IN THE SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY,

Petitioner/Defendant,

v. CASE NUMBER: 95,337

KAREN ANDERSON,

Respondent/Plaintiff.
/

ON A CERTIFIED QUESTION FROM
THE ELEVENTH CIRCUIT COURT OF APPEALS

INITIAL BRIEF OF PETITIONER/DEFENDANT AUTO-OWNERS INSURANCE COMPANY

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The undersigned attorney hereby certifies this brief was prepared using a 14-point New Times Roman type font which does not exceed ten characters per inch.

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PRELIMINARY STATEMENT

For the purposes of this appeal, Petitioner/Defendant, Auto-Owners Insurance Company, refers to itself as "Auto-Owners" or as "Defendant," its capacity in the trial court.

Auto-Owners refers to Respondent/Plaintiff, Karen Anderson, as "Anderson" or as "Plaintiff," her capacity in the trial court.

Auto-Owners designates references to the record on appeal by the prefix "R.," followed by the volume number, document number, and, where appropriate, the page number designed by the prefix "p." or "pp."

Auto-Owners designates references to Anderson's Answer Brief in the Eleventh Circuit Court of Appeals by the prefix "AB."

Auto-Owners designates references to the Appendix attached to its Initial Brief by the prefix "App."

STATEMENT OF THE CASE AND FACTS

A. The Accident.

The facts of this case are undisputed. On December 7, 1996, Plaintiff Anderson was a passenger in a Mazda Miata automobile traveling southbound in the left lane of Interstate 75. Also traveling in the left lane was a tractor-trailer rig comprised of a 1987 White tractor and a 1986 Great Dane commercial trailer. The driver of the Mazda attempted to pass the tractor-trailer rig by using the right lane. While the Miata was passing the rig, the rig driver began to move into the right lane. In an effort to avoid colliding with the rig, the driver of the Mazda swerved off the paved highway and overturned. Plaintiff sustained severe bodily injuries (R. I-26-p.1).

B. The Policy and Its Provisions.

Both the tractor and the trailer were owned by Craig A. Bishop, and both were insured by Auto-Owners under the same policy of insurance. Auto-Owners, pursuant to its contractual duty to defend Mr. Bishop, engaged in settlement negotiations with the Plaintiff.

The major stumbling block in resolving Plaintiff's claim was a disagreement about the amount of coverage available under the Auto-Owners policy. Plaintiff contended two $750,000 “per occurrence" policy limits were available, while Auto-Owners contended only one such limit was available to Anderson.

Ultimately, Auto-Owners settled the claim against Mr. Bishop by paying Anderson the $750,000 in uncontested policy proceeds and agreeing to litigate and resolve, in a separate action, Anderson's claimed entitlement to a second policy limit. (R. I-26-pp.1-2).

The Auto-Owners policy provides in part as follows:

> **LIABILITY COVERAGE for Bodily Injury and Property Damage:** We will pay damages for bodily injury and damage to tangible property for which you become legally responsible and which involve your automobile....
>
> * * * * *
>
> **COMBINED LIMIT OF LIABILITY ENDORSEMENT (Bodily Injury and Property Damage):** When the coverage shown in the Declarations is "Combined Liability," we further agree that the Limit of Liability provision of Liability Coverage is replaced by the following: *The limit of liability stated in the declarations is the most we will pay for all damages, including damages for expenses, care and loss of service and loss of use as the result of any one occurrence. Charging premiums under this policy for more than one automobile does not increase the limit of our liability as stated for each occurrence....*
>
> * * * * *

> **(Definition of "automobile"):** "a four-wheel private passenger automobile, a truck or truck tractor or a commercial trailer, unless another type of vehicle is described in the Declarations."

(R. I-26-pp.4-5; App.1, pp. 2, 3, 22, emphasis added).[1] The Declarations for both the tractor and trailer, vehicles 8 and 9, state "Combined Liability $750,000 EA OCC (R. I-2, Exhibit "B", p. 4; App. 26)."

C. Statement of the Case.

This is an appeal from a final summary judgment entered in a declaratory judgment action by the United States District Court for the Middle District of Florida. By agreement of the parties, the sole issue to be determined was whether one or two $750,000 policy limits were available to Anderson for her accident with a tractor-trailer rig insured under a policy issued by Auto-Owners.

This action was initiated when Anderson filed a complaint in the Circuit Court for the Fifth Judicial Circuit of Florida seeking a declaratory judgment that two policy limits, or a total of $1.5 million in coverage, were available under the Auto-Owners policy with respect to her accident. The action was subsequently removed to the United States District Court for the Middle District of Florida (R. I-1). Both parties

[1] For the Court's convenience, Auto-Owners has included a copy of the entire policy, including the Declarations, at App. 1.

filed motions for summary judgment (R. I-9; R. I-11). The District Court entered summary judgment in favor of Anderson based on its finding that two policy limits were available to Anderson (R. I-26). Following the entry of final judgment in accordance with that ruling, Auto-Owners appealed to the Eleventh Circuit Court of Appeals (R. I-29).

In an opinion dated April 13, 1999, the Eleventh Circuit concluded the case involved a question of state law as to which the court could find no clear, controlling Florida precedent. It therefore certified the following question of law to this Court:

> Whether the tractor-trailer rig should be treated as a single covered automobile under the policy language forming the basis of the present dispute, or whether the single accident resulting in Anderson's injuries constituted two occurrences within the meaning of the policy.

