

ORAL ARGUMENT – 2/9/00
99-0453
EMBREY V. ROYAL INSURANCE CO.
99-0411
HENSON V. SOUTHERN FARM BUREAU

COWLING: The issue in this case is whether or not prejudgment interest is ever recoverable in an underinsured motorist coverage claim or in any contract claim where the words “legally entitled to recover” are used to describe the damages that are available to a litigant.

This is and should be the only issue before this court at this time, because this is the only issue which has been preserved for review for the CA’s and which was presented to the TC, or which was presented to this court in the respondent’s response to the petition for review in this case.

ENOCH: For underinsured or uninsured, do you agree that at some point there has to be either an agreement or litigation as to whether or not the underinsured defendant is liable? Do you agree that you have to do that?

COWLING: No. No more so than in any other kind of unliquidated damage case.

ENOCH: If the uninsured defendant is not liable and does not owe any damages, you would still have a claim against your policy for underinsured - how do you determine that you had an underinsured defendant if you don’t somehow either get an agreement as to what their liability damages are, or litigate what their liability damages are?

COWLING: The classical way is for the parties to conduct a thorough investigation of the facts and damages involved and then to evaluate the potential exposure or liability of the parties involved, and then of course, the damages in addition to that.

ENOCH: And so the parties could either agree to that or if they didn’t agree to that, you would have to litigate that issue?

COWLING: Yes. As much as would be the case in any standard third-party...

ENOCH: Now if you litigated that issue as to the defendant’s liability and the amount of damages that the defendant is liable for, and I’m talking about the tort feisor, I’m talking about the underinsured person here, and you won, that would result in a judgment for damages plus prejudgment interest from 6 months after the accident or whatever the claim is under *Cavnar*, right?

COWLING: As modified by the legislature in 569-1.05 regarding the date and notice of the claim.

ENOCH: And that judgment would include prejudgment interest?

COWLING: Unquestionably. Yes.

ENOCH: If that judgment is within the policy limits of the uninsured, the underinsured portion of your policy, the policy would require them to pay that which the defendant is legally obligated to pay, which is the amount of the judgment and you would be paid and it would be whatever the amount of that judgment was, and that would include prejudgment interest, right? Now we're talking about it's all within the cap on the underinsured policy that would all get paid because that is what they are legally obligated to pay, the tort-feasore defendant?

COWLING: