IN THE SUPREME COURT OF THE
STATE OF FLORIDA

AUTO-OWNERS INS.
COMPANY,

Petitioner/Defendant,

-vs-

KAREN ANDERSON,

Respondent/Plaintiff.

CASE NO.: 95,337

ON A CERTIFIED QUESTION FROM
THE ELEVENTH CIRCUIT COURT OF APPEALS

ANSWER BRIEF OF RESPONDENT KAREN ANDERSON

Thomas J. Farkash, Esquire
Florida Bar No.: 216631
Fine, Farkash & Parlapiano, PA
622 NE First Street
Gainesville, Florida 32601
Telephone: (352) 376-6046
Facsimile: (352) 372-0049

CERTIFICATE OF TYPE SIZE AND STYLE

This brief has been typed utilizing 14 pt proportionately spaced Times New Roman font.

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PRELIMINARY STATEMENT

For purposes of this brief, Respondent/Plaintiff, Karen Anderson, refers to herself either as "Respondent" or "Karen Anderson." Respondent refers to Petitioner/Defendant, Auto-Owners Insurance Company either as "Petitioner" or "Auto-Owners."

STATEMENT OF THE CASE

Proceedings Below

In October 1996, Respondent, Karen Anderson, filed her First Amended Declaration Action Complaint seeking declaratory judgment in the Circuit Court of Marion County (R.I-2.). Petitioner filed a timely Answer. (R.I-7.). On October 10, 1996, the case was removed at the request of Petitioner, Auto-Owners, to Federal Court based upon diversity. (R.I-1.). Pursuant to the Case Management Report filed with the Federal District Court, Middle District of Florida, the parties agreed that since the sole issue of coverage required resolution as a matter of law the court should render its decision via summary judgment. (R.I-6., p.2,3).

Both parties filed their cross-Motions for Summary Judgment and Memoranda thereto. (R.I-9-13,17-19,27). A pre-trial conference was held on September 25, 1997, wherein the Federal District Court, Middle District of Florida heard argument, reviewed case law, and acknowledged the stipulation of the parties regarding jurisdiction. (R.II-30). The District Court entered an Order removing the case from the trial docket calendar and determined that the court would decide the outcome of the case based upon the Cross-motions for Summary Judgment. (R.I-25.). On October 1, 1997, the District Court entered its Order granting Respondent's Motion for Summary Judgment and entered a final judgment for Respondent in the amount of $1,500,000. (R.I-26,28).

Petitioner subsequently filed a Notice of Appeal to the Eleventh Circuit Court of Appeals on October 27, 1997. (R.I-29.). Oral Arguments were presented to the Eleventh Circuit Court of Appeals on October 6, 1998. On April 13, 1999, the Eleventh Circuit Court of Appeals entered an Order certifying the following question 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.
>
> The phrasing of this question is not intended to limit the Supreme Court in considering the issue presented or the manner in which it gives its answer. (Petitioner's Brief, Appendix 2, p.4)

Statement of the Facts

The underlying facts of this case are undisputed and arise out of an automobile crash which occurred on December 7, 1996. Craig A. Bishop Farms had an automobile insurance policy in effect with Auto-Owners at the time of the loss under policy number 38021135 which separately listed, charged premiums, and provided coverage in the amount of $750,000.00 for each of the two vehicles, a 1987 Whit Tractor and a 1986 Great Dane Trailer, involved in the loss. (R.I-2., p.1). Respondent was a passenger traveling within a vehicle which was involved in a loss with these two vehicles owned by Craig A. Bishop Farms. (R.I-2., p.2). This case arises out of ambiguity in language of the policy and declarations concerning the

amount of coverage available to compensate Respondent for her injuries incurred in this loss. (R.I-2.). The parties have stipulated that the only issue before the Court is a question of law as to the interpretation of coverage of the policy. (R.I-15.).

SUMMARY OF THE ARGUMENT

The certified question presented by the Eleventh Circuit Court of Appeals contains two disjunctive questions. The first certified question asks, "Whether the tractor-trailer rig should be treated as a single covered automobile under the policy language forming the basis of the present dispute…" This question is answered 'No' based on a complete reading of the language of Petitioner's policy as discussed in Argument I, *infra*. The definitions section of the policy defines the tractor and the trailer each as an "automobile". The tractor and the trailer are each separately listed in the declarations. The tractor and the trailer were each charged a separate premium and the policy language consistently refers to "each vehicle." The declarations provides separate coverage in the amount of $750,000.00 each for the tractor and the trailer. The policy does not contain any language defining two or more vehicles as "one" or as a "rig". The policy is silent as to when two or more vehicles are involved in any loss, other than providing coverage for each separate vehicle involved.

