IN THE SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY, Petitioner/Defendant, v. KAREN ANDERSON, Respondent/Plaintiff.	CASE NUMBER: 95,337

ON A CERTIFIED QUESTION FROM
THE ELEVENTH CIRCUIT COURT OF APPEALS

REPLY BRIEF OF PETITIONER/DEFENDANT
AUTO-OWNERS INSURANCE COMPANY

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CERTIFICATE OF TYPE SIZE AND STYLE

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.

TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE ACCIDENT CONSTITUTED ONE OCCURRENCE; THEREFORE, ONLY ONE POLICY LIMIT IS AVAILABLE FOR THAT SINGLE OCCURRENCE UNDER THE UNAMBIGUOUS TERMS OF THE AUTO-OWNERS POLICY 4

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CITATIONS

CASES **PAGE**

American Indemnity Company v. McQuaig,
435 So. 2d 414 (Fla. 5th DCA 1983) 11, 12

Bartholomew v. Insurance Company of North America,
502 F.Supp. 246 (D.C.R.I. 1980),
affirmed 655 F.2d 27 (1st Cir. 1981) 11

Davis v. Crown Life Insurance Company,
696 F.2d 1343 (11th Cir. 1983) 8

Greer v. Associated Indemnity Corporation,
371 F.2d 29 (5th Cir. 1967) 9

Loerzel v. American Fidelity Fire Ins. Co.,
120 N.Y.S.2d 159 (N.Y. Sup. Ct. 1952),
aff'd, 118 N.Y.S.2d 180 (N.Y.App.Div. 1952) 9

Nat. Merchandise v. United Serv. Auto. Ass'n,
400 So. 2d 526 (Fla. 1st DCA 1981) 6

State Auto Insurance Company v. Stinson,
142 F.3d 436, 1998 WL 124051 (6th Cir. 1998) 5, 6

Suh v. Dennis,
614 A.2d 1367, 1370 (N.J. Super. 1992) 5, 6

Weimer v. Country Mut. Ins. Co.,
575 N.W.2d 466 (Wis. 1998) 5, 6

STATEMENT OF FACTS

Auto-Owners notes that Plaintiff, in her Statement of the Facts, has attempted to disguise contested legal argument as undisputed factual statements.[1] For example, Plaintiff states the Auto-Owners policy in effect at the time of the loss provided coverage in the amount of $750,000 for each of the two vehicles involved in the loss (SAB 2). While this may be Plaintiff's legal position in this case, it is certainly not a fact. The same holds true for Plaintiff's assertion that "[t]his case arises out of ambiguity in the language of the policy and declarations concerning the amount of coverage available to compensate Respondent for her injuries incurred in this loss" (SAB 3). Again, this is Plaintiff's legal position, not a fact. Auto-Owners denies that its policy language is ambiguous.

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[1] Auto-Owners relies on the same designations as in its Initial Brief. In addition, Auto-Owners designates references to its Initial Brief in the Supreme Court by the prefix "SIB," and references to Plaintiff's Answer Brief in the Supreme Court by the prefix "SAB."

SUMMARY OF THE ARGUMENT

Plaintiff contests neither the unanimity nor the correctness of the existing authority that holds only one policy limit is available where there is but a single occurrence involving multiple insured vehicles. Her attempts to distinguish these cases on the basis of perceived differences in policy language fail.

Plaintiff claims the absence of a "regardless clause" in the Auto-Owners policy renders the policy ambiguous. Auto-Owners' policy provision, however, makes clear the **only** factor affecting Auto-Owners' liability limits is the number of occurrences. That the provision does not list every situation having **no** effect on Auto-Owners' limits of liability is irrelevant.

Plaintiff's assertion that the alleged ambiguity in this case is created by the format of the Declarations is similarly misguided. Plaintiff essentially argues, without supporting authority, that if the insurance policy says something twice (*i.e.*, in the Declarations and the Combined Limit of Liability Endorsement), the statements cancel each other out. When the Combined Limit of Liability Endorsement is read substituting the limits of liability set forth in the Declarations as the policy instructs, the policy reads, "Combined liability of $750,000 each occurrence is the most we will pay for all damages." There is no ambiguity.

