FILED
United States Court of Appeals
Tenth Circuit

June 22, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KEVIN WARD,

Plaintiff - Appellant,

v.

ACUITY, a mutual insurance company,

Defendant - Appellee.

COLORADO TRIAL LAWYERS ASSOCIATION; COLORADO DEFENSE LAWYERS ASSOCIATION,

Amici Curiae.

No. 22-1117
(D.C. No. 1:21-CV-00765-CMA-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EBEL**, and **BACHARACH**, Circuit Judges.

---

* This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

This appeal concerns the interplay between insurance benefits for workers' compensation and injuries caused by uninsured motorists. Many employers carry separate insurance policies for injuries that are

- caused by uninsured motorists and
- covered by workers' compensation statutes.

Uninsured motorist coverage often protects not only the employer itself but also employees permitted to use company vehicles.

Despite this coverage, Colorado's law on workers' compensation immunizes employers and co-employees from tort liability for workplace injuries. Does that immunity prevent employees in Colorado from recovering uninsured motorist benefits for injuries caused by third-party tortfeasors? We answer *no* because the third parties lack immunity under Colorado's workers' compensation statute.

1. An employer's insurance policy provides uninsured motorist benefits for drivers of company vehicles, but excludes workers' compensation benefits.

Acuity Mutual Insurance Company sold an insurance policy that provided liability coverage and payment for injuries caused by uninsured motorists. This policy promises benefits not only to the employer but also to each *insured*. The term *insured* is defined to include employees permitted to use the employer's vehicles. But the insurance policy also contains two exclusions involving workers' compensation benefits:

1. "[a]ny obligation for which the *insured* or the *insured's* insurer may be held liable under any workers' compensation law" and

2. "direct or indirect benefit[s]" from insurers as to workers' compensation, disability, or a similar law.

Appellant's App'x at 65, 78 (italics in original).

2. Mr. Ward sues Acuity for uninsured motorist benefits.

While driving the employer's truck, an employee (Mr. Kevin Ward) got hit; and the other driver fled the scene. Mr. Ward applied for benefits under two of the employer's insurance policies. One policy addressed injuries falling under the workers' compensation statute; the other policy was Acuity's, which provided coverage for both liability and compensation for injuries caused by uninsured motorists. Mr. Ward obtained payment under the policy for workers' compensation. But Acuity denied the uninsured motorist claim, and Mr. Ward sued Acuity for breach of contract. The district court granted summary judgment to Acuity, concluding that workers' compensation provided the only remedy to Mr. Ward.

3. Mr. Ward waited too long before seeking certification to the state supreme court.

After losing on summary judgment, Mr. Ward has twice asked us to certify this question to the Colorado Supreme Court: "Does the Colorado Workers' Compensation Act preclude an employee injured by an uninsured third-party tortfeasor from making a claim for uninsured motorist benefits

from his employer's uninsured motorist policy." Appellant's Motion for Certification of Question of Law to the Colorado Supreme Court at 7 (Sept. 12, 2022).[1] But we generally don't certify questions when the requesting parties wait until the federal district court has ruled. *See Pacheco v. Shelter Mut. Ins. Co.*, 583 F.3d 735, 738 (10th Cir. 2009); *Massengale v. Okla. Bd. of Exam'rs in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994).

[1] The Colorado Supreme Court recently accepted certification of a similar question:

> Whether an employee injured in the course of his employment by the acts of an underinsured third-party tortfeasor, and who receives worker's compensation benefits as a result, is barred, under Colorado's Workers' Compensation Act, Colo. Rev. Stat. § 8-41-104, from bringing suit against his employer's UM/UIM insurer?

Order of Court, *Klabon v. Travelers Prop. Cas. Co. of Am.*, No. 2023SA142 (Colo. June 6, 2023); *see Klabon v. Travelers Prop. Cas. Co. of Am.*, No. 22-cv-02557-NRN, 2023 WL 3674970, at *1 (D. Colo. May 26, 2023) (certifying this question). So a second certification of this issue would serve little purpose.

The parties haven't asked us to wait for the Colorado Supreme Court to decide the issue. But even if we were to wait for the Colorado Supreme Court to decide the issue, the answer might not be dispositive because Acuity has urged us to affirm based on two exclusions in the policy. So if we were to credit Acuity's arguments involving either exclusion, we might need to affirm irrespective of the state supreme court's answer to the certified question.

We decline to take a different approach here. Mr. Ward could have asked the district court to certify the issue, but didn't. So we deny the requests for certification to the Colorado Supreme Court.