The second certified question asks, "whether the single accident resulting in Anderson's injuries constituted two occurrences within the meaning of the policy." The Respondent's answer to this question is as follows: regardless of whether there is one or more occurrences, each vehicle involved in the loss is separately covered under the Auto-Owners policy for $750,000.00. This second question does not resolve the coverage issues presented by the policy which is the basis of this lawsuit.

In the instant case, the policy provides coverage for each of the two vehicles involved in this loss but is otherwise silent as to limiting coverage when more than one vehicle is involved. This silence when read *para materum* with the policy gives rise to two or more reasonable interpretations of coverage resulting in ambiguity which must be resolved in favor of the party seeking coverage. The ambiguity is further exacerbated because there is no specific, clear provision which expressly limits the liability of the insured when more than one insured vehicle was involved in a loss. Each of the cases cited by Petitioner contained a limitation of liability provision which resolved the ambiguity in those policies. To remain consistent with the case law across the country, this Court should find that when more than one vehicle is involved in a loss and there is no clear provision controlling coverage regardless of the number of vehicles involved the ambiguity contained within the policy must be resolved in favor of coverage. Whether there is one occurrence or two occurrences, the policy remains ambiguous and therefore must be read in favor of coverage.

ARGUMENT

I. AUTO-OWNERS DRAFTED THE INSURANCE POLICY WITH CRAIG BISHOP FARMS SUCH THAT THE TRACTOR AND THE TRAILER ARE DEFINED AS SEPARATE VEHICLES. A COMPLETE READING OF THE POLICY RESULTS IN $750,000 COVERAGE FOR EACH OF THE TWO VEHICLES INVOLVED IN THE DECEMBER 7, 1996 LOSS.

The initial question certified from the Eleventh Circuit asks "Whether the tractor-trailer rig should be treated as a single covered automobile under the policy language forming the basis of the present dispute. . ." This question is easily answered 'No' by a complete reading of the language contained within the policy.

The policy language defines "automobile" as follows:

> **Automobile** - this word means a four-wheel private passenger automobile, a truck or **truck tractor or commercial trailer** . . .
> (Petitioner Brief, Appendix 1, p.2)

Each of the two vehicles *involved* in the December 7, 1996, loss are separately defined in Auto-Owners' definition of "automobile." Further, as discussed *supra*, each of the two vehicles involved in the December 7, 1996, loss are listed separately in the Declarations. The combined language of the policy and format of the declarations demonstrate Petitioner's intention to consider each of the vehicles involved in this loss as a separate vehicle answering the first certified question in the affirmative.

The Auto-Owners policy cover page directs the reader to proceed to page three for information regarding liability protection. (Petitioner Brief, Appendix 1, p. 1) On page three, the first line across the top of the page states:

> The attached Declarations describes the automobile we insure and shows the coverages for which you have paid a premium. **We agree with you as follows with respect to each coverage for which a premium has been paid.** (*emphasis added*).
> (Petitioner Brief, Appendix 1, p.3)

The initial provision on page three, under the heading "LIABILITY COVERAGE for Bodily Injury and property damage" states:

> We will pay damages for bodily injury and damage to tangible property for which you become legally responsible and which **involve your automobile.** . . (*emphasis added*)
> (Petitioner Brief, Appendix 1, p.3).

The plain language of this provision provides coverage for the two vehicles involved in the December 7, 1996, accident.