(App. 2, p. 3). The Eleventh Circuit opinion further stated it did not intend to limit this Court in considering the issue presented or the manner in which it gives its answer by the phrasing of the certified question (App. 2, p. 4).

CERTIFIED QUESTION

WHETHER THE TRACTOR-TRAILER RIG SHOULD BE TREATED AS A SINGLE COVERED AUTOMOBILE UNDER THE POLICY LANGUAGE FORMING THE BASIS OF THE PRESENT DISPUTE, OR WHETHER THE SINGLE ACCIDENT RESULTING IN ANDERSON'S INJURIES CONSTITUTED TWO OCCURRENCES WITHIN THE MEANING OF THE POLICY?

SUMMARY OF THE ARGUMENT

The certified question presented in this appeal arises from a final summary judgment by the United States District Court for the Middle District of Florida holding that an Auto-Owners' policy insuring a tractor and trailer provided two limits of liability for a single accident involving that rig and another vehicle, even though the tractor and trailer were insured under a single policy, acted together as a single unit in causing the accident, and the Auto-Owners policy was written on a "per occurrence" limits basis.

As the Eleventh Circuit recognized, Florida has not addressed this precise issue, but cases from other jurisdictions have. These cases are essentially unanimous in holding that automobile liability insurance policies are not ambiguous in the situation where more than one insured vehicle is involved in a single accident, and that a single limit of liability applies in these circumstances.

The only exception is a case involving a policy containing a special "separability clause" which specifically required that policy be treated as though a separate policy had been issued on each vehicle; this case has been expressly distinguished on this basis by later decisions involving policies without that clause. The Auto-Owners policy has no such "separability clause." Accordingly, a decision

by this Court approving the result reached by the Middle District would make Florida a minority of one on this important issue of insurance coverage law.

In construing an insurance policy, a court must consider the policy as a whole and endeavor to give each of its provisions full meaning and operative effect. The only way to reach the conclusion that Plaintiff is entitled to two "per occurrence" policy limits is to ignore the language of the "Combined Limit of Liability Endorsement." Dismissing this pivotal provision as an anti-stacking clause deprives the provision of any practical meaning because Florida law prohibits an insured from aggregating liability limits on vehicles not involved in an accident even in the absence of a policy provision to that effect.

The first part of the Eleventh Circuit's certified question --whether the tractor-trailer rig constituted one or two covered automobiles -- does not affect the coverage analysis for a policy, such as this one, that limits the insurer's liability on a per occurrence basis. A restriction on coverage when two or more listed vehicles are involved in the same loss would be superfluous. The "Combined Limit of Liability Endorsement" effectively limits Auto-Owners' liability based on the number of occurrences, regardless of the number of premiums paid. Courts across the country have uniformly enforced these provisions.

The second part of the Eleventh Circuit's certified question -- whether the single accident resulting in Anderson's injuries constituted two occurrences within the meaning of the policy -- should be answered in the negative based on the plain meaning of the term "occurrence." Both standard interpretation principles and case law confirm the undefined term "occurrence" in the Auto-Owners policy unambiguously refers to the accident between the tractor-trailer rig and Plaintiff's vehicle which gave rise to the claim for damages under the policy.

When the Auto-Owners policy is correctly construed in accordance with the governing principles of policy construction, it unambiguously provides but a single limit of liability for this accident. The policy limits of the Auto-Owners policy expressly provide for a limit of $750,000 "per occurrence." The limits of liability clause then states that this amount is the most Auto-Owners will pay as a result of any one occurrence. This same clause goes on to further provide that the charging of premiums for more than one vehicle does not increase the limits of the company's liability as stated for each occurrence.

These policy provisions unambiguously provide that the amount of coverage provided by the Auto-Owners policy is a function of the number of occurrences involved. Since in the present case there was only one occurrence, there was *a fortiori* only one policy limit available. Since Auto-Owners has already paid

Anderson the applicable $750,000 policy limit, summary judgment should have been entered in Auto-Owners' favor.

ARGUMENT

FLORIDA SHOULD ALIGN ITSELF WITH THE OVERWHELMING MAJORITY OF COURTS IN THIS COUNTRY WHICH HAVE HELD THAT, WHERE THERE IS A SINGLE OCCURRENCE INVOLVING MULTIPLE INSURED VEHICLES, ONLY ONE "PER OCCURRENCE" POLICY LIMIT IS AVAILABLE.

The certified question presented in this appeal arises from a final summary judgment by the United States District Court for the Middle District of Florida holding as a matter of law that two "per occurrence" policy limits were available to Plaintiff, a passenger in a vehicle involved in an accident with a tractor-trailer rig, even though the tractor and the trailer were commonly owned, were insured under the same Auto-Owners policy, and acted together as a single unit in causing the accident. The basis for this holding was the purported ambiguity of the Auto-Owners policy with regard to the amount of coverage available when more than one insured vehicle is involved in a single accident. No Florida court has addressed this issue. Consequently, the Eleventh Circuit has asked for the Florida Supreme Court's guidance on this important question of Florida law.

Because the Middle District's conclusion as to the ambiguity of the Auto-Owners insurance policy is a question of law, this Court's scope of review is plenary. *See State Farm Fire and Casualty Company v. Nickelson*, 677 So. 2d 37 (Fla. 1st DCA 1996).

