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## A Light at the End of the Tunnell?: The Parameters of Uninsured Motorist Coverage Coverage in Wrongful Death Cases

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## NOTE

# A Light at the End of the *Tunnell?*: The Parameters of Uninsured Motorist Coverage in Wrongful Death Cases

*Floyd-Tunnell v. Shelter Mutual Insurance Co.*, 439 S.W.3d 215 (Mo. 2014) (en banc).

EDWARD WITTRIG\*

### I. INTRODUCTION

From its inception in 1967, the Missouri Uninsured Motorist statute<sup>1</sup> has prompted continual and substantial litigation in an attempt for both insurers and their insureds to determine the statute's proper application and scope.<sup>2</sup> At its core, the statute states that any automobile liability policy must contain a provision that extends a minimum amount of coverage to the insured in the

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1. MO. REV. STAT. § 379.203.1 (2000). This statute states in part:

No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, or in the case of any commercial motor vehicle, as defined in section 301.010, any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle.

*Id.*

2. See *Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo.*, 992 S.W.2d 308 (Mo. Ct. App. 1999).

event of injuries resulting from acts by uninsured motorists.<sup>3</sup> Thus, the statute demands that automobile liability policies protect an insured when he or she sustains certain damages that were caused by a legally responsible, yet uninsured, motorist.<sup>4</sup> Beyond demanding uninsured motorist (“UM”) coverage in each automobile liability policy, however, the UM statute is largely silent on the exact nature of the requirements of the mandated UM coverage, permissible provisions, allowable exclusions, and, in general, the intended scope of UM coverage in the respective policies.<sup>5</sup>

As a result, the implementation, application, and interpretation of this important piece of legislation has been left largely to the providence of the Missouri judicial system.<sup>6</sup> When faced with litigation surrounding the UM statute, Missouri courts have often broadly interpreted the statute,<sup>7</sup> extending its coverage to a large class of insureds as well as increasing the maximum amount of recovery possible.<sup>8</sup> Additionally, insurers have often struggled to obtain favorable decisions in Missouri courts, especially in cases appealed to the Supreme Court of Missouri,<sup>9</sup> and have failed to establish a concrete boundary that limits the scope and extent of UM coverage. Despite this tendency to define the coverage required by the UM statute broadly, some Mis-

3. § 379.203.1; *Ezell v. Columbia Ins. Co.*, 942 S.W.2d 913, 915 (Mo. Ct. App. 1996).

4. *Weinberg v. State Farm Mut. Ins. Co.*, 659 S.W.2d 236, 238 (Mo. Ct. App. 1983).

5. *See Gibbs v. Nat’l Gen. Ins. Co.*, 938 S.W.2d 600, 603 (Mo. Ct. App. 1997) (stating that the UM statute does not provide a definition of the term “operator”); Fred Davis, *Uninsured Motorist Coverage: Some Significant Problems and Developments*, 42 MO. L. REV. 1, 4 (1977).

6. Davis, *supra* note 5, at \*4.

7. It is important to remember, however, that these cases interpreting and employing Missouri’s UM statute only provide general principles to apply to any of the insurance policies in question. Cases interpreting insurance provisions are highly dependent on the specific language used by the policy at issue as well as the specific circumstances of the case. *See generally* *Dibben v. Shelter Ins. Co.*, 261 S.W.3d 553, 556 (Mo. Ct. App. 2008) (declaring that one has to read the policy as a whole in order to determine its meaning). Thus, even though these cases evidence the approach Missouri courts take in considering UM provisions in insurance policies, it is important to remember and appreciate that the specific language used in the provision and the applicability of relevant exclusions and exceptions will dictate the outcome of the case. However, if the language of the policy violates the clear provisions of the statute, the statute will invalidate the language of the policy. *See Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. 2009) (en banc).

8. *See Shepherd v. Am. States Ins. Co.*, 671 S.W.2d 777 (Mo. 1984) (en banc); *Hines v. Gov’t Emps. Ins. Co.*, 656 S.W.2d 262 (Mo. 1983) (en banc); *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538 (Mo. 1976) (en banc); *Galloway v. Farmers Ins. Co., Inc.*, 523 S.W.2d 339 (Mo. App. W.D. 1975).

9. Scott Lauck, *Insurers Rarely Sure of Victory*, MO. LAWYERS MEDIA at \*1 (Feb. 23, 2013), <http://molawyersmedia.com/blog/2013/02/23/insurers-rarely-sure-of-victory/>.

souri courts have imposed limits on the reach of the statute.<sup>10</sup> In this murky atmosphere regarding the UM statute, the Supreme Court of Missouri decided *Floyd-Tunnell v. Shelter Mutual Insurance Co.*<sup>11</sup>

Decisions, such as *Floyd-Tunnell*, that interpret UM coverage are becoming increasingly important as the cost of injuries<sup>12</sup> in automobile accidents, as well as the population of uninsured drivers, increase.<sup>13</sup> Because uninsured drivers comprise a significant portion of the driving pool in each state,<sup>14</sup> the issue of who qualifies as an insured in UM provisions can often determine whether a claimant is actually able to recover any damages for the injuries sustained in a car accident for which the claimant is not at fault. Judicial decisions that act to extend or limit the application of a policy's UM coverage also have real consequences beyond determining the extent, if any, of possible recovery for individual claimants, as these decisions determine the future costs of premiums as well as future policy language and provisions across the state. After reviewing the relevant case law surrounding the UM statute, this Note will examine the greater ramifications of the Supreme Court of Missouri's decision to limit UM coverage in wrongful death cases to the damages sustained by the insured decedent, rather than for injuries that a co-insured personally endured.

## II. FACTS AND HOLDING

The instant case was the product of a car accident that occurred when a vehicle driven by an uninsured motorist negligently crossed the centerline of Missouri State Highway 38 in Dallas County and struck a Chevrolet Cavalier

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10. *Livingston v. Omaha Prop. & Cas. Ins. Co.*, 927 S.W.2d 444 (Mo. Ct. App. 1996).

11. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215 (Mo. 2014) (en banc).

12. For more information on the average costs of automobile accidents of varying degrees of severity, see the National Safety Council's website. *Safety on the Road*, NAT'L SAFETY COUNCIL, <http://www.nsc.org/Pages/nsc-on-the-road.aspx> (last visited June 22, 2015).

13. Linda Russell, *Uninsured Drivers are Growing Dangers on Missouri Roadways*, KY3 (Sept. 13, 2011), [http://articles.ky3.com/2011-09-13/uninsured-drivers\\_30147391](http://articles.ky3.com/2011-09-13/uninsured-drivers_30147391); *Recession Marked by Bump in Uninsured Motorists*, THE INSTITUTES (Apr. 21, 2011), [http://www.insurance-research.org/sites/default/files/downloads/IRCUM2011\\_042111.pdf](http://www.insurance-research.org/sites/default/files/downloads/IRCUM2011_042111.pdf) (linking the recent increases in uninsured motorists with the latest downturn in the economy as well as charting the percent of uninsured motorists by state).