Plaintiff also attempts to create a "separability clause" where none exists in order to interpret the policy to mean that each vehicle is separately covered for $750,000 for each occurrence for each vehicle involved in the occurrence. In fact, Auto-Owners' limitation of liability provision is the very antithesis of a "separability clause." This provision which states 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" precludes Plaintiff's proposed interpretation. Auto-Owners' policy can have only one meaning: a single limit of liability in the amount of $750,000 applies to each occurrence, regardless of the number of covered vehicles involved, because charging premiums for more than one automobile does not increase the limit of liability as stated for each occurrence.

The question for this Court is whether the single accident resulting in Plaintiff's injuries constituted one or two occurrences. The method for determining what constitutes an occurrence when that term is undefined is to identify the cause of the injury. Here, there is no dispute that both the tractor and trailer acted in concert to cause the accident. Thus, the single accident between Plaintiff's vehicle and the tractor-trailer rig constituted but one occurrence, and, thus, only one policy limit is available under the terms of the Auto-Owners policy.

ARGUMENT

I. THE ACCIDENT CONSTITUTED ONE OCCURRENCE; THEREFORE, ONLY ONE POLICY LIMIT IS AVAILABLE FOR THAT SINGLE OCCURRENCE UNDER THE UNAMBIGUOUS TERMS OF THE AUTO-OWNERS POLICY.

In its Initial Brief, Auto-Owners demonstrated the existing authority throughout the country is essentially unanimous in holding only one policy limit is available where there is but a single occurrence involving multiple insured vehicles. Plaintiff disputes neither the unanimity nor the correctness of these decisions. Instead, she attempts to distinguish these cases based on what she perceives as critical differences in the policy language. Plaintiff, however, relies on distinctions without a difference.

Plaintiff contends that Auto-Owners' policy provides for $750,000 coverage for each of the covered automobiles (*i.e.*, the tractor and the trailer) involved in the accident because Auto-Owners's Combined Limit of Liability Endorsement does not

contain preliminary language such as "regardless of the number of vehicles involved" (SAB 27). Similar language was used in the policy at issue in *State Auto Insurance Company v. Stinson*, 142 F.3d 436, 1998 WL 124051, **2 (6th Cir. 1998), which 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 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.[2]

The "regardless clause" which Plaintiff finds so determinative is nothing more than a list of examples, and does not alter the basic language of the policy in *Stinson*, stating that "the most we will pay" for damages from one accident is a single policy limit. Plaintiff, in essence, is arguing that a plainly stated limitation of coverage in an insurance policy will not be enforced unless it is accompanied by a "regardless clause" identifying every possible example of circumstances which do **not** affect the coverage limitation. No meaningful distinction exists, however, between a policy, such as Auto-Owners', that says, "The most we will pay is **_____**," and one that says, "Regardless of the circumstances, the most we will pay is **_____**."

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[2] Essentially the same language appears in the policies at issue in *Weimer v. Country Mut. Ins. Co.*, 575 N.W.2d 466, n. 6 (Wis. 1998); and *Suh v. Dennis*, 614 A.2d 1367, 1370 (N.J. Super. 1992).

Further, the Auto-Owners Combined Limit of Liability Endorsement operates in essentially the same way as the quoted language in the *Stinson* policy:

> The limit of liability stated in the Declarations in 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). Auto-Owners' provision makes it clear that the **only** factor affecting Auto-Owners' limit of liability is the number of occurrences. The provision then reinforces this message by explaining that charging premiums for more than one automobile does not increase the limits of liability.[3] That the provision does not list every situation having no effect on Auto-Owners' limits of liability is irrelevant. Such an undertaking would have been impossible as well as pointless.