4. We consider Mr. Ward's challenges under the standard for summary judgment.

We conduct de novo review of the district court's summary-judgment ruling, applying the same standard that governed in district court. *SEC v. GenAudio Inc.*, 32 F.4th 902, 920 (10th Cir. 2022). Under this standard, the district court must view the evidence and draw all reasonable inferences favorably to Mr. Ward. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Viewing the evidence and drawing reasonable inferences favorably to Mr. Ward, the district court could grant summary judgment to Acuity only in the absence of a "genuine dispute as to any material fact" and upon Acuity's showing of an entitlement "to judgment as a matter of law." Fed. R. Civ. P. 56(a).

5. The insurance policy provides Mr. Ward with coverage for uninsured motorist benefits.

Mr. Ward challenges the district court's reliance on Colorado's workers' compensation statute, which immunizes employers from tort liability for injuries sustained while working. Colo Rev. Stat. § 8-41-102. In applying this statute, we must predict how the Colorado Supreme Court would analyze the issue. *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003).

We consider Colorado law in connection with the pertinent policy, which contains two parts:

1. an insuring agreement, which identifies the persons protected and the scope of that protection, and

2. exclusions, which remove coverage for risks that would otherwise be covered under the insuring agreement.

We thus must consider two questions:

1. Does the insuring agreement cover the loss?

2. Does an exclusion negate coverage?

See, e.g., *K.V.G. Props., Inc. v. Westfield Ins. Co.*, 900 F.3d 818, 821 (6th Cir. 2018).

A. The insuring agreement would generally cover Mr. Ward's loss.

The first question is whether Acuity's insurance policy would have covered Mr. Ward's loss in the absence of an exclusion. We answer *yes*.

The policy supplies protection for all *insureds*. Appellant's App'x at 78. Employees are considered *insureds* under the policy when they use a covered vehicle.[2] *Id.* Mr. Ward was using a covered vehicle with the employer's permission. So Mr. Ward was an *insured* under the policy.

[2] The policy covers "[a]nyone *occupying* or using a covered *auto*." Appellant's App'x at 78 (italics in original). But an exclusion applies when employees use "a vehicle without a reasonable belief" that they have permission. *Id.* at 75.

Acuity acknowledges that this policy language would generally cover Mr. Ward if he had purchased the policy, but denies coverage when the employer purchased the policy. Appellee's Resp. Br. at 11. This distinction lacks any basis in the policy language. The policy specifies coverage based on status as an *insured*—not on status as the *purchaser*. *See* 1 No-Fault & Uninsured Motorist Auto Insurance § 7.10[1] (MB, rev. ed. 2023) ("By definition, first-party coverage under a motor vehicle liability insurance policy is always afforded to a named insured as long as there is a causal relationship between the insured and the accident.").

Based on similar policy language, the Arkansas Supreme Court rejected the same argument that Acuity makes, reasoning that the purpose of uninsured motorist benefits remains the same regardless of who had purchased the policy:

> [T]he underlying purpose for [uninsured and under-insured motorist] benefits remains the same whether purchased by the employer for the benefit of its employees or by the employee for his own personal benefit[:] [under-insurance] coverage was enacted to supplement benefits recovered from a tortfeasor's liability carrier, and to find that an employee could not benefit from the policy under which he is a recognized insured would result in "discrimination" against a workers' compensation claimant and a windfall to the [under-insured motorist] or [uninsured motorist] carrier who received benefits on a policy under which it would not have to pay.

Elam v. Hartford Fire Ins. Co., 42 S.W.3d 443, 451 (Ark. 2001). Here, for example, nothing in Acuity's policy would support coverage for some *insureds* and not for others.

Despite the absence of any support in the policy's language, Acuity distinguishes between uninsured motorist policies bought by employers and employees. For this distinction, Acuity relies largely on three rulings by the District of Colorado: *Coleman-Domanoski v. St. Paul Guardian Ins. Co.*, 456 F. Supp. 3d 1250 (D. Colo. 2020); *Markel Ins. Co. v. Hollandsworth*, 400 F. Supp. 3d 1155 (D. Colo. 2019); and *Employers Mutual Casualty Co. v. Trejo*, No. 1:18-cv-03066-RM-KLM, 2019 WL 2341557 (D. Colo. June 3, 2019) (unpublished). In these cases, the court ruled that an employee couldn't recover under the employer's policy when the tortfeasor was a co-employee. *Coleman-Domanoski*, 456 F. Supp. 3d at 1254–56; *Markel*, 400 F. Supp. 3d at 1160; *Trejo*, 2019 WL 2341557, at *2–3. None of these cases involved a third-party tortfeasor,[3] and these rulings aren't binding on us or the Colorado Supreme Court. *See Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1147 (10th Cir. 2023) ("Federal district court decisions with views on state law are not binding on this court."); *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 615