14. Larry Copeland, *One in Seven Drivers Have No Insurance*, USA TODAY (Sept. 12, 2011 5:04 PM), <http://usatoday30.usatoday.com/news/nation/story/2011-09-11/uninsured-drivers/50363390/1>; *Uninsured Motorists*, INS. INFO. INSTITUTE, <http://www.iii.org/fact-statistic/uninsured-motorists> (last visited June 22, 2015).

that was driven by Jerry Floyd.<sup>15</sup> As a result of the head-on collision, Mr. Floyd sustained substantial injuries and was pronounced dead at the scene.<sup>16</sup> Mr. Floyd and his wife, Doris Floyd, had purchased three separate automobile insurance policies from Shelter Mutual Insurance Company (“Shelter”) prior to the accident.<sup>17</sup> One of the policies was issued for the Chevrolet Cavalier that was involved in the accident, while the other two policies insured the Floyd’s Chevrolet Silverado and Toyota Camry, respectively.<sup>18</sup>

As required by Missouri law,<sup>19</sup> each of the Floyds’ insurance policies contained a provision that allowed coverage for accidents involving uninsured motorists.<sup>20</sup> Each of these respective policies contained the same language and identical provisions regarding UM coverage. Specifically, each of the policies stated that in a collision where an uninsured motor vehicle is legally responsible for the accident and liable for damages sustained by the insured, the insurance company “will pay the uncompensated damages; but this agreement is subject to all conditions, exclusions, and limitations of [its] liability.”<sup>21</sup>

Additionally, each policy in its declarations page stipulated that UM coverage was limited to \$100,000 per person.<sup>22</sup> Finally, the policies contained an “owned-vehicle” exclusion.<sup>23</sup> This exclusion capped the insurance company’s maximum liability under any individual policy at \$25,000<sup>24</sup> in the event that the insured was injured while driving or operating a vehicle that was not covered by that specific policy, but was still owned by the insured at the time of the claim or covered under a different policy.<sup>25</sup>

After the accident, Mrs. Floyd filed a claim seeking a total of \$300,000, which included the \$100,000 limit from each of the separate policies.<sup>26</sup>

15. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, No. WD 75725, 2013 WL 5978452 at \*1 (Mo. Ct. App. Nov. 12, 2013), *transferred to* 439 S.W.3d 215 (Mo. 2014) (en banc).

16. Lauren Matter, *Marshfield Man Dies in Dallas County, MO Car Crash*, KSPR (Oct. 9, 2011), [http://articles.kspr.com/2011-10-09/dallas-county\\_30261805](http://articles.kspr.com/2011-10-09/dallas-county_30261805); Paula Morehouse, *Head-on Crash Kills Man From Marshfield*, KY3 (Oct. 9, 2011), [http://articles.ky3.com/2011-10-09/marshfield\\_30261801](http://articles.ky3.com/2011-10-09/marshfield_30261801).

17. *Floyd-Tunnell*, 2013 WL 5978452 at \*1.

18. *Id.*

19. MO. REV. STAT. § 379.203.1 (2000).

20. *Floyd-Tunnell*, 2013 WL 5978452 at \*1.

21. *Id.*

22. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 217 (Mo. 2014) (en banc).

23. *Id.* For more information on “owned-vehicle” exclusions, *see generally*, Janet Jones, Annotation, *Uninsured Motorist Coverage: Validity of Exclusion of Injuries Sustained by Insured while Occupying “Owned” Vehicle Not Insured by Policy*, 30 A.L.R.4th 172 (1984).

24. \$25,000 is the minimum statutory requirement in Missouri for UM coverage. MO. REV. STAT. § 379.203.1; MO. REV. STAT. § 303.030.5 (2000).

25. *Floyd-Tunnell*, 439 S.W.3d at 217.

26. *Id.*

However, Shelter agreed to pay only \$150,000 out of the requested amount, asserting that the “owned-vehicle” exclusion applied to the policies of the Floyds’ Silverado and Camry.<sup>27</sup> Because Mr. Floyd was injured while driving an owned vehicle that was not covered under the Silverado and Camry policies, Shelter argued that the maximum recovery under the Silverado and Camry plans was \$25,000 for each of these two policies.<sup>28</sup> Both parties agreed that Mrs. Floyd was owed the \$100,000 limit for the policy that covered the Chevrolet Cavalier that Mr. Floyd was operating at the time of the accident because the amount of damages sustained as a result of Mr. Floyd’s wrongful death exceeded the \$100,000 policy limit.<sup>29</sup>

In order to collect the outstanding \$150,000 that she believed was due, Mrs. Floyd and her daughter, Rebecca Floyd-Tunnell, filed suit against Shelter, seeking monetary compensation for the outstanding claim, attorney’s fees, and penalty fees against Shelter for vexatious refusal to pay.<sup>30</sup> Subsequently, both Mrs. Floyd and Shelter moved for summary judgment on the claim.<sup>31</sup> The Floyds contended that as a named insured, Mrs. Floyd suffered a distinct injury as a result of her husband’s death. Therefore, the owned-vehicle exclusion would not apply to Mrs. Floyd, as she was not operating a vehicle at the time of the accident.<sup>32</sup> Further, Mrs. Floyd argued that the owned-vehicle exclusion in the policy itself was vague and ambiguous and should be construed against the insurance company.<sup>33</sup>

In contrast, Shelter asserted that the exclusion was clearly applicable under the circumstances because Mr. Floyd was the insured that suffered the injury. As Mr. Floyd suffered the injury, the owned-vehicle exclusion applied for the policies for the Silverado and Camry.<sup>34</sup> Therefore, Mrs. Floyd was necessarily limited to recover \$25,000 from each of those two policies and could only receive a total of \$50,000 from these two insurance contracts.

The trial court found in favor of Shelter, specifically finding that the “owned-vehicle” provision applied.<sup>35</sup> Plaintiffs appealed the trial court ruling.<sup>36</sup> The Missouri Court of Appeals for the Western District first determined that Mr. Floyd, and not his wife, was the insured that suffered com-

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* Plaintiffs’ petition sought relief under MO. REV. STAT. § 375.420 (2000), which is the vexatious refusal to pay statute for Missouri. Appellant’s Substitute Brief at 11, *Floyd-Tunnell*, 439 S.W.3d 215 (No. S.C. 93904), 2014 WL 1317994. As such, the petition necessarily did not seek punitive damages for the conduct of the insurance company in rejecting the plaintiffs’ claim. See § 375.420.

31. *Floyd-Tunnell*, 439 S.W.3d at 217.

32. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, No. WD 75725, 2013 WL 5978452 at \*2 (Mo. Ct. App. Nov. 12, 2013).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

pensable damages under the terms of the policy.<sup>37</sup> The court reached this determination by stating that even though a Missouri statute<sup>38</sup> authorized Mrs. Floyd to bring the wrongful death action, Mr. Floyd was the person who suffered damages under the definitions supplied by the insurance contract when it was considered in its entirety.<sup>39</sup> Thus, Mr. Floyd, and not his wife, was the named insured for purposes of recovering damages, and the owned-vehicle exclusion would apply to the Silverado and Camry policies because Mr. Floyd was injured in an owned car not covered by those two policies.<sup>40</sup>

Additionally, the court rejected the Floyds' claim that Mrs. Floyd was the damaged insured, stating that this exceeded the normal and reasonable expectations of the average insured entering into an insurance contract.<sup>41</sup> Finally, the court rejected the Floyds' claim that the policies were ambiguous due to the fact that the owned-vehicle exclusion deprived the insureds of some of the coverage granted to them on the declarations page, and that any restrictions to the limits delineated on the declarations page did not extend to the owned-vehicle exclusion.<sup>42</sup> The court disagreed with the Floyds' interpretation, determining that when the insurance contract is read as a whole and proper consideration is given to all the terms, "[T]he partial exclusion to UM coverage is not susceptible to different interpretations and does not cause the meaning of the policies to be uncertain."<sup>43</sup> Therefore, the Missouri Court of Appeals for the Western District affirmed the trial court's ruling on the summary judgment motion in favor of Shelter.<sup>44</sup> Mrs. Floyd and her daughter appealed this decision to the Supreme Court of Missouri.<sup>45</sup>

The Supreme Court of Missouri affirmed the decision of the court of appeals, holding that Mrs. Floyd could not recover under the policies on her own behalf apart from the damages owed to her husband due to his injuries.<sup>46</sup> In so reasoning, the court stated that "[i]t would be unreasonable to interpret section 379.203 to require every automobile liability insurance policy to provide coverage for damages its insureds are legally entitled to recover for the wrongful death of another person."<sup>47</sup> Thus, the court held that UM coverage does not allow the insured to recover on his or her own behalf for damages sustained by the wrongful death of another co-insured, but rather limits re-

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37. *Id.* at \*4.

38. MO. REV. STAT. § 537.080.1(1) (2000).

39. *Floyd-Tunnell*, 2013 WL 5978452, at \*4–5.

40. *Id.* at \*4.

41. *Id.* at \*5.

42. *Id.* at \*7.

43. *Id.*

44. *Id.* at \*8.

45. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 216 (Mo. 2014) (en banc).

46. *Id.*

47. *Id.* at 220.

covery for the insured to damages collected as a beneficiary of the wrongful death claim.<sup>48</sup>

### III. LEGAL BACKGROUND

#### A. *Origins of UM Coverage*

In the aftermath of World War II, the United States experienced a significant economic boom that instigated the exponential development of the infrastructure of the American interior.<sup>49</sup> Specifically, this economic prosperity stimulated the increased development and utilization of the nation's roadways.<sup>50</sup> New and improved roads linked previously isolated communities and connected Americans in ways never before envisioned.<sup>51</sup> The passage of the Federal Aid to Highway Act of 1956 furthered this development, as extensive funding was allocated to build far-reaching interstate systems that not only joined people, but goods, ideas, services, and even American culture.<sup>52</sup> In addition, the economic prosperity enjoyed by many Americans after the war led to increased purchases and acquisitions of automobiles, as accessibility to the machines was no longer limited to the affluent.<sup>53</sup> As a result, by the mid-1950s, Americans were loading up their vehicles and entering the roadways in unprecedented numbers.<sup>54</sup>

As the number of motorists grew, the amount and severity of automobile accidents correspondingly increased.<sup>55</sup> The 1960s in particular saw the num-

48. *Id.*

49. *Overview of the Post-War Era*, DIGITAL HISTORY (2014), <http://www.digitalhistory.uh.edu/era.cfm?eraID=16> (last visited June 22, 2015).

50. Ralph P. Higgins, Note, *Uninsured Motorist Coverage Laws: The Problem of the Underinsured Motorist*, 55 NOTRE DAME L. REV. 541, 541 (1980).

51. Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Landscape*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 120 (1997).

52. Richard F. Weingroff, *Federal-Aid Highway Act of 1956: Creating the Interstate System*, PUBLIC ROADS (Summer 1996), <http://www.fhwa.dot.gov/publications/publicroads/96summer/p96su10.cfm>; MARK H. ROSE, *INTERSTATE: EXPRESS HIGHWAY POLITICS, 1939–1989* 101 (rev. ed. 1990). See generally *History and Cultural Impact of the Interstate Highway System*, LANDSCAPE CHANGE PROGRAM, [http://www.uvm.edu/landscape/learn/impact\\_of\\_interstate\\_system.html](http://www.uvm.edu/landscape/learn/impact_of_interstate_system.html) (last visited June 22, 2015).

53. *Transportation: Past, Present and Future*, THE HENRY FORD 1, 56 (2011), <http://www.thehenryford.org/education/erb/TransportationPastPresentAndFuture.pdf>.

54. See, e.g., *An Analysis of the Significant Decline in Motor Vehicle Traffic Fatalities in 2008*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. at \*31 (June 2010), <http://www-nrd.nhtsa.dot.gov/Pubs/811346.pdf>; see also JOHN HEITMANN, *THE AUTOMOBILE AND THE AMERICAN LIFE* 133 (2009) (declaring the 1950s as the golden age of the automobile in United States, and that this machine altered American culture during that decade in ways unprecedented by the other technologies of its day).

55. HEITMANN, *supra* note 54, at 144.



ber and visibility of fatal car crashes increase at an alarming rate.<sup>56</sup> Many of those involved in these serious accidents were uninsured, and drivers seeking to recover damages in court consistently experienced difficulties in enforcing their judgments.<sup>57</sup> Often, the liable party would be unable to meet the demands of the decision and could not satisfy the outstanding judgment.<sup>58</sup> As a result, the injured party would receive very little compensation and would often be forced to cover its own losses.

Thus, due to the increased number of accidents on American roads following World War II, policies that included UM coverage emerged in the 1950s.<sup>59</sup> Initially, these provisions were strictly voluntary, as concerned observers hoped that market pressures would result in most insurance contracts adopting UM policies.<sup>60</sup> However, this wish was left largely unfulfilled, as very few insurance contracts that included UM coverage were implemented.<sup>61</sup> In response, many state legislatures began adopting compulsory UM insurance statutes<sup>62</sup> that imposed varying minimum coverage limits.<sup>63</sup> Most states by the 1970s had passed some sort of law mandating that insurers cover injuries resulting from uninsured motorists.<sup>64</sup> Currently, forty-nine states have passed legislation requiring UM coverage.<sup>65</sup>

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56. *An Analysis of the Significant Decline in Motor Vehicle Traffic Fatalities in 2008*, U.S. DEP'T TRANSP. 1, 27 (June 2010), <http://www-nrd.nhtsa.dot.gov/Pubs/811346.pdf>.

57. Higgins, *supra* note 50.

58. *Id.*

59. *Id.* at 542.

60. Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance*, 6 APPLEMAN ON INSURANCE LAW § 65.01 (2015).