In concluding that multiple policy limits were available to Plaintiff, the Middle District reached a result at variance with the holding of virtually every decision Auto-Owners (and apparently also Plaintiff) has been able to locate in which two or more vehicles insured under the same policy were involved in an accident with a third party; the sole exception involves a small class of policies containing a special "separability clause" which expressly mandates that each insured vehicle be treated as though a separate policy had been issued on it. The Auto-Owners policy does not contain such a "separability clause." These cases have uniformly held that, where there is a single accident, only one policy limit is available notwithstanding the fact that multiple insured vehicles were involved in the accident. Accordingly, a decision by this Court approving the result reached by the Middle District would make Florida a minority of one on this significant issue of insurance coverage law.

A. Existing authority is essentially unanimous in holding only one policy limit is available where there is a single occurrence involving multiple insured vehicles.

The circumstance of this case in which two vehicles insured under the same policy are involved in an accident with a third vehicle is not an everyday event. However, similar accidents have occurred with sufficient frequency that a body of jurisprudence has developed on this issue. These cases hold that, except when the policy contains a special "separability clause" which expressly mandates the application of separate limits to each vehicle, a clause not found in the Auto-Owners policy, a single accident gives rise to a single limit of liability notwithstanding the fact that more than one insured vehicle is involved in the accident.

A recent decision which is factually very close to the present case is *Weimer v. Country Mutual Ins. Co.*, 565 N.W.2d 595 (Wis.App. 1997), *affirmed in part and reversed in part on other grounds*, 575 N.W.2d 466 (Wis. 1998) ("*Weimer*"). There, Trace, the insured, was driving a dump truck with a trailer attached when he crossed the center line of a highway and collided with an automobile driven by Paul Weimer, injuring him. Trace had insured both the dump truck and the trailer under a business automobile policy issued by Country Mutual; the declarations page listed separate premiums for bodily injury liability coverage for the truck and the trailer. The

Country Mutual insurance policy also contained a bodily injury limit of liability of $100,000 per person.

Just as in the present case, the injured party contended that the language of the Country Mutual policy was ambiguous as to the amount of coverage afforded when two covered vehicles were involved in the same accident. Specifically, Weimer claimed that two insuring clauses rendered the policy ambiguous. These clauses provided:

> PART II -- WHICH AUTOS ARE COVERED AUTOS
>
> A. The owned autos shown on the declarations page are covered for each of the coverages where a premium charge is shown.
>
> PART IV -- LIABILITY INSURANCE
>
> A. WE WILL PAY
>
> 1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto.

565 N.W.2d at 601.

Just as Anderson has argued in this case, Weimer contended the foregoing language demonstrated that the purpose of the policy was to insure separately each vehicle owned by Trace for the full amount of the policy limits. The court, however, rejected the claim of ambiguity, noting that the quoted language merely defined the

vehicles covered by the Country Mutual policy and the types of damages for which Country Mutual would be responsible, and that the amount of coverage available for an accident was to be found in the limit of liability clause. The *Weimer* court observed:

> The language from Parts II and IV to which Weimer refers merely defines which vehicles are covered by the policy and the types of damages for which Country Mutual will be responsible under the policy. In order to read Parts II and IV as Weimer suggests, an insured would have to disregard the limit of liability clause entirely. We conclude that the language is fairly susceptible of only one construction to a reasonable insured: for the vehicles listed on the declarations page, Country Mutual promised to pay all sums for bodily injury for which Trace became legally liable, up to the declared bodily injury limits, as further limited by the single-limit language.

565 N.W.2d at 601-602.

Another leading case construing the available policy limits when multiple vehicles insured under the same policy are alleged to have caused an accident is *Shamblin v. Nationwide Mutual Ins. Co.*, 332 S.E.2d 639 (W.Va. 1985) ("*Shamblin*"). In *Shamblin*, three vehicles owned by Shamblin were being driven by its employees in a convoy-type arrangement. While traveling together, the three drivers communicated by citizens band ("CB") radio to signal each other when it was clear to pass other vehicles. At a certain point during the trip, one driver advised another over the CB radio that it was safe for him to pass a truck which the first driver had already passed. In attempting to pass this other truck, the second driver collided with

both that truck and another vehicle. The driver and passenger in the latter vehicle were injured in the collision and brought a lawsuit against Shamblin.

The policy issued by Nationwide to Shamblin contained policy limits of $100,000 for bodily injury to one person, and $300,000 for bodily injury to two or more persons for each occurrence; the injured parties obtained a verdict against Shamblin in excess of these limits. Shamblin then initiated a declaratory judgment action against Nationwide, arguing it was entitled to have separate limits for each vehicle which had contributed to the accident apply toward satisfying its liability. The trial court ruled there was a single limit of liability available regardless of the number of vehicles which had allegedly contributed to the accident. Shamblin appealed.

On appeal, Shamblin argued both that the occurrence clause of the Nationwide insurance policy was ambiguous and also that the separate acts of negligence by two of its drivers in two covered vehicles for which individual premiums were paid required the conclusion that there was a separate "occurrence" as to each of Shamblin's vehicles. The West Virginia Supreme Court rejected these assertions, and affirmed the trial court's conclusion that only a single per occurrence limit was applicable to the accident.