The policy then provides a provision entitled "Limitation of Liability" in the second column on page three. The endorsement attached to the Auto-Owners policy titled "Combined Limit of Liability Endorsement" supersedes the limitation of liability section language provided on page three and replaces it with:

> 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**...(*emphasis added*)

(Petitioner Brief, Appendix 1, p.3)

Auto-Owners directs the reader to the Declarations to determine the coverage available. The Declarations lists eight separate vehicles covered under the policy. (Petitioner Brief, Appendix 1, p.23-28). The vehicles involved in this accident are numbered 8 and 9 in the declarations. (Petitioner Brief, Appendix 1, p.26). Under the heading for the Great Dane Trailer (vehicle 8); under the sub-heading Coverages, the declarations states "Combined Liability $750,000 **EA OCC**" and then a premium is listed. Under the heading for the White Tractor (vehicle 9); under the subheading Coverages the declarations states "Combined Liability $750,000 **EA OCC**" and then a premium is listed. Auto-Owners mis-quotes their own policy by indicated that the policy is listed as "per occurrence." (Initital Brief of Petitioner, p. 27 fn 8, p. 28). Auto-Owners chose to specify in the declarations each vehicle covered at $750,000 for each occurrence. Auto-Owners could easily have limited coverage by stating "the maximum we will pay for any one occurrence is (any specific amount)". There exists language regularly used in the insurance industry to limit coverage in this fashion, as evidenced by the cases cited in Petitioner's Brief. Auto-Owners did not use this language. Instead Auto-Owners seeks to contort the language it chose to use to reach an interpretation in its favor. The plain language of the policy including the Declarations, when read as a whole, states that each vehicle is covered for $750,000 for each occurrence that each vehicle

is involved in.

The second sentence of this provision similarly directs the reader to refer to the Declarations to determine the coverage "as stated for each occurrence." The declarations then provides for $750,000.00 separate coverage for each vehicle, each occurrence. This sentence provides no other guidance as to any limitations of coverage when more than one vehicle is involved in a loss. This sentence is an anti-stacking clause applicable to the six other insured vehicles not involved in the accident. Respondent is not requesting this court to permit stacking of the other non involved vehicles listed in the declarations. Respondent agrees with Petitioner that this provision clearly prohibits stacking coverage of the six other vehicles insured separately under this policy because the other six vehicles were not involved in this loss. The provision fails to restrict coverage when two or more vehicles separately listed in the declarations are involved in the same loss, regardless of the number of occurrences. Instead, both sentences of the provision direct the reader to look to the declarations which provides separate coverage of $750,000.00 for each of the vehicles involved in this loss. The Combined Limit of Liability of Endorsement when read in conjunction with the Declarations, as instructed, results in separabilty.

Auto-Owners had exclusive control over the language and format of the insurance policy it issued to Craig Bishop Farms. Auto-Owners chose not to include any language limiting their liability when two or more vehicles separately covered

under the policy are involved in a loss. Insurance Contracts are unique because they are unilaterally drafted by the insurance company without input from the insured. *Holmes & Rhodes,* Appleman on Insurance 2d §6.1, p.137, (West Publishing Co. 1996). The language of an insurance policy is often very complicated and difficult for a lay person to understand. Insureds do not control the language of the policy as written and interpret the policy on its face.

Florida law requires that an insurance policy must be read and interpreted as a whole. Dahl-Eimers v. Mutual of Omaha Life Ins. Co., 986 F.2d 1379, 1381 (11th Cir. 1993), *citing* Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938, 941 (Fla. 1979). The purpose of this rule is to prevent insurance carriers from denying coverage based on a single word or phrase within the policy. All of the provisions in the policy and in the declarations, where declarations are included, must be considered when interpreting the policy. Davis v. Crown Life Ins. Co., 696 F. 2d 1343, 1345 (11th Cir. 1983).

The language of the policy must be interpreted utilizing the plain and natural meaning of the language under ordinary rules of construction. *See id.* at 1382. The plain language of the Auto-Owners policy and declarations when read as a whole provides $750,000 coverage for each of the eight vehicles listed in the declarations for each occasion that each vehicle is involved in a loss.

In Greer, a Florida case, the question was whether charging separate

premiums for separate vehicles increased the insurer's liability for damages sustained as a result of an accident which involved only one of the insured vehicles. Greer v. Associated Indemnity Corp., 371 F.2d 29 (5th Cir. 1967). The insurance policy at issue in Greer contained a per person/per occurrence limit of $10,000/$20,000. *Id.* at 31. The Plaintiff argued that since the policy insured two automobiles, the insurer was liable for up to $20,000 for injuries sustained by the Plaintiff. *See id*. The basis for Plaintiff's argument was a clause contained within the policy which stated, "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each. ." *See id*. The Plaintiff further contended that there was nothing limiting coverage to the involved automobile. *See id*. at 32. The court disagreed with Plaintiff's interpretation of the policy. An amendment to the policy specified that injury must be caused by *the* owned automobile. The court found the amendment limited coverage to the owned automobile specifically involved in the accident. *See id.* at 33. The key fact involved in the final outcome of Greer was that only one of the covered owned vehicles was involved in the accident. The court held that the liability of the insurer was limited to $10,000 on the vehicle involved in the accident. *See id*.