It is also apparent Plaintiff misinterprets the "regardless of the number of vehicles involved" language in policies such as that in *Stinson*, *Weimer* and *Suh* to mean the number of **covered** vehicles involved in the accident. This interpretation flies in the face of the fundamental principle of construction that requires insurance

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[3] Plaintiff's reliance on *Nat. Merchandise v. United Serv. Auto. Ass'n*, 400 So. 2d 526 (Fla. 1st DCA 1981), to bolster her argument that the Auto-Owners policy is ambiguous because it is silent as to a controlling provision – namely, a provision limiting liability when more than one insured vehicle is involved in any one loss – is unavailing (SAB 17). As Auto-Owners demonstrated at SIB 32, the policy is not silent on the issue because it determines limits on a per occurrence basis rather than on a per insured automobile basis. Such a provision would be superfluous in a policy that limits the insurer's liability in this fashion.

policies to be read and interpreted as a whole. Each of these policies differentiates between covered and non-covered vehicles by using the defined term "autos" to refer to covered vehicles. In fact, the "regardless clauses" in all of these cases make this distinction by listing both "covered 'autos'" and "vehicles."

As Auto-Owners pointed out at SIB 26, the phrase "vehicles involved in the accident" refers to vehicles not covered by the policy that are involved in the accident. This language would come into play if, for example, a covered auto is involved in an accident with several other vehicles. However, it adds nothing to an understanding of the number of policy limits available when multiple covered "autos" are involved in the accident or occurrence.

Plaintiff also asserts Auto-Owners' Combined Limit of Liability Endorsement is ambiguous because it does not state "the most we will pay for any one accident or loss is (amount)" (SAB 8, 27). Again, Plaintiff's criticism misses the mark. No substantive difference exists between a policy provision which includes the above-quoted language and Auto-Owners' policy language which states: "The limit of liability stated in the Declarations is the most we will pay for all damages . . . ." (R. 1-26-p.4). 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).

Plaintiff argues at SAB 16 that alleged ambiguity is created in this case by the format of the Declarations. What Plaintiff is really arguing is that if the insurance policy says something twice (*i.e.*, in the Declarations and the Combined Limit of Liability Endorsement), the statements cancel each other out. Not surprisingly, Plaintiff has failed to cite any authority for that proposition. Moreover, it is apparent the Combined Limit of Liability Endorsement relies on the principle of substitution. In other words, in reading the Combined Limit of Liability Endorsement, one is instructed to substitute the limits of liability set forth in to the Declarations. With that substitution made, the Endorsement actually reads, "Combined liability of $750,000 each occurrence is the most we will pay for all damages . . . ." There is no ambiguity.[4]

Plaintiff would have this Court ignore the plain language of the policy and interpret the Declarations to mean that "each vehicle is covered for $750,000 for each occurrence that each vehicle is involved in" (SAB 9). Plaintiff, however, faced with a unanimous body of case law to the contrary, implicitly concedes she can accomplish

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[4] Plaintiff's reliance on *Davis v. Crown Life Insurance Company*, 696 F.2d 1343 (11th Cir. 1983), is misplaced. *Davis* involved ambiguity created when a controlling provision in a group health insurance master policy was not recited in the certificate of insurance. Only the certificate of insurance and not the master policy was available to the insured employee. *Id.*, at 1344. In other words, there were two separate and contradictory documents of which the insured only had one. Here, however, there was only one policy and the insured had a complete copy. *Davis* is inapposite.

this result only if the Auto-Owners policy contains a separability clause such as that found in *Greer v. Associated Indemnity Corporation*, 371 F.2d 29 (5th Cir. 1967), and *Loerzel v. American Fidelity Fire Ins. Co.*, 120 N.Y.S.2d 159 (N.Y. Sup. Ct. 1952), *aff'd,* 118 N.Y.S.2d 180 (N.Y.App.Div. 1952). (*See* SAB 9-13). However, when the language of an actual separability clause is compared to the language in Auto-Owners Declarations, Plaintiff's argument is doomed to failure. The separability clause in the *Greer* policy stated:

> 'Two or More Automobiles ('Separability Clause') 'When two or more automobiles are insured thereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.'

Id., at 32, n. 9.[5] The separability clause is a far cry from Auto-Owners' Declarations which simply states, "Combined Liability $750,000 EA OCC."

Contrary to Plaintiff's contention at SAB 10, there is no language in the Auto-Owners policy that can even be fairly interpreted as having the effect of a separability clause. There is, however, plain language that precludes such an interpretation. The provision in the Combined Limit of Liability Endorsement that states, "Charging premiums under this policy for more than one automobile does not increase the limit

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[5] The *Loerzel* policy contained similar language. *See Loerzel*, 120 N.Y.S.2d at 161.

of our liability as stated for each occurrence . . . ." is the very antithesis of a separability clause. No insurance policy that contemplates providing separate policy limits for each covered vehicle involved in a single occurrence could logically contain such a provision.