[3] The District of Colorado addressed a third-party tortfeasor in *Laurienti v. American Alternative Insurance Corp.*, No. 19-cv-01725-DDD-KLM, 2020 WL 9424250 (D. Colo. 2020) (unpublished). There the court allowed an employee to recover under his employer's insurance policy for injuries caused by underinsured motorists. *Id.* at *1–3. The court distinguished *Trejo* because there the tortfeasor had been a co-employee rather than a third party. *Id.* at *2. This distinction is equally applicable here because the tortfeasor was a third party rather than a co-employee.

n.5 (Colo. 1999) (stating that "Colorado state courts are not bound by federal district court opinions").

Acuity also relies on an intermediate Colorado appellate opinion: *American Family Mutual Insurance Co. v. Ashour*, 410 P.3d 753 (Colo. App. 2017). There the issue was whether underinsured motorist coverage applied when the tortfeasors were immune under the state workers' compensation statute. *Id.* at 755, 758–67. The court concluded that coverage was available, reasoning that payment of benefits wouldn't implicate immunity from workers' compensation because the injured party—rather than his employer—had bought the policy. *Id.* at 762. Acuity argues that under *Ashour*, workers' compensation immunity is implicated because Mr. Ward is relying on his employer's insurance policy.

Acuity's reliance on *Ashour* is premised on a logical fallacy: "the fallacy of the inverse" or "denying the antecedent." *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 589 (2014) (Scalia, J., concurring) (discussing the fallacy); *Ace Fire Underwriters Ins. Co. v. Romero*, 831 F.3d 1285, 1291 n.7 (10th Cir. 2016) (same). The fallacy concerns "[a]n invalid argument of the general form: If p, then q. Not p. Therefore, not q." *Ace Fire*, 831 F.3d at 1291 n.7 (quoting *TorPharm, Inc. v. Ranbaxy Pharm., Inc.*, 336 F.3d 1322, 1329 n.7 (Fed. Cir. 2003) (alteration in original)).

We've illustrated this fallacy with an example involving cold weather and snow: "Because it's not cold outside, it's not snowing." *Ace Fire*, 831

F.3d at 1291 n.7 (quoting *Agri Processor Co. v. NLRB*, 514 F.3d 1, 6 (D.C. Cir. 2008)). We then considered what would happen if we were to negate the premise by stating that it *is* cold outside. Though we have negated the premise, we can't negate the conclusion because it might not be snowing even when it's cold. *Id.*; *see generally* Douglas Lind, Logic & Legal Reasoning 221–22 (2007) (stating that "[s]ince the truth of the antecedent only provides a sufficient condition for knowing the truth of the consequent, denying the truth of the antecedent does not necessarily disprove that consequent").

Acuity commits the same fallacy by extending *Ashour* with this rationale:

- *Ashour didn't* involve an employer-purchased policy; therefore, the insurer didn't have workers' compensation immunity. [If p, then q].
- Mr. Ward's case *does* involve an employer-purchased policy; therefore, the insurer has immunity. [Not p. Therefore, not q.].

Acuity commits the fallacy of inferring a conclusion based on the opposite of the antecedent (that the employer bought the policy). *Ashour*'s conclusion (that employees can recover under their own uninsured motorist policies) doesn't tell us—either way—whether employees can recover under their employers' policies. So *Ashour* provides no guidance on the availability of coverage for policies purchased by employers.

To determine the availability of coverage under the employer's policy, we consider Colorado's statutes. They state that for uninsured motorist benefits, the insurer must ordinarily pay for injuries caused by an uninsured tortfeasor when the insured is "legally entitled" to "recover" or "collect." Colo. Rev. Stat. § 10-4-609(1)(a)(i) & (4). So coverage ordinarily turns on the insured's ability "to establish that the fault of the uninsured motorist gave rise to damages and the extent of those damages." *Borjas v. State Farm Mut. Auto Ins. Co.*, 33 P.3d 1265, 1269 (Colo. App. 2001).

The insured lacks that ability when the tortfeasor is a co-employee because the workers' compensation statute provides the only possible remedy. So the insured can't recover uninsured motorist benefits when the tortfeasor is a co-employee. *See* 9 Steven Plitt, et al., Couch on Insurance § 123:19 (3d ed. supp. 2022) (stating that when the tortfeasor is a co-employee, the insured isn't "legally entitled to recover" from the co-employee because of the co-employee's immunity under the workers' compensation statute). This situation arose in *Ryser v. Shelter Mutual Insurance Co.*, 480 P.3d 1286 (Colo. 2021). There the plaintiff allegedly suffered injuries as a result of a co-employee's negligence. *Id.* at 1287–88. Because the injuries occurred in the ordinary course of employment, Colorado's workers' compensation statute provided immunity to the negligent co-employee. *Id.* at 1291. Given this immunity, the court held

that the insurer didn't have to pay uninsured motorist benefits to the plaintiff. *Id.*

The unidentified driver in our case wasn't Mr. Ward's employer or a co-employee, so the driver had no immunity under the workers' compensation statute. In the absence of immunity, the workers' compensation statute didn't affect the driver's liability to Mr. Ward.

Though the driver was a third party, Acuity insists that it "derives" immunity from the employer as the entity that had purchased the policy. Appellee's Resp. Br. at 12. This argument lacks support. Acuity and the employer entered into an insurance contract; they're not alter egos. *See, e.g.*, *Phila. Indem. Ins. Co. v. Morris*, 990 S.W.2d 621, 625 (Ky. 1999) (rejecting an uninsured motorist carrier's argument that it was synonymous with the employer for purposes of liability under the workers' compensation statute because payment wouldn't affect the employer's "legal liability").

Acuity points to language in the statutes and the policy, which forbid an employee from recovering under the employer's policy for injuries caused by the employer or a co-employee. But here, Mr. Ward is alleging a tort by a third party rather than the employer or a co-employee.

This distinction matters. Under Colorado's workers' compensation statute, the employer and co-employees enjoy immunity from tort liability. *See Ryser v. Shelter Mut. Ins. Co.*, 480 P.3d 1286, 1291 (Colo. 2021). So

an employer or co-employee wouldn't incur any obligation to pay damages to Mr. Ward. Here, though, Mr. Ward isn't alleging liability on the part of the employer or a co-employee; Mr. Ward is instead alleging liability against a third party. And Colorado's workers' compensation statute allows employees to recover from third parties. Colo. Rev. Stat. § 8-41-203(a)(1).[4]

"[T]he exclusivity of remedy provision found in the Workers' Compensation Act does not apply to the world at large." *Frazier v. St. Paul Ins. Co.*, 880 So. 2d 406, 409 (Ala. 2003). So when the tortfeasor is a third party, courts elsewhere often recognize employees' rights to recover under their employers' policies for uninsured motorist benefits.[5]

---

[4] This statute provides:

> If an employee entitled to compensation under [the Workers' Compensation Act] is injured or killed by the negligence or wrong of another not in the same employ, such injured employee . . . may take compensation under said articles and may also pursue a remedy against the other person to recover any damages in excess of the compensation available under said articles.

Colo. Rev. Stat. § 8-41-203(a)(1). Acuity acknowledges that "[the Workers' Compensation Act] does not preclude an injured employee from seeking [uninsured and underinsured] benefits from a third-party tortfeasor." Appellee's Resp. Br. at 1.

[5] *See Frazier v. St. Paul Ins. Co.*, 880 So. 2d 406, 410 (Ala. 2003) (concluding that an employee could recover uninsured motorist benefits under the employer's policy, despite the exclusivity of workers' compensation benefits, when the tortfeasor was a third party); *Stemple v. Md. Cas. Co.*, 144 P.3d 1273, 1278–79 (Kan. 2006) ("The exclusivity provision of [Kansas's workers' compensation statute] does not bar an injured worker's recovery against the employer's insurance company for underinsurance coverage when he or she has already received workers'

Acuity tries to distinguish two of these opinions (*Lieber v. ITT Hartford Insurance Center, Inc.*, 15 P.3d 1030 (Utah 2000), and *National Farmers Union Property & Casualty Co. v. Bang*, 516 N.W.2d 313 (S.D. 1994)), arguing that they relied on statutes that hadn't gone as far as Colorado in immunizing employers and co-employees. Appellee's Resp. Br. at 32–33, 36–37. Despite differences in wording, however, Colorado's workers' compensation statute expressly allows injured employees to pursue remedies against third parties. *See* Colo. Rev. Stat. § 8-41-203(1)(a) (stating that employees "injured or killed by the negligence or wrong of