The court in Greer, in discussing a New York opinion [Loerzel v. American Fidelity Fire Ins. Co., 204 Misc. 115, (N.Y. Sup. Ct., Ulster Co., 1952)] clearly indicated that if two vehicles covered under the policy had been involved in the

accident then coverage existed for both. *Id*. The Greer court's holding was based on the fact that there was one owned vehicle involved and similarly the Greer court indicated that if two of the covered owned vehicles had been involved in the accident in Greer there would have been $10,000 coverage for each. *Id*. An analogous situation arises in the instant case where two of the separately insured vehicles under the Auto-Owners policy were involved in the December 7, 1996, loss with Respondent. Applying the holding of the court in Greer to the instant case, each of the vehicles involved is separately covered in the amount of $750,000 based on the format and language of the declarations when read in conjunction with the opening language of the policy. Respondent is entitled to collect $1,500,000 under the Auto-Owners policy.

Auto-Owners declaration in its brief that the Federal District Court, Middle District of Florida, found that because there were two vehicles involved in the accident there were two occurrences is incorrect. (Petitioner's Brief, p.37). The Federal District Court, Middle District of Florida, merely found that it was reasonable to interpret the policy to read that "when two separate vehicles are involved in a single accident, there are two occurrences." (R.I-26, p.6).

To demonstrate the fallacy in Auto-Owners argument the District Court referred to a hypothetical scenario proffered by Respondent in her Memorandum in Support of the Motion for Summary Judgment. (R.II-30, p.6). The Court questioned

whether Auto-Owners' argument would be the same if the two vehicles were listed as tractors and had been involved in a three vehicle accident with Respondent. (R.II-30, p.6). Under that scenario Auto-Owners' argument that there was only one occurrence would be absurd as conceded by Petitioner at the hearing.

The Auto-Owners policy lists **separate** coverage for **each** vehicle, **each** occurrence without limitation on the number of vehicles involved. The policy provided coverage of $750,000 for the white tractor and $750,000 for the Great Dane Trailer, which were the two vehicles involved in the December 7, 1996, loss. The "**EA OCC**" following the coverage amount documents a $750,000 limitation for **each** of the vehicles involved in any occurrence. Auto-Owners could easily have said and did not say that the most Auto-Owners would pay regardless of the number of vehicles involved in any one loss is $750,000, single limits.

The action of the tractor and the separate action of the trailer forced the vehicle within which Respondent was traveling off the road giving rise to a reasonable interpretation of two "occurrences". In either case, whether there was one occurrence involving two separately covered vehicles or two separate occurrences, one occurrence as to each vehicle, there is a total of $1,500,000 available in coverage. The Federal District Court, Middle District of Florida, found that if the Petitioner intended to treat the two separately covered vehicles as a single covered vehicle when operated in tandem they could have drafted the policy to achieve that result. (R.I-26

p.6). Each of the two vehicles involved in the December 7, 1996, loss were separately covered for $750,000, each occurrence, under the Auto-Owners policy. The plain language of the policy clearly establishes $1,500,000 coverage comprised of $750,000.00 for the tractor and $750,000.00 for the trailer, the two vehicles involved in the December 7, 1996.

II. THE AUTO-OWNERS POLICY IS AMBIGUOUS BECAUSE IT IS SUSCEPTIBLE TO MORE THAN ONE REASONABLE INTERPRETATION OF COVERAGE WHEN TWO OR MORE VEHICLES SEPARATELY INSURED UNDER THE POLICY ARE INVOLVED IN A LOSS. UNDER FLORIDA LAW, THIS AMBIGUITY MUST BE RESOLVED IN FAVOR OF COVERAGE.