61. *Id.*

62. Some states also passed legislation requiring policies to include underinsured motorist coverage ("UIM coverage") in addition to UM coverage. *See* KAN. STAT. ANN. § 40-284(b) (1988); NEB. REV. STAT. § 44-6408 (1996); VT. STAT. ANN. tit. 23 § 941(a) (2005). UIM coverage compensates insured drivers for injuries that they sustain as a result of acts committed by drivers who have insurance, but the policy limits of the negligent drivers' policies will not fully compensate the insured driver for his or her loss. NEB. REV. STAT. § 44-6406 (1994). Furthermore, UIM coverage is often defined to necessarily exclude coverage in circumstances where the negligent driver is uninsured. *Id.*

63. *See Assembly Votes Car Law Change*, N.Y. TIMES, Mar. 26, 1957, at 28, <http://search.proquest.com.proxy.mul.missouri.edu/docview/114019065/23A6B18134454D6FPQ/11?accountid=14576> (describing contested New York legislation that planned to account for uninsured drivers by requiring that all insurance premiums allocate a small percentage of its payments to a central fund that would disperse to victims of accidents with uninsured motorists).

64. David W. Reynolds, Comment, *Modernizing Underinsured Motorist Coverage in Missouri: Removing the Insurance Paradox Between Uninsured and Underinsured Coverage Via Legislative Action*, 57 ST. LOUIS U. L.J. 1049, 1053 (2013).

65. *Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (July 31, 2013), [www.iii.org/issue-update/compulsory-auto-uninsured-motorists](http://www.iii.org/issue-update/compulsory-auto-uninsured-motorists).

### B. UM Coverage in Missouri

Missouri ratified its UM coverage bill in 1967 with the passage of Missouri Revised Statutes Section 379.203,<sup>66</sup> designated with the purpose of “establish[ing] a level of protection equivalent to liability coverage an insured would have received if the insured had been involved in an accident with an insured tort-feasor.”<sup>67</sup> Over time, Missouri courts have rejected various challenges to the statute by insurance companies attempting to void or limit UM coverage in their respective policies.<sup>68</sup> In *Cameron Mutual Insurance Co. v. Madden*, the Supreme Court of Missouri held that public policy dictates that insurance companies cannot prevent the insured recovery from multiple UM coverage policies on separate automobiles.<sup>69</sup> Thus, an insured who experienced an injury for which an uninsured motorist was liable could elect to recover from each policy that the insured had in effect at the time, rather than recovery being limited to collection from only one of the policies. In effect, this decision allowed the “stacking”<sup>70</sup> of coverage for the insured when he or she has multiple policies covering the same sustained injury.

In *Galloway v. Farmers Insurance Co., Inc.*, the Missouri Court of Appeals for the Kansas City District also elected to extend coverage under the UM statute by allowing the plaintiff to stack two different claims from different policies.<sup>71</sup> The plaintiff in this case had two separate policies for two different vehicles that each contained a UM provision to insure the plaintiff in the event of an injury resulting from the acts of an uninsured motorist.<sup>72</sup> While driving one of the insured vehicles, the plaintiff was struck by an uninsured driver.<sup>73</sup> The plaintiff subsequently sued for the upper limit of both policy provisions, arguing that he should be allowed to stack the policies despite express provisions in the insurance contract that dictated otherwise.<sup>74</sup>

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66. Reynolds, *supra* note 64.

67. Hollis v. Blevins, 927 S.W.2d 558, 568 (Mo. Ct. App. 1996).

68. See *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 545 (Mo. 1976) (en banc).

69. *Id.* at 544–45.

70. In this situation, stacking occurs when the insured has multiple policies that provide coverage for the same injury. In situations involving automobiles, the issue of stacking often happens when the insured owns multiple cars and maintains coverage for each vehicle by paying separate premiums. In these cases, questions often arise if the insured should be able to invoke the applicable UM provisions in each policy to recover for the injury sustained. Most courts have decided in favor of doing so. See generally David M. Peterson, Comment, *Stacking of Uninsured Motorist Coverage*, 49 MO. L. REV. 580 (1984). However, there exists some case law to the contrary. See *Bruder v. Country Mut. Ins. Co.*, 620 N.E.2d 355 (Ill. 1993).

71. 523 S.W.2d 339, 344 (Mo. Ct. App. 1975).

72. *Id.* at 340.

73. *Id.*

74. *Id.* The contract in question contained an “other insurance” provision that limited recovery to only one policy when the insured had other insurance, and recov-

The plaintiff argued that the clauses limiting the UM statute to recovery on only one policy in order to prevent stacking should be unenforceable as a matter of public policy, as the clauses violated the intent of the legislature in seeking to protect drivers who are harmed by uninsured motorists.<sup>75</sup>

Ultimately, the court of appeals found the provisions unenforceable, as the provisions expressly limited recovery from only one policy when the insured also held other UM insurance issued by the same company.<sup>76</sup> The court determined that Missouri law had expressly prohibited provisions limiting recovery to only one policy when the insured had UM insurance from at least one other insurance company.<sup>77</sup> As a result, the court found that “[p]ublic policy requires that coverage in the statutory amount under each of the policies stand undiminished by contractual limitation, regardless of whether the policies are issued by the same or different insurers.”<sup>78</sup> Thus, the court struck down the limiting provisions in the insurance contract and extended the scope of the UM statute to allow stacking of multiple UM policies.

Another important decision that expounded on the scope and parameter of the UM statute was the decision in *Bergtholdt v. Farmers Insurance Co., Inc.*<sup>79</sup> The plaintiff in this case was a passenger in a vehicle that collided with an intoxicated motorist.<sup>80</sup> The accident left the plaintiff and her unborn child permanently injured, and her husband and two children died as a result of the injuries sustained in the accident.<sup>81</sup> The plaintiff owned two insurance policies at the time of the accident, each covering one of the two vehicles that the family owned.<sup>82</sup> Additionally, the intoxicated motorist maintained liability coverage.<sup>83</sup> Each of these policies included a provision for UM coverage and were capped at the statutory minimum required by Missouri law.<sup>84</sup> Thus, the question was whether the defendant’s liability coverage precluded application of the UM coverage and if it did not, whether the two separate policies could be stacked under the circumstances at hand.<sup>85</sup>

After analyzing Missouri precedent, the court in *Bergtholdt* declared that public policy “mandates that when an insured has two separate policies containing uninsured motorist clauses, effect shall be given to both coverages without reduction or limitation by policy provisions, and that both coverages

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ery from the other insurance policy in addition to the amount sought under the pending claim would exceed the policy limits of the contract at issue. *Id.*

75. *Id.* at 340–41.

76. *Id.* at 343.

77. *Id.* at 341 (citing *Gordon v. Maupin*, 469 S.W.2d 848, 851 (Mo. Ct. App. 1971) and *Steinhaefel v. Reliance Ins. Co.*, 495 S.W.2d 463 (Mo. Ct. App. 1973)).