---

compensation benefits from the employer."); *Phila. Indem. Ins. Co. v. Morris*, 990 S.W.2d 621, 624–25 (Ky. 1999) (concluding that an employee could obtain under-insured motorist benefits under the employer's insurance policy because the tortfeasor was a third party); *Gardner v. Erie Ins. Co.*, 722 A.2d 1041, 1041, 1046–47 (Pa. 1999) (concluding that the statutory immunity for co-employees doesn't bar recovery under an employee's policy for uninsured motorist benefits because the tortfeasor was a third party); *Nat'l Farmers Union Prop. & Cas. Co. v. Bang*, 516 N.W.2d 313, 317–18 (S.D. 1994) (concluding that the exclusivity of workers' compensation doesn't prevent an employee from recovering uninsured motorist benefits when the tortfeasor was a third party); *Lieber v. ITT Hartford Ins. Ctr., Inc.*, 15 P.3d 1030, 1035 (Utah 2000) (concluding that an employee could recover under his employer's insurance policy for uninsured motorist benefits, despite the exclusivity of workers' compensation benefits from the employer, when the uninsured driver was a third party); *Henry v. Benyo*, 506 S.E.2d 615, 621 (W. Va. 1998) (concluding that an employee was entitled to uninsured motorist benefits based on a legal entitlement to recover damages from a third-party tortfeasor); *see also* 9 Steven Plitt, et al., Couch on Insurance § 123:19 (3d ed. supp. 2022) (stating that "an employee injured in the course and scope of employment may exercise their rights under the employer's [uninsured motorist] coverage if the injury was inflicted by someone other than a fellow employee").

another *not in the same employ"* may obtain workers' compensation benefits "*and may also pursue a remedy against the other person* to recover any damages in excess of the compensation available [under the workers' compensation statute]" (emphasis added)).

Given Colorado's statutory authority for injured employees to pursue additional remedies against third parties, we have little reason to distinguish *Lieber* or *Bang*.

B. Benefits for a third party's tort don't create a liability for the employer.

Acuity also invokes a provision of the workers' compensation statute protecting employers from "any . . . liability" outside of workers' compensation benefits. Colo Rev. Stat. § 8-41-102; Appellee's Resp. Br. at 24–25.

Acuity's argument mistakenly assumes that any impact on an employer constitutes a *liability*. The term *liability* refers to a "legal responsibility to another or to society, enforceable by civil remedy." Liability, Black's Law Dictionary (11th ed. 2019); *accord Loman v. Freeman*, 890 N.E.2d 446, 458 (Ill. 2008) (defining *liability* as "a legal obligation or responsibility enforceable by civil remedy or criminal punishment"); *Hoffman v. Travelers Indem. Co. of Am.*, 144 So. 3d 993, 998 (La. 2014) (providing a similar definition of *liability*); *Wilhelm v. Parkersburg, M. & I. Ry. Co.*, 82 S.E. 1089, 1091 (W. Va. 1914)

(providing a similar definition of *liable*). Certainly an employer could suffer from a premium hike or nonrenewal of an insurance policy. But the effect wouldn't create a *liability*; the employer could simply decline to pay the higher premium or seek insurance elsewhere.

Acuity apparently assumes that an employer wouldn't want its policy for uninsured motorists to benefit employees. This assumption wouldn't square with the policy itself, which covers "[a]nyone occupying or using a covered *auto*." Appellant's App'x at 78 (italics in original). Employers might relish provisions like this one to broaden the benefits to employees for damages caused by third parties. *See Travelers Indem. Co. of Ill. v. DiBartolo*, 131 F.3d 343, 351 (3d Cir. 1997) (observing that "there is no reason why employers might not also purchase [uninsured motorist policies] to benefit their on-the-job employees" and that "employers may do so because workers' compensation covers only a small portion of the types of damages an injured worker might suffer").

Acuity points out that we lack evidence on the employer's intent when it bought the insurance policy. The employer has never participated as a party in this case, and our only evidence of intent is the insurance policy itself.

The employer might have wanted to enhance the protections for employees injured when using company vehicles. Or the employer might have wanted to deny coverage to employees, fearing a hike in premiums or

nonrenewal of the policy. We have no way of knowing. All we know is that the employer bought a policy that provided uninsured motorist benefits to employees, like Mr. Ward, who had "us[ed] a covered *auto*." Appellant's App'x at 78 (italics in original). So the only available information shows that the employer bought an uninsured motorist policy that covered employees using company vehicles.

C. Acuity's policy arguments don't justify disregard of the policy language.

Acuity also argues that payment under an employer's insurance policy would

- discourage employees from purchasing their own policies for liability insurance,
- provide a windfall to employees, and
- reduce the number of commercial liability policies obtained by employers.

This argument disregards the controlling rules for interpreting Acuity's policy. An insurance policy is a contract, and principles of contract law apply in determining the policy's meaning. *See Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1050–51 (Colo. 2011). For example, we interpret unambiguous terms based on the language itself—not extraneous circumstances. *See Radiology Pro. Corp. v. Trinidad Area Health Ass'n, Inc.*, 577 P.2d 748, 750 (Colo. 1978) ("Written contracts

which are complete, clear in their terms, and free from ambiguity are enforced because they express the intention of the parties.").