Florida law applies because the instant case involves the interpretation of an insurance policy purchased and delivered within the state of Florida. Sovereign Camp Woodmen of the World v. Mixon, 84 So. 171 (Fla. 1920). In Florida, an insurance policy is ambiguous if it is susceptible to two or more reasonable interpretations. Dahl-Eimers, 986 F.2d at 1381 *citing* Herring v. First S. Ins. Co., 522 So.2d 1066, 1068 (Fla. 1DCA 1988); Ideal Mut. Ins. Co. v. C.D.I. Constr., Inc., 640 F.2d 654, 657 (5th Cir, 1981). When one interpretation results in coverage and the other does not, there is ambiguity. *See id.* If an insurance policy is ambiguous the ambiguity is to be resolved against the drafter of the policy applying the rule of *contra preferentem*. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters

Non-Marine Ass'n., 117 F.3d 1328, 1337 (11th Cir. 1997). Auto-Owners wrote the policy such that when the policy language is read in conjunction with the format of the declarations an ambiguity arises as to the amount of coverage available when two or more separately insured vehicles are involved in a loss. Ambiguity arises in the differing interpretations of the policy, which must be interpreted in favor of coverage applying the rule of *contra preferentem*. *See id*.

The issue of ambiguity contained within an insurance contract has been litigated on several occasions. Each case presented a different ambiguity, many of which are similar to the issues presented by this case. Ambiguity in the present case arises in interpreting the language of the policy in conjunction with the format of the declarations. A similar situation was presented to the Eleventh Circuit in Davis v. Crown Life Ins. Co., 696 F.2d 1343 (11th Cir. 1983). Davis involved a health insurance contract which the plaintiff believed provided coverage for her husband who was the claimant. *Id.* at 1344. The certificate of insurance showed deductions for coverage for the husband. *See id*. The "master" policy contained a limitation restricting coverage for a dependent which effectively foreclosed coverage for the husband. *See id*. The court found under Florida law, "an insurance contract consists of the master policy and the certificate of insurance, and ambiguities between the two are to be construed as including rather than precluding coverage." *See id*. at 1345 *citing* Rucks v. Old Republic Life Ins. Co., 345 So.2d 795, 796 (Fla.App.1977). The

court held that when the certificate of insurance **is silent** on a controlling provision an ambiguity is created which must be resolved to provide the broadest coverage. *See id*. at 1346. The court found the claimant husband was covered under the policy. *See id*.

National Merchandise Co., Inc., et al. v. United Service Auto. Ass'n., 400 So.2d 526 (Fla. 1DCA 1981), is another Florida decision which involved an ambiguity within an insurance policy created by silence. The issue in National was whether there was coverage when a key term was not defined within the policy. *Id*. at 529. The coverage provision stated, "we will pay damages for bodily injury or property damage. . .because of an auto accident." *See id*. However, the policy did not define 'auto accident.' *See id*. In this case a boy died after ingesting prescription medications which were in the vehicle. *See id.* at 528. The court held that because USAA failed to define auto accident there was coverage available for the incident. *See id*. at 533.

The court found that when terms of a policy are ambiguous they are to be construed against the insurer because they drafted the policy. *See id*. at 530. The insurer cannot, by failing to include qualifying or exclusionary language, insist upon a narrow, restrictive interpretation limiting coverage. *See id*. The court is free to take into consideration the established custom and usage in the insurance industry. *See id*.

Contrary to the interpretation proffered by Auto-Owners, nowhere within the Combined Limit of Liability clause and nowhere within the policy or declarations is there any clear language which expressly limits the liability of the insured when more than one vehicle is involved in a loss. The clause merely instructs the reader to look to the Declarations to ascertain what limit of liability coverage is available. Petitioner further gets bogged down in attempting to provide a definition of "occurrence" where one is not provided within the policy. This argument is innocuous and has no bearing on the coverage issues of this case. In order to ascertain the limits of liability, the reader must go to the declarations.

The insurance contract clearly does not exclude coverage in the situation where two vehicles separately listed on the Declarations Endorsement with separate coverage of "$750,000.00 [for each vehicle for] each occurrence" are involved in a single loss. Should this Court consider Petitioner's interpretation, then the insurance contract is ambiguous for it is reasonably susceptible to more than one interpretation, one finding coverage and one not. The Federal District Court, Middle District of Florida, held based on well established Florida Law that when there was more than one reasonable interpretation the policy is ambiguous and therefore must be resolved in favor of coverage. (R.I-26, p.6).