78. *Id.* at 343.

79. 691 S.W.2d 357 (Mo. Ct. App. 1985).

80. *Id.* at 358.

81. *Id.*

82. *Id.*

83. *Id.* at 359.

84. *Id.* at 358–59.

85. *Id.* at 359.

are available to those insured thereby.<sup>86</sup> Furthermore, the court made a determination that, due to the peculiarity of the language contained in the UM provision in these particular policies, the plaintiff was not precluded from recovery thereunder purely as a result of the defendant's status as an insured.<sup>87</sup> Thus, the court allowed the plaintiff to recover for the maximum limits of the UM coverage, minus money already received via settlement of the plaintiff's other outstanding claims.<sup>88</sup>

In contrast, the 1996 case of *Livingston v. Omaha Property and Casualty Insurance Co.*<sup>89</sup> provided a limit to the scope of UM coverage in Missouri with regard to wrongful death actions.<sup>90</sup> In *Livingston*, the Missouri Court of Appeals for the Western District established that in wrongful death actions, the party seeking to recover under the policy's UM coverage does so from the standpoint of the victim who suffered the physical injuries, rather than on his or her own behalf.<sup>91</sup> In this lawsuit, the daughter of the plaintiff was a passenger in a vehicle that collided with an uninsured motorist.<sup>92</sup> As a result of the accident, the daughter sustained substantial injuries and subsequently died.<sup>93</sup> Both of the cars that were involved in the accident did not have current insurance policies, and the plaintiff's insurance policy did not extend to the car her daughter owned.<sup>94</sup>

As the insurer refused to cover the loss, the plaintiff filed a wrongful death claim in order to recover for damages she sustained as a result of her daughter's death.<sup>95</sup> In her claim, the plaintiff asserted that her insurance carrier owed her compensation for the emotional injuries she sustained as an insured under the UM coverage provision in her insurance policy and that any language limiting her ability to recover damages violated the coverage afforded by the UM statute when broadly construed.<sup>96</sup> However, the court rejected her argument, ruling that the exact language of the policy at issue re-

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86. *Id.*

87. *Id.* at 359–60. In the policy at issue, an uninsured under the policy was defined “to include a motor vehicle where there is bodily injury liability insurance or an applicable bond at the time of accident, but in amounts *less than the limits carried by the insured under Uninsured Motorist Coverage.*” *Id.* at 360.

88. *Id.*

89. 927 S.W.2d 444 (Mo. Ct. App. 1996).

90. For other Missouri cases limiting the extension of UM coverage because of the specific policy language and definitions, see *Famuliner v. Farmers Insurance Co., Inc.*, 619 S.W.2d 894 (Mo. Ct. App. 1981) and *Elder v. Metropolitan Property & Casualty Co.*, 851 S.W.2d 557 (Mo. Ct. App. 1993).

91. *Livingston*, 927 S.W.2d at 445.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

quired that a named insured sustain the bodily injury resulting from an accident with an uninsured motorist.<sup>97</sup>

Thus, the court found that one who suffers the injury, as defined by the policy, must be a named insured, and policy provisions requiring this are not unenforceable as a matter of public policy, as these provisions are consistent with the intent of the legislature in passing Section 379.203.<sup>98</sup> The court therefore determined that the UM statute should not be construed to allow recovery by an insured under the UM provision when the policyholder files a wrongful death action on behalf of a decedent non-insured.<sup>99</sup>

However, in the 2009 case of *Derousse v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court of Missouri distinguished the reasoning in this case from that in *Livingston* by allowing an insured to recover for emotional damages that were sustained in a collision with an uninsured motorist.<sup>100</sup> In *Derousse*, the plaintiff was involved in an automobile accident where a body was ejected from an uninsured vehicle and landed forcefully on the hood of her car.<sup>101</sup> The body subsequently slid off the hood of the automobile, and rolled under the car.<sup>102</sup> Unfortunately, the plaintiff recognized the decedent when she saw the body lying by her driver's side door.<sup>103</sup>

As a result of this accident, the plaintiff experienced severe emotional distress and sought coverage from her insurance company to compensate her for her damages.<sup>104</sup> In denying her claim, the insurance company cited policy language in the UM coverage provision that excluded from coverage any damage that was not a bodily injury.<sup>105</sup> In resolving the dispute, the Supreme Court of Missouri determined that the UM statute demanded coverage for bodily injuries, sickness, or disease, and that such sickness or disease could be interpreted to include emotional distress.<sup>106</sup> Because the court determined that the UM statute requires coverage for sickness and disease, it voided the provision in the insurance contract limiting damage strictly to bodily injuries.<sup>107</sup> Therefore, the court seemed to mandate that UM coverage necessarily extend to compensate insureds for emotional damages sustained as a result of accidents caused by uninsured motorists, and any policy language to the contrary is void as a matter of law.

In the midst of this murky case law, the instant case was decided. The court in *Floyd-Tunnell v. Shelter*<sup>108</sup> was asked to consider whether to permit

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97. *Id.* at 446.

98. *Id.*

99. *Id.*

100. 298 S.W.3d 891, 893 (Mo. 2009) (en banc).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 895.

107. *Id.*

108. 439 S.W.3d 215 (Mo. 2014) (en banc).

the stacking of the UM coverage provisions to the full amount offered by the policy. In order to do so, the court also evaluated the propriety of allowing the plaintiff to recover in cases in which the decedent and the one seeking to recover on his or her behalf are both insureds, and where the non-decedent insured seeks to recover personal damages sustained for the death of another person.

#### IV. INSTANT DECISION

In *Floyd-Tunnell*, the Supreme Court of Missouri ultimately enforced the owned-vehicle exclusion by determining that UM coverage does not extend to emotional injuries sustained by the insured as a result of the wrongful death of others, even if the other person also qualified as an insured under the same insurance contract.<sup>109</sup> The court stated that the insurance policy contained a severability clause and therefore, the contract should be read by inserting the insured plaintiff's name into the policy whenever there was any reference to the insured in the agreement.<sup>110</sup> In implementing this strategy, the court interpreted the contract to assert that the plaintiff would be afforded coverage for money owed as a result of bodily injury sustained by the plaintiff that was caused by an uninsured motorist.<sup>111</sup> Because Mrs. Floyd did not sustain bodily injury as defined by the terms of the policy,<sup>112</sup> the court ruled that she was barred from recovering for any emotional damages she personally suffered as a result of her husband's death.

Thus, the court determined that the only way Mrs. Floyd could recover for any injuries caused by the death of her husband was through the position of the decedent, Mr. Floyd, and the decedent clearly fit into the owned-vehicle exclusion, as he was driving a different car than the automobiles protected by the policies covering the Camry and Silverado, respectively.<sup>113</sup> The court also ruled that the specific language of the owned-vehicle exclusion was not ambiguous or vague, as a policyholder reading the contract as a whole would understand the provision to expressly limit coverage to \$25,000 if the insured was injured while operating or driving a vehicle that was not covered by the policy, but still owned by the insured.<sup>114</sup> Therefore, with regard to those two policies, the court determined that the decedent was limited to recover only the statutory minimum of \$25,000 per policy.<sup>115</sup> Yet, the court

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109. *Id.* at 219–21.