The *Shamblin* court provided several reasons for its conclusion. First, it held that this result was compelled by the plain and ordinary meaning of the terms "accident" and "occurrence," which are ordinarily used to describe an event and are not dependent on the number of persons or things involved.

Next, the court rejected the argument that charging a separate premium for each vehicle presented a conflict with the limitation of liability clause which should be resolved in favor of multiple limits. It pointed out that such a separately computed premium merely assures the policy applies to whichever automobile is involved in the accident, and does no more (332 S.E.2d at 645). It also rejected the contention that it was "unjust enrichment" to allow an insured to limit its liability coverage to the limit for one vehicle when separate premiums have been paid for more than one vehicle, noting that "Nationwide should not be required to pay twice simply because it collected two premiums" because an insurer which insures multiple vehicles obviously assumes greater risks than an insurer which insures a single vehicle (332 S.E.2d at 646).[2]

Finally, the *Shamblin* court noted it was particularly inappropriate to "stack" liability coverages when the policy contained language limiting the insurer's liability

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[2] Here, Auto-Owners filed an affidavit confirming that the additional premium was representative of the additional risk arising from insuring multiple vehicles (R. I-20).

as a result of any occurrence "regardless of the number of . . . automobiles to which this policy applies . . . ." *Id*.[3]

A third decision addressing available limits where two vehicles insured under the same policy are involved in causing a single accident is *Suh v. Dennis*, 614 A.2d 1367 (N.J.Super. 1992) ("*Suh*"). In *Suh*, two employees of Service Sales, Inc. ("Service Sales"), were driving Mazda automobiles along the same route to deliver one of the vehicles to a customer. The evidence indicated the two employees were traveling at high rates of speed, and were apparently racing with each other. The two Mazdas collided, and one of them then spun out and struck a Mercedes killing some of its occupants and seriously injuring others.

Service Sales was insured under a policy issued by Aetna Casualty and Surety Company ("Aetna"), with liability limits of $500,000 per accident. The injured parties argued two liability limits were applicable because of the alleged ambiguity in the policy definition of "insured," which was defined to include any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. The plaintiff argued that since both of the Service Sales

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[3] This language is similar to the provision in the Auto-Owners Combined Limit of Liability Endorsement that "[c]harging premiums under this policy for more than one automobile does not increase the limit of our liability as stated for each occurrence." (R. I-26-p.4).

employees whose negligence had contributed to the accident were "insureds" under the policy definition, this indicated an intent that separate policy limits would be available to each insured.

The *Suh* court rejected this claim and found that, read in its entirety, the Aetna insurance policy was unambiguous, stating:

> In the instant case, the insurance policy must be read in its entirety. An insured to whom coverage is provided is insured separately except "with respect to the Limit of Insurance." The Limit of Insurance clearly states " . . . the most we will pay for all damages resulting in any one 'accident' is the Limit of Insurance for Liability Coverage shown in the Declarations." It is therefore the clear intent of the policy to pay no more than $500,000 for any one occurrence, regardless of the number of vehicles involved in the accident. The policy is not ambiguous.

614 A.2d at 1373.

State Auto Insurance Company v. Stinson, 142 F.3d 436, 1998 WL 124051 (6th Cir. 1998) ("Stinson"), relies on both *Shamblin* and *Suh* to support the conclusion that only one policy limit is available when two covered vehicles are involved in a single accident.[4] This case also involved a vehicle towing a trailer, both of which were owned by Mr. and Mrs. Travelstead and insured under the same policy issued by State Automobile Insurance Company ("State Auto").[5] In the course of parking these

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[4] *Stinson* is an unpublished opinion. A copy of this case is included in the Appendix at App. 3.

[5] Under the policy at issue in *Stinson*, State Auto insured seven of the Travelsteads' business vehicles, including the two vehicles involved in the accident.

vehicles, the Travelsteads negligently allowed the back end of their trailer to extend into the roadway. Ms. Stinson's car collided with the trailer, and Ms. Stinson was killed.

The district court concluded that State Auto must pay $100,000 for each covered vehicle (for a total of $200,000) because the policy was ambiguous as to the limits of coverage. However, the Sixth Circuit reversed and entered judgment for State Auto, holding that the plain language of the limitation in the insurance policy was clear and unambiguous. That policy provided:

> Regardless of the number of covered "autos," "insureds," premiums paid, claims made or vehicles involved in the "accident," the most [State Auto] will pay for the total of all damages . . . from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations.

Id., at 1998 WL 124051,**3. According to the Sixth Circuit, "This language permits only one reasonable interpretation, that being the clear intent of the policy to pay no more than $100,000 for any one occurrence, regardless of the number of vehicles involved in the accident." *Id*.

Stinson also rejected the argument like the one made by Plaintiff here that, because the Travelstead's paid liability premiums for each vehicle, they had a right to expect that multiple vehicles would be individually covered to the limit of $100,000 in a single accident. The court recognized,

> A limitation of liability clause within an automobile liability insurance policy that limits coverage for any one occurrence, regardless of the number of covered vehicles, does not violate any applicable Kentucky insurance statute or regulation, and there is no policy that prevents an insurer from so limiting its liability and yet collecting a premium for each covered vehicle, because each premium is for the increased risk of an "occurrence."

Id., at ** 5.