The Auto-Owners' policy is similar to that in <u>Davis</u> and <u>National</u> because the policy is silent as to a controlling provision. The policy body and the declarations

are silent reference a provision limiting liability when more than one insured vehicle is involved in any loss. Auto-Owners cannot now come to this Court and ask to be rescued from their own hand given their failure to include a limitation of liability provision in the policy or declarations when two or more separately insured vehicles are involved in a loss.

III. EACH OF THE CASES RELIED UPON BY PETITIONER ARE DISTINGUISHABLE BECAUSE EACH POLICY CONTAINED A LIMITATION OF LIABILITY PROVISION WHICH RESOLVED AMBIGUITY IN THE RESPECTIVE POLICIES. AUTO-OWNERS CHOSE NOT TO INCLUDE WITHIN ITS POLICY OR DECLARATIONS SPECIFIC, CLEAR LANGUAGE EXPRESSLY LIMITING COVERAGE TO RESOLVE POLICY AMBIGUITY.

This Court may consider the established customs or usage in the insurance industry in resolving this case. National, 400 So.2d at 530. Auto-Owners' has demonstrated through the cases relied upon in its brief that it is regular practice for insurers to include limitation of liability clauses within their policies or declarations when two or more covered vehicles are involved in a loss. Auto-Owners chose not to follow these practices and chose not to include such a clause in its policy. Instead, Auto-Owners chose to draft its policy and declarations in such a manner as to provide separate coverage for each of the two vehicles involved in this loss. Under well-established Florida Law, this ambiguity must be resolved in favor of coverage. Respondent is entitled to collect $1,500,000, comprised of $750,000 for each of the

two vehicles involved in the December 7, 1996 loss.

All of the non-binding state court opinions cited by Auto-Owners in their brief are easily distinguishable based on the different policy language involved in this case. Auto-Owners is misguided in their reliance upon these cases, in that each of the cases relied upon by Auto-Owners involved a policy which contained a specific, clear provision which expressly limited the liability of the insured when more than one insured vehicle was involved in a loss. Directly in contrast, the instant Auto-Owners policy clearly does not contain a limitation of liability provision or any language indicating a limitation, either within the policy or in the declarations, and is thereby distinguished from the cases cited by Auto-Owners. A review of the specific policy language in each of these cases graphically highlight the failure of petitioner to incorporate a simple, definitive clause universally used throughout the industry in policies which actually do limit liability. The *ex post facto* attempt by Petitioner to argue the limitation of liability without the inclusion of these standard clauses or other unambiguous language is weakened when one actually looks at the case law.

In State Auto Insurance Company v. Stinson, 142 F.3d 436, 1998 WL 124051 (6th Cir. Ky 1998), Circuit Court opinion out of Kentucky, more than one vehicle insured under the policy was involved in the accident precipitating the lawsuit. The contract contained a liability coverage provision which stated:

> Regardless of the number of covered "autos," "insureds," premiums paid, claims made or **vehicles involved in the "accident"**, the most we will pay for the total of all damages and "covered pollution cost" or expense combined resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations. (emphasis added).

The court further states that "the declarations section in the policy **clearly** established a $100,000.00 limit on liability, again providing in plain terms that $100,000.00 is 'the most we will pay for any one accident or loss'." *Id.* at **2. This language is clearly distinguishable from the language of the Auto-Owners policy. Nowhere within the Auto-Owners policy is there any language limiting liability when more than one insured vehicle is involved in any one loss, nor is there any "clear" limitation of liability language contained within the declarations. This case demonstrates how easy it would have been for Auto-Owners to include this language within their policy, eliminating any ambiguity. Auto-Owners chose to draft a policy which does not provide this type of limitation of liability language. Instead, Auto-Owners chose to draft a policy which provides separate coverage for each vehicle, each occurrence.

In Weimer v. Country Mutual Insurance Co., 575 N.W.2d 466, n.6 (Wis. 1998), Country Mutual's policy was similar to that of Auto-Owners in that it instructed the reader to refer to the declarations to ascertain the coverage available.