110. *Id.* at 219.

111. *Id.*

112. The policy described bodily injury as follows: “(a) A physical injury; (b) A sickness or disease of the body; (c) The physical pain and physical suffering that directly results from (a) or (b), above; or (d) A death that directly results from (a) or (b), above.” *Id.* at 218.

113. *Id.* at 220–21.

114. *Id.* at 221.

115. *Id.*

allowed Mrs. Floyd to stack the three policies to receive a total of \$150,000<sup>116</sup> in UM coverage from the three separate automobile policies. Finally, the court determined that it would be beyond the scope the legislature originally envisioned to extend the requirements of the UM statute to include “coverage for damages sustained by an insured as a result of the wrongful death of another person,” and that it would be unreasonable to mandate such coverage without the express demand of the legislature to do so.<sup>117</sup>

The dissent, on the other hand, disagreed with the decision that Mrs. Floyd would not be able to recover under the UM statute for injuries she personally received as the result of the death of her husband.<sup>118</sup> The dissent found that Mrs. Floyd suffered grievous injuries because of the conduct of the uninsured motorist. Specifically, Mrs. Floyd suffered such damages as the loss of consortium, loss of economic support, suffering, and loss of companionship.<sup>119</sup> For the dissent, the majority’s interpretation that she could not recover on her own behalf would be contrary to the plain language of the Missouri UM statute. The statute requires that UM coverage provide “for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of . . . death.”<sup>120</sup>

Because Mrs. Floyd, the plaintiff, can recover for her injuries on her own behalf rather than merely as a beneficiary of her husband’s estate, the dissent argued that the owned-vehicle exclusion does not apply to her.<sup>121</sup> The dissent further argued that the exclusion does not apply because Mrs. Floyd was not operating or driving a vehicle owned but not insured by the specific policy at the time of the accident and the loss.<sup>122</sup> Thus, the dissent found that the provision was not applicable, and that the insured, Mrs. Floyd, should be able to recover the full \$100,000 limit from which she qualified under the UM provision contained therein.<sup>123</sup>

In making this determination, the two-judge dissent noted that, when ambiguous, the insurance policy must be read from the position and understanding of an average reader, with any unclear or vague terms being construed against the drafter.<sup>124</sup> Because the policy in this case was unclear at best, and because Mrs. Floyd suffered real and tangible personal injuries, the

116. The plaintiff was allowed to recover \$25,000 each from the Camry and Silverado policies, as well as \$100,000 from the policy of the vehicle driven by Mr. Floyd at the time of the accident. *Id.* at 217. The total award for the plaintiff totaled \$150,000. *Id.*

117. *Id.* at 220.

118. *Id.* at 222 (Teitelman, J., dissenting).

119. *Id.*

120. MO. REV. STAT. § 379.203.1 (2000).

121. *Floyd-Tunnell*, 439 S.W.3d at 223 (Teitelman, J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.* (citing *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 46 (Mo. 2009) (en banc)).

dissent found full recovery possible under its construction and interpretation of the UM provision of the insurance contract.<sup>125</sup>

## V. COMMENT

There are many important consequences of the court's decision and reasoning in favor of the insurer in this case. However, this Part will focus on the four most important aspects of the decision. First, the Supreme Court of Missouri decided to follow the basic reasoning applied in *Livingston*, which rejected an interpretation of bodily injury that would encompass injuries sustained by an insured who was attempting to recover under the wrongful death statute. The second notable consequence is the rejection of the dissent's interpretation of the confluence of Missouri's wrongful death and UM statutes, including its application of the rationale employed in *Derosse*. The third significant outcome is that the court upheld the owned-vehicle exclusion as it was defined in the policy, and in so doing offers insurers a useful exclusion to utilize in decreasing the total policy limits under the UM provisions in their policies. The fourth major consequence is that it will further complicate attempts by insurers and insureds to determine the proper scope and nature of the coverage afforded by their insurance contract in the future.

### A. Affirming the UM Emotional Recovery Bar as Established by Livingston

One of the most important aspects of the decision is the Supreme Court of Missouri's decision to extend the same basic reasoning from *Livingston v. Omaha Property and Casualty Insurance Co.* to the circumstances of the case before the court. In *Livingston*, the insured sued for emotional and psychological damages she experienced as a result of the wrongful death of her uninsured daughter who died in an accident caused by an uninsured motorist.<sup>126</sup> The insured argued that she still sustained emotional injuries from the accident, and any provision in the contract preventing her ability to recover for all losses sustained as a result of the accident should be unenforceable, as it would be inconsistent with the purpose of Missouri Revised Statutes Section 379.203.1.<sup>127</sup> This argument is made possible by the fact that protection against injuries sustained by the actions of uninsured motorists, unlike liability insurance, "does not inure with a particular motor vehicle."<sup>128</sup> Thus, UM

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125. *Id.* (majority opinion).

126. *Livingston v. Omaha Prop. & Cas. Ins. Co.*, 927 S.W.2d 444, 445 (Mo. Ct. App. 1996).

127. *Id.*

128. Stephen R. Bough and M. Blake Heath, *Current Issues in Underinsured and Uninsured Coverage in Missouri*, 68 J. MO. BAR 208, 209 (July-Aug. 2012), <http://www.mobar.org/uploadedFiles/Home/Publications/Journal/2012/07-08/bough.pdf>.



coverage will, in theory, cover any losses sustained by the insured, irrespective of whether the insured was a pedestrian, operating a different vehicle from the one named under the policy, or was a passenger in a vehicle unnamed under the policy.<sup>129</sup>

However, the court in *Livingston*, like the Supreme Court of Missouri in *Floyd-Tunnell*, declined to allow the plaintiff to recover for injuries and the death of the third party.<sup>130</sup> In so deciding, the court stated that “to accept plaintiff’s interpretation, would permit plaintiff to recover under her uninsured motorist policy for the death of any person from whom she is legally entitled to bring a claim under the wrongful death statute.”<sup>131</sup> This outcome, the court contended, was not contemplated by the legislature as they likely envisioned that the survivors of the decedent would file a claim under the decedent’s policy rather than on their own behalf.<sup>132</sup> Thus, the court concluded, “[W]hile uninsured motorists coverage is to be given a liberal interpretation, coverage should not be created where there is none.”<sup>133</sup>

The *Livingston* decision, however, could be easily distinguished from the facts of *Floyd-Tunnell*. In *Floyd-Tunnell*, the decedent is insured by the policy at issue, whereas the decedent in *Livingston* was not.<sup>134</sup> Thus, the survivors of the decedent were seeking to recover from the decedent’s own policy, which also was the same policy issued to the survivors.<sup>135</sup> As a result, the claimant is not seeking to recover for just any person that he or she is legally entitled to recover, but rather a co-insured on the same policy.

However, the *Floyd-Tunnell* court rejected this distinction and chose to limit recovery in cases where the insured is seeking recovery because he or she is entitled to do so under the state’s applicable wrongful death statute, rather than choosing to allow recuperation for the losses sustained by the insured on his or her own behalf.<sup>136</sup> In stating that mandatory UM coverage under the Missouri UM statute “does not include coverage for damages sustained by an insured a result of the wrongful death of *another* person,”<sup>137</sup> the *Floyd-Tunnell* court determined that “[i]t would be unreasonable to interpret [this statute] to require every automobile liability insurance policy to provide coverage for damages its insureds are legally entitled to recover for the wrongful death of another person.”<sup>138</sup>

129. *See id.*

130. *Livingston*, 927 S.W.2d at 446.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, No. WD 75725, 2013 WL 5978452, at \*1 (Mo. Ct. App. Nov. 12, 2013).

135. *Id.*

136. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 220–21 (Mo. 2014) (en banc).

137. *Id.*

138. *Id.*

Although, by this reasoning, the *Floyd-Tunnell* court, like the *Livingston* court, ignored the exact language of the statute that specifically allows recovery for those insureds “who are legally entitled to recover damages.”<sup>139</sup> As the statutorily defined claimant under the wrongful death statute, these insureds are legally entitled to recover damages, and thus, the UM statute would seemingly demand their inclusion under UM coverage, especially if the statute is broadly construed.<sup>140</sup> Because Missouri courts tend to broadly construe the extent and scope of UM coverage,<sup>141</sup> this rejection of the insureds’ ability to recover for damages that they are legally entitled to is difficult to reconcile with existing case law. Ultimately, however, the court implicitly extended the decision in *Livingston* to apply to cases where the person who suffered the injury is a decedent co-insured, and rejected a strong argument to deviate from *Livingston* and its ilk<sup>142</sup> as the decedent was a co-insured and the statute seems to suggest recovery under these circumstances.<sup>143</sup> Without the passage of any legislation to the contrary, it appears that an insured will always be precluded from seeking to recover on his or her own behalf for injuries sustained by a decedent.<sup>144</sup>

#### *B. Rejection of the Derosse Decision by Barring Emotional Damages*

In addition to reaffirming cases like *Livingston*, another important aspect of the decision in *Floyd-Tunnell* is the rejection of the dissent’s interpretation of recovery under Missouri’s wrongful death statute, which coincides with the court’s previous decision in *Derosse*.<sup>145</sup> In his dissent, Judge Richard B. Teitelman stated that the insured at issue in this case, Mrs. Floyd, did not sustain a physical injury directly inflicted by the accident between her husband and the uninsured motorist.<sup>146</sup> However, Mrs. Floyd was severely injured in other ways by the death of her husband as a result of the fatal accident for which her husband bore no fault.<sup>147</sup> Mrs. Floyd’s claim for injury

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139. *Id.* at 219–20.

140. MO. REV. STAT. § 379.203.5 (2000).

141. *Id.* § 379.203.1.

142. See *Famuliner v. Farmers Ins. Co.*, 619 S.W.2d 894 (Mo. Ct. App. 1981); *Elder v. Metro. Prop. & Cas. Co.*, 851 S.W.2d 557 (Mo. Ct. App. 1993).

143. *Floyd-Tunnell*, 439 S.W.3d at 216–17.

144. Although limiting recovery in this manner may not be a bad policy overall, it still would be beneficial if the statute could be amended to clarify this issue. If insureds were allowed to recover on their own behalf for any damages to which they are legally entitled, as the statute seems to suggest, then this would cause insurers to raise the prices and rates of insurance premiums and policies, as insurers would be required to assume a significant increase in the amount of risk that they are insuring against under the policies.

145. *Id.* at 220; *Derosse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. 2009) (en banc).

146. *Floyd-Tunnell*, 439 S.W.3d at 222 (Teitelman, J., dissenting).

147. *Id.*

through the wrongful death action was, therefore, a “separate and distinct claim allowing her to recover damages for items such as loss of consortium, companionship and economic support.”<sup>148</sup> Thus, for the dissent, Mrs. Floyd was the relevant insured to consider when evaluating the nature and extent of the loss.<sup>149</sup>

Furthermore, the dissent contended that the majority’s belief that Mrs. Floyd did not herself sustain any “bodily injuries” as demanded by the UM statute<sup>150</sup> ignored the fact that in a wrongful death case, the insured seeking to recover for injuries sustained will never be the one who sustained the bodily injuries.<sup>151</sup> Additionally, such an interpretation of the nature of the injuries sustained by the insured ignores the court’s reasoning employed in *Derousse*, where the court found recoverable under the UM statute certain emotional injuries that occurred as a result of the accident with the uninsured motorist.<sup>152</sup> Thus, the dissent argued that wrongful death claims cannot be filed under the policies at issue if one strictly employs the definitions of the majority, and that such an interpretation of all of the policies of this nature would render them unenforceable as against both the statute and against public policy.<sup>153</sup>

The rejection of the argument proffered by the dissent has a few practical consequences. First, the decision preserves the status quo in that it continues to bar statutory wrongful death claimants from recovery for their own non-physical damages under the UM provisions in their auto policies. The decision further reaffirms the ability of surviving insureds to recover on behalf of the decedent insured, but precludes the survivors from also asserting claims on their own behalf due to a lack of bodily injury.<sup>154</sup> Furthermore, the interpretation of the majority avoids invalidating many existing policies that are based upon the insurer’s understanding of the applicability of the wrongful death statute to such claims.

The rejection of the dissent’s argument by the majority may also predict future limitations on recovery by those seeking damages under UM provisions to a more strict definition of bodily injuries than had been previously employed by Missouri courts in decisions such as *Derousse*.<sup>155</sup> By stating

148. *Id.* (citing *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. 2009) (en banc)).

149. *Id.*

150. MO. REV. STAT. § 379.203 (2000).

151. *Floyd-Tunnell*, 439 S.W.3d at 222 (Teitelman, J., dissenting).

152. *Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. 2009) (en banc).

153. *Id.* at 896. In particular, the reasoning would violate Section 379.203.1, which provides “that a policy for automobile liability coverage can only be issued if the coverage provides “for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of . . . death.” § 379.203.

154. *Floyd-Tunnell*, 439 S.W.3d at 221 (Teitelman, J., dissenting).

155. *Derousse*, 298 S.W.3d at 895.

that Mrs. Floyd did not sustain any covered injuries, the court allows for the exclusion from UM coverage of damages based on emotional suffering, mental anguish, loss of companionship, and more intangible injuries sustained in the accident.<sup>156</sup> Although many contracts already equate bodily injury with physical injury, decisions such as the opinion rendered in this case could be used to support a very strict definition of what constitutes a recoverable injury. Thus, cases like *Floyd-Tunnell* could possibly be used to justify the exclusion of monetary or emotional injuries on a claim brought under the UM provision of the policy at issue. Such a result would seem to militate against the express purpose of the UM statute to provide adequate relief to insureds who suffer from damages caused by uninsured motorists.