Yet another decision reaching a similar conclusion is *Inman v. Hartford Insurance Group*, 346 N.W.2d 885 (Mich.App. 1984) ("*Inman*"). In *Inman*, two vehicles insured under the same insurance policy and driven by two brothers were illegally involved in a race when a passenger was thrown from one of the vehicles suffering serious permanent injuries. The brothers' vehicles were insured under a policy providing a bodily injury limit of liability of $100,000 per person for injuries sustained as a result of any one occurrence. Again, the plaintiff took the position that two policy limits were available because the policy covered two vehicles and assessed separate premiums for each. The *Inman* court rejected this contention, finding the policy unambiguously provided only a single liability limit for such an accident.

The *Inman* decision is particularly significant, however, in that it thoroughly analyzes and distinguishes *Loerzel v. American Fidelity Fire Ins. Co.*, 118 N.Y.S.2d 180 (N.Y.App.Div. 1952) ("*Loerzel*"), a case which superficially appears to reach a contrary result and was relied on by the plaintiffs in *Shamblin* and *Suh* as support for

their arguments that multiple limits should apply. *Loerzel* is a short, cryptic opinion from an intermediate New York appellate court affirming a trial court order that two per accident limits were available for an accident involving two trucks owned by the same company and commonly insured. The appellate division upheld the trial court's conclusion that the policy at issue there "was intended to cover each vehicle the same as though a separate policy had been issued therefor" (118 N.Y.S.2d at 181).

While *Shamblin* and *Suh* also considered *Loerzel* and found it inapplicable and unpersuasive, the *Inman* court examined the case in greater depth. Going back to the trial court opinion, it ascertained that the basis of that decision was a special "separability clause" in the policy which expressly mandated the application of separate limits to each of the two trucks involved in the accident. No such clause was contained in the policies at issue in *Shamblin*, *Suh* and *Inman*; the Auto-Owners policy in this case likewise contains no such clause.

Inman thus harmonized the superficially contrary holding in *Loerzel* with all other precedent by demonstrating that its seemingly inconsistent result was due to the unique policy language at issue there. Even assuming *Loerzel* correctly interprets a policy containing a "separability clause," that decision obviously is not authority that policies with no such clause are ambiguous. As the *Inman* court noted,

> However, in both *Greer*[6] and *Loerzel*, the insurance policies contained a separability clause. This is the source of the ambiguity. The policy in the instant case does not contain a separability clause or any similar language. Rather, it states that "[r]egardless of the number of *** automobiles to which [the] limit of bodily injury liability stated in the schedule as applicable to 'each person' is the limit of the company's liability for all damages *** because of bodily injuries sustained by one person as the result of any one occurrence ***." The limit of bodily injury liability stated in the schedule as applicable to "each person" is $100,000. The event which resulted in injuries to the plaintiff was one occurrence. The plaintiff is one person. The fact that two automobiles were involved in the accident does not conjure up a separability clause. The stated limit of liability is exact and the policy clearly declares that the inclusion of more than one automobile does not affect that limit. Therefore, the policy limit of $100,000 must be enforced.

Id., at 35-36.

As the foregoing discussion demonstrates, the universe of case law on this issue is essentially unanimous in its treatment of multiple insured vehicles involved in a single accident. Other than for policies containing a unique "separability clause," automobile liability insurance policies are **not** deemed ambiguous when more than one insured vehicle is involved in an accident, and only a single limit of liability applies to such accidents.

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[6] *Greer v. Associated Indemnity Corp.*, 371 F.2d 29 (5th Cir. 1967), also involved a policy with a separability clause. However, in *Greer*, the court still found that only a single policy limit was available to the plaintiff because just one insured vehicle was involved in the accident giving rise to the claim.

Before the Eleventh Circuit, Plaintiff did not attempt to argue *Weimer, Suh, Shamblin* and *Inman* were wrongly decided, but instead attempted to distinguish them.[7] Ultimately, the only "distinction" made was her assertion that, while the differently-worded limitation of liability provisions in *Weimer, Suh, Shamblin* and *Inman* were each sufficient to limit the insurers' liability under similar circumstances, the Auto-Owners policy purportedly was insufficient to accomplish that result.

However, in fact, the language in Auto-Owners' "Combined Limit of Liability Endorsement" is the functional and legal equivalent of the language employed in *Weimer, Suh, Shamblin* and *Inman*. For example, the policy in *Suh* provided:

> Regardless of the number of covered "autos", "insureds", premiums paid, claims made, or vehicles involved in the "accident", the most we will pay for all damages resulting in any one "accident" is the limit of insurance for liability coverage shown in the Declarations.

Id., 614 A.2d at 1370. Compare this to the Auto-Owners policy:

> The limit of liability stated in the Declarations is the most we will pay for all damages, including damages for expenses, care and loss of services and loss of use as the result of any one occurrence. Charging premiums under this policy for more than one automobile does not increase the limit of our liability as stated for each occurrence.

(R. I-26-pp. 4-5.) Further, just as the Declarations page in *Suh* specified, "$500,000 per accident," the Declarations page of the Auto-Owners policy specifies "$750,000 EA OCC." There simply is no meaningful variation between these policies.

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[7] Auto-Owners did not cite *Stinson* in its Eleventh Circuit briefs.

Further, the decisions in *Weimer, Suh, Shamblin, Stinson* and *Inman* do not turn on the exact wording of their respective limitation provisions. In fact, *Weimer* relies on *Suh, Shamblin* and *Inman* for support without mentioning any policy language differences between them. *Weimer*, at 565 N.W.2d 600, n.4.