The relevant language contained in the body of the policy stated as follows:

1. **Regardless of the number of** covered autos, insured, claims made or **vehicles involved in the accident**, our limit of liability is as follows:

a. The most we will pay for all damages resulting from bodily injury to any one person caused by any one accident is the limit of Bodily Injury Liability **shown in the declarations** for "Each Person."

b. Subject to the limit of Each Person the most we will pay for all damages resulting from bodily injury caused by any one accident is the limit of Bodily Injury Liability **shown in the declarations** for "Each Accident."

Id.

The Country Mutual Declarations, starkly in contrast to Auto-Owners Declarations, clearly states in the heading the per person/per occurrence coverage limits of $100/300, before any vehicles are listed. The Country Mutual declarations is clearly distinguishable from the Auto-Owners Declarations where coverage is provided as to each vehicle, each occurrence. The Auto-Owners policy does not include a limitation of liability clause, whether single limits or per person/per occurrence, regardless of the number of vehicles involved in the accident, as provided by the Country Mutual policy in Weimer. The Wisconsin court held, applying the limitation of liability clause, that the available coverage was limited to the policy limits of $100,000.[1]

[1] Weimer also involved an issue of whether the policy limits had been tendered and whether Weimer was entitled to post judgment interest. There had already been a judgment entered in excess of the policy limits. The Court held that

The policy in Shamblin v. Nationwide Mutual Insurance Co., 332 S.E.2d 639 (W. Va. 1985) also contained clear language limiting liability within the policy and declarations. Petitioner did not fully cite the relevant language in it's brief. This case involved three vehicles insured under one policy. *See id.* at 640. The relevant language of the Nationwide policy was as follows:

> **Regardless of the number of** . . .(4) **automobiles to which this policy applies,** the company's liability is limited as follows:
>
> Coverage C - 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 …

Id. at n.3.

The Declarations page of the Nationwide policy indicates that the limits of coverage are $100,000 limit for each person, $300,000 limit for each occurrence. *See id.* at 640. The West Virginia state court held the language limited Aetna's liability to $100,000.00. *See id.* at 646. Shamblin is different in kind from Auto-Owners because the Auto-Owners policy does not contain, either in the main body of the policy or in the declarations, any similar limiting provision.

Suh v. Dennis, et al, 614 A.2d. 1367, 1370 (N.J. Super. 1992), another state case relied on by Auto-Owners, involved multiple vehicles covered under a single

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Country Mutual was only liable for payment of the judgment up to the $100,000 limit provided for in the policy.

policy. The Aetna policy contained a single limit of liability clause. The relevant policy language stated:

> 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 at 1370.

The Declarations page then stated as follows:

Coverages	Covered Autos	Limit
	(Entry of one or more of the symbols from three shows which are are [sic] covered).	"**The most we will pay for any one accident or loss**"
Liability Insurance	7,8,9	$500,000 per accident

Id.

The New Jersey state court held that the Declarations page clearly set forth the maximum liability as $500,000. The court limited Aetna's liability to the single limit of $500,000 set forth in the policy. Suh is opposite from the instant case in that Auto-Owners chose in the instant case not to include such a single limits clause. The Auto-Owners policy defines each of the eight vehicles as an "automobile" and sets forth coverage for eight separate vehicles including the two vehicles involved in the December 7, 1996, loss, of $750,000 separately for each vehicle, each occurrence.

The Michigan state court opinion relied upon by Auto-Owners of Inman v. Hartford Insurance Co., 346 N.W.2d 885 (Mich. Ct. App. 1984), involved an automobile fleet insurance policy with a clear "per person" limitation of liability. The relevant language of the Hartford policy was as follows:

> Limits of Liability
>
> **Regardless of the number of** (1) insured under this policy, (2) persons or organizations who sustain bodily injury of property damage . . .(4) **automobiles to which the policy applies**, the company's liability is limited as follows:
>
> Coverage C - 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** . . .**sustained by one person as the result of any one occurrence**; but subject to the above provisions respecting 'each person', the total liability of the company for all damages. . .shall not exceed the limit of bodily injury liability stated in the schedule as applicable to 'each occurrence.'

Id. at 886. (emphasis added)

The schedule referred to in the policy then lists the per person limit of $100,000. *See id.* at 887. The Michigan state court concluded, "The stated limit of liability is exact. . .Therefore, the policy limit of $100,000.00 must be enforced." *See id.* at 888. The Hartford policy read with the declarations page provided for a limitation of liability, in contrast to the Auto-Owners policy which does not include any such limitation provision anywhere within the policy or declarations. The Auto-Owners policy or

declarations does not provide any limitation of liability where more than one covered vehicle is involved.