Acuity hasn't characterized the policy language as ambiguous, and it's not. The policy unambiguously requires Acuity to pay "all sums the *insured* is legally entitled to recover as compensatory damages from the owner or driver of an *uninsured motor vehicle*." Appellant's App'x at 78 (italics in original). We lack any basis to disregard this unambiguous language based on the broader policy impact.

* * *

In summary, we conclude that the employer's insurance policy covers Mr. Ward's injury caused by the uninsured tortfeasor. That coverage isn't affected by the exclusivity of remedies for workers' compensation.[6]

---

[6] The dissent interprets our order and judgment to distinguish between

- insurers that provide both workers' compensation coverage and uninsured motorist coverage and
- insurers (like Acuity) that provide uninsured motorist coverage but not workers' compensation coverage.

Dissent at 4. For this interpretation, the dissent appears to assume that an insurer providing both coverages would enjoy immunity under Colo. Rev. Stat. § 8-41-102: "[N]or shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability." *Id.* Based on that assumption, the dissent infers that our order and judgment would recognize liability only if an insurer provided uninsured motorist coverage but no workers' compensation coverage. *Id.*

This case does not involve an insurer that has covered both workers' compensation and uninsured motorists. So we do not address whether

6. As interpreted by Acuity, the policy exclusions would violate Colorado's public policy.

Despite this coverage, Acuity invokes the insurance policy's exclusions for

- "any obligation for which the *insured* or the *insured's* insurer may be held liable under any workers' compensation law" and
- "[t]he direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law."

Id. at 65, 78 (italics in original). Mr. Ward argues that we shouldn't enforce the exclusions because they violate Colorado public policy.

A. We should consider these arguments even though the district court didn't address them.

Although the district court didn't address the exclusions, we have discretion to affirm on any ground adequately supported by the record. *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1321 (10th Cir. 2003). In deciding whether to exercise that discretion, we consider whether

- the ground was fully briefed and argued on appeal and in district court,
- the parties have had an opportunity to develop the record, and

---

insurers providing both coverages would enjoy statutory immunity for uninsured motorist benefits. *See Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1094 (10th Cir. 2010) ("Judicial restraint . . . usually means answering only the questions we must, not those we can.").

- the issue involves only questions of law.

See Elkins v. Comfort, 392 F.3d 1159, 1162 (10th Cir. 2004). These factors support our consideration of Acuity's argument.

First, the parties briefed the issue on appeal. Appellant's Opening Br. at 35–39; Appellee's Resp. Br. at 41–51; Appellant's Reply Br. at 16–18. Both Acuity and Mr. Ward also briefed the issue in district court. Appellant's App'x at 40–42 (Acuity's summary-judgment motion); *id.* at 124–25 (Mr. Ward's response to Acuity's motion for summary judgment); *id*. at 132–33 (Acuity's reply in support of its motion for summary judgment).

Second, both parties had the opportunity to present evidence on the issue in district court.

Finally, resolution of the issue turns on legal questions involving the enforceability of the exclusions. *See Del Valle v. Cal. Cas. Indem. Exch.*, 525 P.3d 689, 693 (Colo. App. 2022) ("Whether an insurance policy provision violates public policy is a legal question that we review de novo.").

We thus consider Acuity's argument for affirmance based on the exclusions.

B. The exclusions violated Colorado's public policy.

Under Colorado law, Acuity bore the burden when invoking the exclusions. *See Am. Fam. Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 953

(Colo. 1991). Seeking to meet this burden, Acuity urges a broad application of the exclusions. In Acuity's view, employees who receive workers' compensation benefits get no coverage for liability or uninsured motorist benefits.

In this appeal, Mr. Ward doesn't challenge the applicability of these exclusions. He instead argues that the exclusions are unenforceable. Under Colorado law, the exclusions would be unenforceable if they had been designed "to 'dilute, condition, or limit statutorily mandated coverage.'" *Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 100 (Colo. 1995) (quoting *Meyer v. State Farm Mut. Auto Ins. Co.*, 689 P.2d 585, 589 (Colo. 1984), *superseded by statute as stated in Allstate Ins. Co. v. Feghali*, 814 P.2d 863, 865–66 (Colo. 1991)).

Colorado embraces a public policy favoring uninsured motorist coverage. This policy appears, for example, in a state law that requires liability insurers to offer uninsured motorist coverage to all insureds who are covered for liability. Colo. Rev. Stat. § 10-4-609(1)(a)(i); *see Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 98 (Colo. 1995). So if permissive users are covered for liability, the insurer must also offer coverage for injuries from uninsured motorists. *McMichael*, 906 P.2d at 98–99.[7]

[7] The Colorado Supreme Court explained that "the plain language and legislative history of [this provision], together with the public policy upon

Acuity's policy covered the liability of permissive users, and Mr. Ward had the employer's permission to use the vehicle. *See* Appellant's App'x at 64 (stating that "[w]e will pay all sums an *insured* legally must pay as damages . . . caused by an *accident* and resulting from the . . . use of a covered *auto*" and defining an "*insured*" to include "[a]nyone using with . . . permission a covered auto" (italics in original)). So Colorado law required Acuity to extend uninsured motorist coverage to Mr. Ward.

Acuity argues that the state statute didn't require uninsured motorist coverage because Mr. Ward had obtained benefits for workers' compensation. This argument reflects a misapplication of the state statute. Because Acuity's policy covered the liability of permissive users like Mr. Ward, Acuity had a legal obligation to provide uninsured motorist coverage unless the employer were to reject the coverage.

Despite this obligation, Acuity argues that the liability insurance provision doesn't cover Mr. Ward, relying on an exclusion when the insured or its "*insurer* may be held liable under" the workers' compensation law. Appellant's App'x at 65 (italics in original). This

---

which the statute was based, compel the conclusion that insurers must offer [uninsured motorist and under-insured motorist] coverage to a class of insureds coextensive with the class of insureds covered under the liability provision of the policy." *McMichael*, 906 P.2d at 98.

provision excludes liability coverage only if the *insurer* would incur liability under the workers' compensation law. *Id.* This exclusion couldn't affect Acuity because it didn't even provide the employer's insurance for workers' compensation.

Under Acuity's interpretation of the exclusions, the insurer could deny benefits for uninsured motorist coverage to employees entitled to liability coverage. This interpretation of the policy would fail to "offer [uninsured motorist] coverage to a class of insureds [that is] coextensive with the class of insureds covered under the liability provision of the policy." *Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 98 (Colo. 1995); *see id.* at 98–99 ("[B]ecause the . . . policy covered permissive users of insured vehicles for purposes of liability coverage, it was required that the policy cover permissive users of covered vehicles for purposes of [uninsured/underinsured] coverage."). The exclusions are thus unenforceable.[8]

[8] In a single sentence, Acuity asserts that uninsured motorist coverage isn't statutorily mandated because it's optional. Appellee's Resp. Br. at 48. But Acuity waived this argument by failing to develop it. *See Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) (concluding that a party waived an argument through perfunctory discussion).

7. We vacate the district court's grant of summary judgment to Acuity and remand for further proceedings.

The district court erred in granting summary judgment to Acuity based on Colorado's workers' compensation statute. That statute did not unravel Mr. Ward's contractual right to benefits for injuries caused by an uninsured third party. We thus vacate the district court's grant of summary judgment and remand the case to the district court for further proceedings.

Entered for the Court

Robert E. Bacharach
Circuit Judge

22-1117, *Ward v. Acuity*

TYMKOVICH, Circuit Judge, dissenting.

We must hazard an *Erie* guess as to how the Colorado Supreme Court would decide a matter of first impression regarding the interplay between Colorado's Workers' Compensation Act, Colo. Rev. Stat. § 8-40-101, *et seq.*, and its uninsured motorist benefits statute, § 10-4-609. The question is whether an employee who receives workers' compensation benefits after being injured in an accident by a third-party tortfeasor is entitled to recover uninsured motorist benefits from his employer's insurer. The answer turns on the interpretation of the Act's exclusivity provision, § 8-41-102. The lower federal district courts are divided,[1] as is this panel. But I read the Colorado Supreme Court's most recent statement on the subject, *Ryser v. Shelter Mut. Ins. Co.*, 480 P.3d 1286 (Colo. 2021), to apply workers' compensation immunity to employers, and their insurers, from employees injured on the job even if the employer carries uninsured motorist insurance.[2] I therefore respectfully dissent.

---

[1] *Compare Coleman-Domanoski v. St. Paul Guardian Ins. Co.*, 456 F. Supp. 3d 1250, 1256 (D. Colo. 2020) *with Laurienti v. Am. Alt. Ins. Corp.*, No. 19-CV-01725, 2020 WL 9424250, at *3 (D. Colo. Jan. 3, 2020).