Plaintiff's misplaced reliance on *Greer, supra*, in the Eleventh Circuit, demonstrates she is actually attempting to rewrite Auto-Owners' policy to include a separability clause (AB 21-23). Plaintiff argued the holding in *Greer* that only a single limit was available was based on there being only one listed vehicle involved in the accident rather than two, and purported to rely on the court's dictum that had two covered vehicles had been involved, two policy limits would have applied (AB 23). However, that result could have occurred in *Greer* **only** because the policy at issue there contained the unique separability clause mandating separate coverage. It is undisputed no such clause exists in the Auto-Owners policy.

Plaintiff's argument to the Eleventh Circuit also demonstrated she either misunderstood or misconstrued the language used in these other policies. For example, Plaintiff found it significant that the policy in *Weimer* provides, "**Regardless of the number of** covered autos, insureds, claims made or **vehicles involved in the accident**, our limit of liability is as follows..." (AB 15, emphasis added by Plaintiff). The *Suh* policy, quoted above, uses similar language (*Id.*, 614

A.2d at 1370). However, the phrase "vehicles involved in the accident," as used in these policies, plainly refers to vehicles not covered by the policy that are involved in the accident. For example, if a covered auto is involved in an accident with fifteen other cars on an interstate highway, the limits of liability are not affected.

Under Florida law, an insurance policy is not ambiguous simply because someone argues it is so. There must be a "genuine inconsistency, uncertainty, or ambiguity in meaning [that] remains after resort to the ordinary rules of construction." *Excelsior Insurance Company v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979). Here, Plaintiff has attempted to draw distinctions without a difference between functionally equivalent versions of limitation of liability provisions in an effort to create ambiguity and avoid the plain meaning of the Auto-Owners policy language.

B. Whether the tractor-trailer rig is considered one or two covered automobiles is irrelevant because the amount of coverage available under Auto-Owners' policy is solely a function of the number of occurrences, not the number of insured vehicles involved.

In construing an insurance policy, a court must consider the policy as a whole and endeavor to give each of its provisions full meaning and operative effect. *See Excelsior Insurance Company, supra*; *Praetorians v. Fisher,* 89 So. 2d 329 (Fla.

1956)*; Nationwide Mutual Fire Insurance Company v. Olah*, 662 So. 2d 980 (Fla. 2d DCA 1995); *see also Dahl-Eimers v. Mutual of Omaha Life Insurance Company*, 986 F.2d 13779 (11th Cir. 1993). Here, the Combined Limit of Liability Endorsement of the Auto-Owners policy expressly provides as follows:

> "**[T]he limit of liability stated in the Declarations is the most we will pay for all damages**, including damages for expenses, care and loss of services and loss of use **as the result of any one occurrence**." (emphasis added).

(R. I-26-p.4).[8]

The policy then reinforces this limitation and forestalls any argument that the policy provides multiple limits because it insures multiple vehicles by going on to state that: "Charging premiums under this policy for more than one automobile does not increase the limit of our liability as stated for each occurrence" (R. I-26-p.4). The plain meaning of this language is that the amount of coverage available under the Auto-Owners policy is a function the number of occurrences involved, not the number of insured vehicles.

Since the amount of coverage available under this policy is a function of the number of occurrences, not the number of insured vehicles involved, whether the

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[8] "The limit of liability stated in the declarations" is "$750,000 per occurrence," again emphasizing that the application of the policy limits is a function of the number of occurrences.

tractor-trailer rig was one or two covered automobiles is irrelevant to the coverage analysis.[9] In fact, the only way to reach the conclusion that Plaintiff is entitled to two "per occurrence" policy limits is to ignore the language of the "Combined Limit of Liability Endorsement," thereby failing to give this provision its full meaning and effect.

With no explanation or citation of authority, Plaintiff endeavored to dismiss this pivotal provision as nothing more than a "classic anti-stacking clause applicable to the six other insured vehicles not involved in the accident" (AB 11). Nothing in the "Combined Limit of Liability Endorsement" expressly or implicitly limits its application to vehicles not involved in the accident. In fact, limiting this provision in the manner urged by Plaintiff not only requires the Court to rewrite this policy provision, but also deprives the "Combined Limit of Liability Endorsement" of any practical meaning. It has long been the law of Florida that an insured may not aggregate liability limits on vehicles not involved in an accident even in the absence of a policy provision to that effect. *See Greer, supra*.

Plaintiff's efforts to, in effect, read this provision out of the policy are misplaced. Whether the tractor-trailer rig constituted one or two covered automobiles

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[9] Accordingly, the first part of the Eleventh Circuit's certified question does not affect the coverage provided since the issue is whether this single accident constituted one or two occurrences under the Auto-Owners policy.

is irrelevant to the coverage analysis of a policy that limits the insurer's liability on a per occurrence basis. Plaintiff's criticism that the policy fails to restrict coverage when two or more listed vehicles are involved in the same loss misses the point (AB 11). Such a restriction would be superfluous in an "occurrence" based policy.

Because Plaintiff could not explain away the plain meaning of the "Combined Limit of Liability Endorsement," she attempted to create ambiguity out of whole cloth by examining policy provisions having nothing to do with the multiple limits issue. First, Plaintiff quoted the policy definition of "automobile" and announced both the tractor and the trailer fall within this definition (AB 9). Auto-Owners agrees; however, this language says nothing about whether multiple policy limits are available.