Auto-Owners worded their policy and formatted their declarations such that the limits of coverage listed were available individually to each of the two vehicles involved in the December 7, 1996, accident. The language of the Auto-Owners policy is markedly different from the language utilized in each of the opinions cited by Petitioner in that there is NO clear language limiting liability when more than one vehicle is involved in any one loss. Each of the state cases relied on by Auto-Owners, none of which are binding on this Court, are easily distinguishable from the instant case based on the respective language of the policies involved in those cases. Each of the policies of the cases relied upon by Auto-Owners contained a limitation of liability, either within the policy itself, or in the declarations, or both. Auto-Owners chose not to include a limitation of liability clause, either single limits or each person/each occurrence, regardless of the number of vehicles involved.

Auto Owners attacks the logic and legal reasoning of the Federal District Court, Middle District of Florida, yet consistently omits in their discussion of the case law the specific limitation of liability clauses upon which the cited decisions revolve. The reason Auto-Owners fails to discuss the relevant policy language in the cases it relied upon is because the lack of any limitation of liability clause in the Auto-Owners policy vitiates the precedental value of all of the cited cases and exposes to clear view

the failure of Auto-Owners to utilize a clause to limit liability. Auto-Owners now, after the fact, is requesting this Court to find a liability limitation where none exists. Every reported case relied upon by Auto-Owners utilized clear limitation of liability language, such as "**regardless of the number of vehicles involved**" or "**the most we will pay for any one accident or loss is** (amount)."

Auto-Owners utilized the policy language they chose, yet seeks to contort language of other cases involving policies which contain clear limitation of liability clauses that Auto-Owners chose specifically not to use. Auto-Owners' strained interpretation of the language and case law should not deprive a catastrophically injured plaintiff of coverage. Whether the policy language clearly provides coverage, or there is ambiguity, the result is the same that Respondent is entitled to recover $1,500,000 under the Auto-Owners policy. Respondent respectfully request this Honorable Court to resolve the certified questions in favor of coverage for this loss.

CONCLUSION

The answer to the first certified question is 'No.' The policy itself separately defines both the tractor and the trailer as "automobiles" and the policy and declarations repeatedly and consistently reference coverage as to "each vehicle." A complete reading of the Auto-Owners policy provides $750,000.00 coverage for each of the two vehicles involved in the December 7, 1996 loss. Auto-Owners chose to consistently refer to the tractor and the trailer as separate vehicles in both the policy and declarations and cannot ask this Court to rescue them from their own hand and rewrite the policy to create limitation where none exists when two vehicles are involved in a loss.

The answer to the second certified question is whether there is one or two or more occurrences, each vehicle involved in the loss is separately covered under the policy for $750,000.00. The key question is whether or not the policy is ambiguous and if it is, it must be interpreted in favor of coverage. Ambiguity exists based on the policy's failure contain a specific provision limiting liability when more than one covered vehicle is involved in a loss. This ambiguity is further exacerbated by Auto-Owners failure to include a limitation of liability clause, either single limits or per person/per occurrence, which would have resolved the ambiguity. The Federal District Court, Middle District of Florida, properly applied Florida Law to the unique facts of this case and was correct in finding ambiguity in Auto-Owners' policy and

in granting Summary Judgment for Respondent. Respondent respectfully requests this Court to affirm the Order of the District Court.

Respectfully Submitted,

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THOMAS J. FARKASH, ESQ.
Florida Bar No.: 216631
Attorney for Respondent,
Karen Anderson
Fine, Farkash & Parlapiano, PA
622 NE First Street
Gainesville, Florida 32601
telephone: (352)376-6046
facsimile: (352)372-0049

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Respondent have been furnished via U.S. mail to CHARLES B. SCHROPP, ESQUIRE, Suite 2600, 401 East Jackson Street, Tampa, Florida 33602 on this ____ day of _________________, 1999.

____
THOMAS J. FARKASH, ESQ.
Florida Bar No.: 216631
Attorney for Respondent,
Karen Anderson
Fine, Farkash & Parlapiano, PA
622 NE First Street
Gainesville, Florida 32601
telephone: (352)376-6046
facsimile: (352)372-0049