[2] Though our circuit has a long history of disfavoring the certification of questions at the appellate level only after a requesting party has lost at the district court, *Massengale v. Okla. Bd. of Exam'rs in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994), this case is a rare example in which certifying a question is the most helpful and sensible use of state and federal judicial resources. Contrary to the majority's contentions, maj. op. at 4 n.1, the state supreme court's answer would be dispositive as we need not credit Acuity's policy-exclusion arguments. This court, following Colorado Supreme Court precedent, has already found such exclusions and limiting provisions like the ones contained in Acuity's uninsured motorist policy to be void as a matter of Colorado public policy. *Adamscheck v. Am. Fam. Mut. Ins. Co.*, 818 F.3d 576, 582–83 (10th Cir. 2016).

In *Ryser* the Colorado Supreme Court held that the Act's exclusivity provision and principles of co-employee immunity barred recovery for an injured employee against the co-employee–tortfeasor's uninsured motorist insurer. 480 P.3d at 1291. The court explained—after a detailed examination of the language of Colorado's uninsured motorist and workers' compensation statutes—that "[t]he foregoing provisions of the WCA establish the long-held proposition that the Act provides the exclusive remedy to a covered employee for injuries sustained while the employee is performing services arising in the course of his or her employment." *Id.* at 1290 (internal quotation marks omitted). This is the case because "[r]ecovery under the Act is meant to be *exclusive* and to preclude employee tort actions against an employer." *Id.* (quoting *Kandt v. Evans*, 645 P.2d 1300, 1302 (Colo. 1982)) (emphasis added). Indeed, "[o]ne of the fundamental aims in adopting the act was that of substituting *for any and all previously existing remedies* the special procedure supplied by the act." *Id.* (quoting *Roper v. Indus. Comm'n*, 25 P.2d 725, 726 (1933)) (emphasis added).

The *Ryser* court detailed how such justifications explained its application of the "exclusivity provisions to extend immunity from any common law liability arising out of a work-related injury to the injured worker's co-employees." *Id.* A co-employee, like an injured employee, is part of the quid pro quo that is the Workers' Compensation Act's "compromise of rights," and is protected by the exclusivity provision's broad grant of immunity. *Id.* Colorado's legislature, the General Assembly, has declared this to be the case in no uncertain terms:

> It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, *without the necessity of any litigation*, recognizing that the workers' compensation system in Colorado is based on a *mutual renunciation* of common law rights and defenses by *employers and employees alike*.

Colo. Rev. Stat. § 8-40-102(1) (emphasis added).

I interpret the Colorado Supreme Court's recent decisions to point toward an eventual extension of workers' compensation immunity to an employer's uninsured motorist insurer on these facts. To do otherwise erodes the foundations of the workers' compensation's exclusivity provision, the justification for the mutual renunciation of rights and defenses, and the language of the election of remedies provision.[3] This decision undermines employers' confidence in the workers' compensation system as it allows an end-run around their anticipated liabilities and coverage for employee injuries.

Two predictable consequences result from the majority's decision: (1) insurers like Acuity, susceptible to new claims, will raise their rates for businesses like Pacesetter who

---

[3] > An election . . . in compliance with the provisions of articles 40 to 47 of this title, . . . shall be construed to be a surrender by the employer, such employer's insurance carrier, and the *employee* of their rights to any method, form, or amount of compensation or determination thereof or to any cause of action, action at law, suit in equity, or statutory or common-law right, remedy, or proceeding for or on account of such personal injuries or death of such employee other than as provided in said articles.

Colo. Rev. Stat. § 8-41-104.

will ultimately bear the financial burden not contemplated under Colorado's workers' compensation scheme for injuries to its employees in the course and scope of employment; and (2) there is now bifurcated liability stemming from the language in Colo. Rev. Stat. § 8-41-102 between insurers who provide both workers' compensation and uninsured motorist insurance, and those that only provide uninsured motorist benefits.

I do not interpret the majority's opinion to prevent liability when the insurer provides coverage for both workers' compensation and uninsured motorist coverage; the plain language of Colo. Rev. Stat. § 8-41-102 already provides for that result.[4] I interpret the majority as no longer providing statutory immunity to insurers, like Acuity, that were previously shielded by workers' compensation immunity but are now susceptible to uninsured motorist liabilities.[5] That distinction is the natural result of the majority's decision. Certainly, the General Assembly could not have intended such a result from its plain language in Colo. Rev. Stat. §§ 8-40-102(1), 8-41-102, and 8-41-104.

[4] ". . . nor shall such employer or the *insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability* for the death of or personal injury to any employee." Colo. Rev. Stat. § 8-41-102 (emphasis added).

[5] While it is possible that a future court may decide to strip statutory immunity from dual-purpose insurers for claims made only against their uninsured motorist policies, I view this as an unlikely occurrence given the language of § 8-41-102 and the public policy enunciated by the Colorado Supreme Court's decisions discussed above.