Next, Plaintiff referred to the language that introduces the portion of the policy explaining the various coverages offered (AB 9).[10] Like the definition of "automobile," this provision says nothing about the limits of liability.

Plaintiff then pointed to the insuring agreement which provides: "We will pay for damages for bodily injury and property damage for which you become legally responsible and which involve your automobile (AB 10)." According to Plaintiff, "[t]he plain language of this provision provides coverage for the two vehicles

[10] In order to know which of the described coverages have actually been purchased, one must look to the Declarations.

involved in the December 7, 1996, accident." *Id*. However, as is apparent on the face of this provision, the purpose of an insuring agreement is to set forth the conditions necessary for the policy to attach in the first instance. Here, those conditions were met and the policy attached.[11] The language of the insuring agreement, however, adds nothing to Plaintiff's argument that the policy provides multiple limits under the same coverage.

Plaintiff also claimed support for her position from the fact that the Declarations for both the tractor and trailer states "Combined Liability $750,000 EA OCC" (AB 11). She argued the use of "EA OCC" has no effect other than to indicate a $750,000 limitation for each vehicle involved in any occurrence (AB 13). Far from buttressing Plaintiff's argument, this language actually reinforces the plain meaning of the "Combined Limit of Liability Endorsement," namely that the Auto-Owners policy limits its liability based on the number of occurrences, not the number of vehicles. Moreover, Plaintiff's interpretation cannot be squared with the language of the "Combined Limit of Liability Endorsement" specifying that: "Charging premiums under this policy for more than one automobile does not increase the limit of our liability for each occurrence."

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[11] If, for example, Plaintiff's damages had been the result of a slip and fall on defendant's premises and "your automobile" had not been involved, the policy would not have been applicable.

Plaintiff suggested "Auto-Owners could easily have limited its coverage by stating 'the maximum we will pay for any one occurrence is (any specific amount)'" (AB 11). In fact, no substantive difference exists between Plaintiff's proposed language and the Auto-Owners policy language, which states: "The limit of liability stated in the declarations ($750,000 per occurrence) is the most we will pay for all damages..." (R. I-26-p. 4). It is at least as clear from this provision (if not clearer) that the most Auto-Owners will pay for any one occurrence under the terms of this policy is $750,000.

Plaintiff cited *National Merchandise Company v. Service Automobile Association*, 400 So. 2d 526 (Fla. 1st DCA 1981), in the Eleventh Circuit, as support for an argument that the Auto-Owners policy is ambiguous because it is "silent as to a controlling provision" -- that being a "provision limiting liability when more than one insured vehicle is involved in any one loss" (AB 25). In fact, however, the Auto-Owners policy is not silent on the issue because it determines limits on a per occurrence basis rather than on a per vehicle basis. It does not matter how many insured vehicles are involved in a particular accident when the insurer's liability is limited in this fashion, and it is simply unnecessary for the policy to address separately the multiple insured vehicle issue.

It is customary in the insurance industry to include limitation of liability provisions in insurance policies. *Weimer*, *Suh*, *Shamblin*, *Stinson* and *Inman* demonstrate that insurers use a variety of wordings to accomplish this result. The provision used by Auto-Owners effectively limits its liability based on the number of occurrences regardless of the number of premiums paid. Courts across the country have uniformly enforced these provisions notwithstanding the slight differences in their wording.

In fact, *Weimer*, *Suh*, *Shamblin*, *Stinson* and *Inman* expressly rejected the same type of flawed analysis urged by Plaintiff in this appeal as incompatible with the requirement that an insurance policy be read in its entirety and so as to give meaning and effect to each policy provision. For example, in *Weimer*, the plaintiff made essentially the same argument as that of Plaintiff here, claiming that the language of the insuring agreement created an ambiguity as to the amount of coverage afforded when two covered vehicles were involved in a single accident. In rejecting this assertion, the *Weimer* court observed:

> The language from Parts II and IV to which Weimer refers merely defines which vehicles are covered by the policy and the types of damages for which Country Mutual will be responsible under the policy. In order to read Parts II and IV as Weimer suggests, an insured would have to disregard the limit of liability clause entirely.

565 N.W.2d at 601.

In *Suh*, the court rejected a similar contention with the observation that "the insurance policy must be read in its entirety" (614 A.2d at 1373). In *Inman*, the court analogized this argument as an attempt to "conjure up" a separability clause where none existed in the policy (346 N.W.2d at 888).

C. The single accident resulting in Plaintiff's injuries resulted in only one occurrence within the meaning of the policy.

The issue for this Court's determination is the second part of the Eleventh Circuit's certified question, namely whether the single accident resulting in Plaintiff's injuries constituted one or two occurrences.

The Auto-Owners policy does not define "occurrence," and the term is therefore given its plain and ordinary meaning. See, e.g., *Old Dominion Insurance Company v. Elysee, Inc.*, 601 So. 2d 1243, 1245 (Fla. 1st DCA 1992)("*Elysee*"). Under Florida law, a principal way of determining the plain and natural meaning of an undefined term used in an insurance policy is to consult its dictionary definitions. *See, e.g., Berkshire Life Insurance Company v. Adelberg*, 698 So. 2d 828, 837 (Fla. 1997); *Elysee, supra*. "Occurrence" is defined in *Webster's New Collegiate Dictionary*, p. 794 (1976) as "something that takes place usually unexpectedly and without design" and as "the action or process of happening." Similarly, *Black's Law Dictionary*, p. 1231 (Rev. 4th ed. 1968) defines the term as "a coming or happening; any incident or event, especially one that happens without being designed or expected."