In light of this provision, the Declarations in the Auto-Owners policy can have only one meaning: a single limit of liability in the amount of $750,000 applies to each occurrence, regardless of the number of covered automobiles involved, because charging premiums for more than one automobile under this policy does not increase the limit of liability as stated for each occurrence. Here, even though Auto-Owners charged premiums for both the tractor and the trailer, doing so did not increase the $750,000 limit of liability for each occurrence. Thus, the first part of the Eleventh Circuit's certified question – whether the tractor-trailer rig constituted one or two covered automobiles – is irrelevant. The answer to this question does not affect the coverage analysis for a policy, such as this one, that limits the insurer's liability on an "each occurrence" basis.

The issue for this Court's determination is contained in 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. Auto-Owners respectfully submits the single accident in this case resulted in only one occurrence.

Although the Auto-Owners policy does not define "occurrence," the method for determining what constitutes an occurrence is to identify the cause of the injury or damages. *See American Indemnity Company v. McQuaig*, 435 So. 2d 414 (Fla. 5th DCA 1983) ("*McQuaig*").

In *McQuaig*, two deputy sheriffs (Pope and McQuaig) had responded to an incident at the Croskey's residence. Croskey, the homeowner, fired three gun shots at the deputies, injuring them. Croskey's homeowner's policy provided personal liability coverage in the amount of $100,000 for "each occurrence." *Id.*, at 414-415. American Indemnity settled with Deputy Pope for the total limits of the liability coverage of $100,000. Deputy McQuaig then filed a declaratory judgment action against American Indemnity seeking a determination that the limits of liability under the policy had not been exhausted by the payment to Pope. *Id.*, at 415.

The insurer appealed the adverse summary judgment, contending there was only one occurrence, and that the $100,000 payment to Pope had exhausted the policy limits. The appellate court affirmed the summary judgment in favor of McQuaig. The court stated that "the inquiry is whether there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages." *Id.*, at 415, citing *Bartholomew v. Insurance Company of North America*, 502 F.Supp. 246, 251 (D.C.R.I. 1980), *affirmed* 655 F.2d 27 (1st Cir. 1981). The

court found there were three separate occurrences because Croskey could have stopped (interrupted) his injurious conduct after each shot. *Id.*

Here, by contrast, the trial court's order stated, "There is no dispute that both the tractor and trailer **acted in concert** to cause the accident . . . ." (R I-28-pp. 2-3, emphasis added). Stated another way, the tractor and trailer, acting in concert, constituted but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages. *See McQuaig*, 435 So. 2d at 415. Nothing in the record supports a finding that the trailer, firmly affixed as it was to the back of the tractor, constituted a separate and independent cause of the single accident.

In its Initial Brief, Auto-Owners noted that throughout this case, Plaintiff has failed to come to grips with a fundamental problem with her case – the "occurrence" in this case was the accident. There was only one accident here, and only one occurrence (SIB 37). Plaintiff has apparently realized the problem and is **now** trying to remedy it by attempting to change the previously undisputed facts. She now contends, "**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" (SAB 14, emphasis added). Plaintiff's

belated attempt to fabricate two occurrences from what no one has disputed was a single accident is not only contrary to the undisputed facts, but also defies logic.[6]

The undisputed facts in this case are susceptible to only one interpretation: the single accident between Plaintiff's vehicle and the tractor-trailer rig constituted but one occurrence, and only one policy limit is available for that single occurrence under the terms of the Auto-Owners policy.

CONCLUSION

For the reasons stated above and in its Initial Brief, 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

[6] Before the Middle District, Plaintiff repeatedly acknowledged that the accident was a single occurrence (R. I-10-p.3; I-18-p.4. *See also* SIB 37).

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, on this 16th day of July, 1999, a copy of the foregoing Reply Brief of Petitioner/Defendant Auto-Owners Insurance Company has been sent via U.S. Mail to:

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