### C. Importance of the Owned-Vehicle Exclusion

Another significant ramification of *Floyd-Tunnell* is that the decision upheld the owned-vehicle exclusion. The owned-vehicle exclusion limited recovery to the statutory minimum if the insured who suffered damages was operating a vehicle that was owned by the insured, but not covered under the policy at issue.<sup>157</sup> By enforcing this provision, it appears that insurers in the future will be able to limit the full consequences of stacking by limiting the application of other policies to only the statutory minimum via the owned-vehicle exclusion. Thus, insureds who pay premiums on multiple policies, each including UM coverage by law, will continue to be unable to reap the full coverage limits of such policies if there exists an owned-vehicle exclusion in their policies. Instead, this exclusion will limit recovery under all policies except those covering the car the driver was operating at the time of the accident.<sup>158</sup> Therefore, recognition of the validity of such provisions seems to militate against public policy in favor of stacking, which Missouri courts have long recognized with respect to UM coverage.<sup>159</sup> Although technically the insured can bargain out of any agreement that contains any owned-vehicle exclusions, the practical effect of decisions that find enforceable such clauses will be to reinforce the use of these provisions in UM coverage and will largely limit the gains secured by insureds in litigation over stacking.

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156. *Floyd-Tunnell*, 439 S.W.3d at 220 (majority opinion).

157. *Id.* at 220–21.

158. For an interesting discussion regarding the enforceability of Drive-Other-Car exclusions under the Wisconsin state UM statute, see Michael J. Certak, Kasdorf, Lewis, & Swietlik, *The Enforceability of the Drive-Other-Car Exclusion in Light of the Truth in Automobile Insurance Act of 2009*, WISC. DEF. COUNSEL J. (Summer 2012), <http://www.wdc-online.org/index.php/wdc-journal/wdc-journal-archive/summer-2012/the-enforceability-of-the-drive-other-car-exclusion-in-light-of-the-truth-in-automobile-insurance-act-of-2009>.

159. See *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538 (Mo. 1976) (en banc); *Galloway v. Farmers Ins. Co., Inc.*, 523 S.W.2d 339 (Mo. Ct. App. 1975).

*D. Clarifying the Scope of UM Coverage in Policies*

One final aspect to consider when weighing the effectiveness of the court's decision in *Floyd-Tunnell* is to contemplate the opinion in the context of current driving realities. As previously mentioned, one in seven drivers are allegedly uninsured, and many of these drivers are involved in severe car accidents.<sup>160</sup> Thus, the provisions of UM coverage often have a substantial effect on the possible amount and nature of recovery for the claimant. On the one hand, *Floyd-Tunnell* probably departs from the expectations of the normal insurance purchaser. The average insured pays three separate, not insignificant, premiums for three separate policies that each individually have a substantial upper limit for UM coverage. Upon an accident involving an uninsured motorist for which the damages sustained by the insured exceed policy limits, it seems likely that the insurance purchaser would assume that the upper limit of each distinct policy would apply, and help them recuperate some portion of his or her loss. Furthermore, the purchaser would expect to be compensated for all losses sustained, rather than be constrained by the degree the injury is related to the definition of "bodily injury" as established by the policy.

On the other hand, with insurance purchasers often owning multiple cars and buying the required UM coverage for each policy, insurance companies can incur substantial losses if the full amount of such policies are allowed to stack, and all types of damages are included in the claim. If such exclusions or limitations on the definition of who qualifies as an insured and what types of losses are insurable were not allowed as unenforceable as against public policy, the cost of insuring the mandatory UM coverage would rise. As a result, this rising cost would likely be passed on to the insurance purchaser through a variety of mechanisms which would at least include increased premiums.

Therefore, the problem of insuring against uninsured drivers compels Missouri courts to engage in a very intricate and delicate balancing act. These decisions with wide ranging societal implications and costs are never easy to determine. However, opinions like *Floyd-Tunnell*, need to offer some sort of guidance in determining the required extent of the UM statute and the concrete parameters of UM coverage. Acceptable boundaries to UM coverage not only protect insurance companies, but also the companies' insureds by keeping the costs of insurance manageable, and gives notice to insureds and insurers alike of the extent of the purchased coverage.

One of the unfortunate aspects of purchasing an insurance contract is that often neither the insured nor the insurer knows the precise nature of the purchased coverage at the time of the transaction, or whether all the agreed upon provisions of the contract are fundamentally acceptable to a court interpreting the contested policy. Additionally, neither the insured nor the insurer will know if a court will find the provision void due to ambiguity, as against

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160. Copeland, *supra* note 14; *Uninsured Motorists*, *supra* note 14.

public policy, or some other traditional means of invalidating an unenforceable clause within the policy. Although many aspects of the policies through continual trial and error are wrought into serviceable provisions by the courts, the constantly changing realities and circumstances of insureds and insurers render the perfect insurance contract impossible and unattainable. Therefore, decisions like *Floyd-Tunnell* remain necessary, and continue to help elucidate the acceptability of certain provisions under the UM statute, in resolving future uncertainties over whether or not coverage even exists in certain situations, and the amount or nature of compensable damages under the policy at issue. Unfortunately, *Floyd-Tunnell* does not provide the needed clarification of the UM statute,<sup>161</sup> and may operate only as another shadow in the murky tunnel that is the case law surrounding the UM statute.

## VI. CONCLUSION

In *Floyd-Tunnell*, the Supreme Court of Missouri determined that the co-insured should be prevented from recovering the full amount from the two policies at issue as the insurance agreement limited recovery to only the insured that suffered any direct physical injuries from the conduct of the uninsured motorist. As the co-insured plaintiff did not sustain such injuries, but was recovering for the wrongful death of the decedent insured, the court maintained that she was only able to recover from the position of the decedent. As a result, the unambiguous owned-vehicle exclusion applied, limiting the extent of recovery for two of the three policies.

In so determining, the Supreme Court of Missouri approved potentially significant limitations to UM coverage despite case law to the contrary. First, the court permitted the use of owned-vehicle exclusions in claims involving recovery through the wrongful death of another person. Additionally, the court adopted a strict definition of “bodily injury” that precludes wrongful death beneficiaries, who are insureds, from recovering for their own intangible injuries. Finally, the court failed to ultimately clarify and identify the precise nature of the espoused limitations to the seemingly expansive UM coverage mandated by the UM statute, and did not resolve conflicting case law on the matter.

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161. For instance, the decision effectively bars recovery of emotional damages in the event of an insured seeking to recover for the wrongful death of another when an uninsured motorist is liable for the damages. *See Floyd-Tunnell*, 439 S.W.3d at 219. However, the decision does not clarify in what situations an insured will be able to collect for damages that are not purely bodily injuries under the UM statute. *See id.* Furthermore, the decision does not clarify what precise coverage and language is necessitated by the UM statute in wrongful death cases. *See id.*