In this case, the unexpected incident or event at issue was plainly the accident between Plaintiff and the tractor-trailer rig. Indeed, *Black's* goes on to define the word "accident" as used in an automobile liability policy as "an untoward and

unforseen **occurrence** in the operation of the automobile which results in injury to the person or property of another." *Id.* at pp. 30-31 (emphasis added).

This conclusion is confirmed by *Weimer, Suh, Shamblin, Stinson* and *Inman*, each of which reject the argument that the involvement of multiple insured vehicles in an accident has the effect of making the accident involve more than one "occurrence." For example, in both *Shamblin* and *Suh*, the plaintiffs attempted to argue the "occurrence" referred to something other than the accident, such as the antecedent acts of negligence, for the purpose of trying to create multiple occurrences and, hence, multiple policy limits. However, the effort to advance such strained interpretations of the term "occurrence" was flatly rejected. *Shamblin* observed the term "refers unmistakably" to the collision, the resulting event for which the insured becomes liable, stating as follows:

> In like manner, there was only one "event" or "occurrence" here, the collision, both in common parlance and under the policy's definition of "occurrence." If there were two negligent acts of two of the appellant's drivers in this case, the two acts, (1) signaling to pass and (2) passing, happened, according to the jury's answer to the special interrogatory, at or about the time of the accident, and, due to the closeness in time, as concurrent negligence proximately caused the one "occurrence," the collision. Any two antecedent negligent acts do not constitute two "occurrence." The term "occurrence" in a limitation of liability clause within an automobile liability insurance policy refers unmistakably to the resulting event for which the insured becomes liable and not to some antecedent cause(s) of the injury.

332 S.E.2d at 644.

In *Suh*, the court similarly observed:

> In the case at bar, the two defendants' vehicles collided with each other, one of which then hit plaintiff's car. Here, the collision of defendants' cars was merely an antecedent cause and not an occurrence within the terms of the policy. The single occurrence was one of the defendant's cars hitting the Suh vehicle.

614 A.2d at 1373.

This meaning is also consistent with the limited Florida case law addressing the situation in which the term "occurrence" is not defined in an insurance policy. *American Indemnity Company v. McQuaig,* 435 So. 2d 414 (Fla. 5th DCA 1983) ("*McQuaig*") holds that Florida follows the "cause" theory of occurrence, and that the method for determining what constitutes the occurrence when the term is not defined is to identify the cause of the injury or damages. In the present case, that is the accident between Plaintiff and the tractor-trailer rig.

Throughout this case, Plaintiff has failed to come to grips with a fundamental problem with her position: that is, that the "occurrence" in this case was the accident. There was only one accident here, and only one occurrence. Plaintiff has not factually challenged this point. Indeed, her Answer Brief repeatedly refers to "the accident" (AB 10, 11).

Plaintiff also acknowledged in the trial court that the accident was a single occurrence. In the memorandum in support of her motion for summary judgment,

Plaintiff stated: "In this case, two separate vehicles listed and insured separately were involved in **this loss occurrence**." (R. I-10-p.3) (emphasis added). Similarly, in her reply memorandum, Anderson argued: "Defendant's Combined Limit of Liability Provision fails to address the situation where two vehicles insured separately on the Declarations Endorsement are involved in the loss, **even if it is only one occurrence**. Since two vehicles insured under the policy were involved in **the occurrence** this is not a case of stacking." (R. I-18-p.4) (emphasis added).

Once it is recognized the accident between the Anderson vehicle and the tractor-trailer rig constituted a single "occurrence," it also becomes evident the Auto-Owners policy unambiguously provides for only one $750,000 policy limit with respect to that "occurrence."

In sum, the Middle District's conclusion that when two separate vehicles are involved in a single accident, there are two occurrences -- one with respect to each separately covered vehicle -- is plainly wrong. The only circumstances under which such an interpretation is permissible are when the two vehicles involved in the accident are actually insured under separate policies of insurance, or perhaps when a special "separability clause" in the policy converts it into a policy "intended to cover each vehicle the same as though a separate policy had been issued therefor."

Loerzel, supra, 118 N.Y.S.2d at 181. Absent such a "separability clause," not present in the Auto-Owners policy, the unanimous weight of authority mandates that only a single limit of liability is available. A contrary decision by this Court would make Florida a minority of one on this important issue.

CONCLUSION

For the reasons stated, Auto-Owners respectfully submits the answer to the first part of the certified question– whether the tractor-trailer rig should be treated as a single covered automobile -- is irrelevant to a determination of the amount of coverage available under an occurrence-based policy such as the Auto-Owners policy. The second part of the certified question -- whether the single accident resulting in Anderson's injuries constituted two occurrences within the meaning of the policy -- should be answered in the negative. There was only one accident and, therefore, only one occurrence based on the plain meaning of the term, case law and Plaintiff's acknowledgment of the same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to: Thomas J. Farkash, Esquire, of Fine, Farkash & Parlapiano, P.A., 622 Northeast 1st Street, Gainesville, Florida 32601, this 24th day of May, 1999.

Attorney