 78-11-12(1);

f) whether the Alexander vehicle is “underinsured” within the meaning of the Policy; and

g) whether the Berkemeir Estate is legally entitled to recover any UIM benefits from Hartford given the Policy language, applicable Utah law, Ms. Berkemeir’s demise, her prior settlement with Allstate, and the payments Hartford made under Part B of the Policy.

#### **LEGAL POSITION OF BERKEMEIR ESTATE**

23. If Utah Code Ann. § 78-11-12(1) is not controlling, pursuant to the terms of the Policy, the Berkemeir Estate claims that Hartford is indebted to the Berkemeir Estate in the amount of \$100,000 and has damaged the Berkemeir Estate in that amount by failing to pay that sum, in addition to interest.

24. Upon her death, if Utah Code Ann. § 78-11-12(1) is applicable, the Berkemeir Estate alternatively claims payment under the UIM coverage as a contractual claim against the Policy, “out-of-pocket expenses incurred by or on behalf of that injured person as a result of his injury” of the medical expenses necessarily incurred as a result of the October 16, 1995, collision, in addition to interest. In this regard, the Berkemeir Estate claims that the “out-of-

pocket” expenses it is entitled to recover consist of medical expenses totaling \$38,249.29 paid by Ms. Berkemeir or paid by others on her behalf.

25. If Utah Code Ann. § 78-11-12(1) is applicable, the Berkemeir Estate is entitled to interest on the medical expenses at the rate of ten percent per annum from the date of the accident, October 16, 1995. Utah Code Ann. § 78-27-44.

### **LEGAL POSITION OF HARTFORD**

26. Under the Hartford Policy, the Estate is entitled to recover from Hartford what Dorothy Berkemeir would have been “legally entitled” to recover from Alexander if he had unlimited liability coverage (see ¶16).

27. Ms. Berkemeir died of causes unrelated to the accident (see ¶18).

28. Utah Code Ann. §78-11-12(1) determines what an estate is legally entitled to recover from a tortfeasor if the plaintiff died from causes that were not related to the accident. By its terms, this statute applies to “causes of action arising out of personal injury.” (See ¶20). Therefore, the statute applies to this case, since the Estate’s claim for UIM benefits is a cause of action that arises out of personal injuries sustained by Ms. Berkemeir (see ¶¶11, 17). By its terms, the statute limits the Estate’s claims against Hartford to “out-of-pocket expenses.” (See ¶20).

29. Hartford is entitled to summary judgment in this action on two separate but related grounds:

- *First:* The maximum amount of out-of-pocket expenses claimed by the Estate is \$38,249.29 (see ¶12). This amount is less than the \$50,000 limits of Alexander's Allstate policy (see ¶13). Hartford's Policy obligates it to pay UIM benefits only when the accident was caused by an "underinsured motor vehicle," which is contractually defined as a vehicle that is covered by a bodily injury liability policy with a limit that is "not enough to pay the full amount the insured is legally entitled to recover as damages." (See ¶16). Because the limits of Alexander's policy exceed the maximum recoverable special damages incurred by Ms. Berkemeir and her Estate, Alexander was not operating an "underinsured motor vehicle" when the accident occurred. Therefore, the Estate is not entitled to UIM benefits under the Hartford Policy.

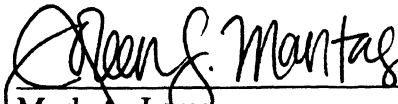
- *Second:* The UIM portion of the Hartford Policy states that Hartford will not make a "duplicate payment . . . for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible." (See ¶16). Ms. Berkemeir has already received \$60,000 for her loss (\$50,000 from Allstate on Alexander's behalf, and \$10,000 from Hartford) (see ¶¶13 and 15). These payments constitute an "element of loss for which payment has been made . . ." Accordingly, the UIM portion of the Hartford Policy is not implicated in this matter until the Estate's recoverable damages exceed \$60,000. It is undisputed that the maximum amount of out-of-pocket expenses claimed by the Estate is less than \$60,000 (see ¶12). Therefore, Hartford owes no UIM benefits to the Estate as a matter of law.

30. In the event the Court finds that the Estate is entitled to recover some amount of out-of-pocket expenses, such expenses are not the total amount of medical expenses incurred by Ms. Berkemeir and her Estate because of the accident. Rather, "out-of-pocket expenses" within the meaning of Utah Code Ann. § 78-11-12(1) are limited to medical expenses that were actually paid by Ms. Berkemeir or her Estate, and for which no reimbursement was received.


31. In the event the Court awards some out-of-pocket expenses to the Plaintiff, the provisions of Utah Code Ann. § 78-27-44, pertaining to interest thereon, are applicable.

Dated: August 9th, 2000.

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