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IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Defendant/Petitioner,

v.

ANGELA STECK,

Plaintiff/Respondent.

SUPREME COURT
CASE NUMBER: SC01-464

SECOND DISTRICT
CASE NUMBER: 2D00-932

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Blue Cross's[1] statement of facts is generally accurate, except that its description of the holding of the Second District Court of Appeal is superficial and therefore misleading. Blue Cross implies that the Second District held that intoxication exclusions apply as a general matter only to "direct" injury to the insured's biological systems, such as acute alcohol poisoning or liver damage, and not to "indirect" injuries, such as accidental injuries caused by the behavior of an intoxicated individual. That implication is incorrect.

The Second District's holding was based on the lack of specificity in the particular language utilized by Blue Cross in the exclusion incorporated into Ms. Steck's policy; its opinion expressly states: "Blue Cross's exclusionary language in Ms. Steck's policy was not specific enough to exclude from coverage indirect injuries as well as direct injuries." (A.4) Moreover, the Second District based its determination that Blue Cross's policy lacked the necessary specificity on the controlling authority of a decision of this Court which had applied functionally identical exclusionary wording to virtually identical facts.

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[1] Petitioner, Blue Cross and Blue Shield of Florida, Inc. will be referred to in this brief as "Blue Cross," and Respondent, Angela Steck, as "Ms. Steck." References to the appendix will be designated by the prefix ("A.") and to Blue Cross's jurisdictional brief by the prefix ("I.B.").

SUMMARY OF ARGUMENT

There is no conflict of decisions. The Second District in this case expressly based its decision upon the particular language of the intoxication exclusion in Ms. Steck's policy, and applied the controlling authority of a prior decision of this Court which had applied a functionally identical exclusion to virtually the same facts and concluded that the exclusion was not sufficiently specific to bar coverage for accidental injuries. The Second District also recognized that a more comprehensively worded exclusion could exclude such injuries. The allegedly conflicting Fifth District decision does not even specify the language of the exclusion involved in that case, although it is clear from context that it is different from the exclusion construed by the Second District. Moreover, that decision did not adjudicate the applicability of the exclusion, but rather involved whether the insurer had waived its right to rely on policy exclusions by failing to honor a claim deadline.

Blue Cross's claim that other Florida courts have "ceased to rely on" the controlling *Mason II* decision is inaccurate. To the contrary, most subsequent policies have broadened their exclusions to expressly exclude indirect injuries in order to comply with the holding of *Mason II.* Blue Cross is simply asking the Court to rewrite its policy after the fact.

ARGUMENT

I. THERE IS NO CONFLICT OF DECISIONS.

Blue Cross seeks discretionary review of a Second District decision holding that a health insurance policy it issued to Ms. Steck did not exclude coverage for medical bills incurred when Ms. Steck, a pedestrian, was struck by a motor vehicle while intoxicated. The Second District found that Blue Cross's exclusion of benefits for "a condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician," was not specific enough to exclude indirect injuries, *e.g.*, accidental injuries caused by the behavior of the person while intoxicated, such as those sustained by Ms. Steck.

The Second District had controlling authority for this conclusion - - a decision of this Court which applied a functionally identical exclusion to virtually the same facts. *Mason v. Life & Casualty Insurance Company of Tennessee*, 41 So. 2d 155 (Fla. 1949)("*Mason II*"),[2] involved an intoxicated woman who was riding in a taxi cab outside of Pensacola, Florida, when she ordered the driver to her out on a dark deserted stretch of road in the early morning hours. While walking on the paved portion of the road in her inebriated condition, she was hit by a truck properly using

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[2] The facts of *Mason II* are set out in a companion case, *Mason v. Life & Casualty Insurance Company of Tennessee*, 41 So. 2d 153 (Fla. 1949) ("*Mason I*").

the highway and died as a result of her injuries. In *Mason II*, this Court held that an insurance policy which excluded coverage for "loss or injury resulting from the use of intoxicating liquors" was insufficiently specific to allow the insurer deny coverage based on this exclusion. The Second District noted that Blue Cross's exclusion was "like the exclusionary language of *Mason II*" and that "consequently, *Mason II* is controlling." (A.4) Blue Cross does not claim that *Mason II* is distinguishable or that the Second District misinterpreted this decision.

Notwithstanding the Second District's express reliance on a controlling, on-point decision of this Court, Blue Cross argues that this Court has jurisdiction to review the decision based on purported conflict with the Fifth District decision in *Blue Cross and Blue Shield of Florida, Inc. v. Ming*, 579 So. 2d 771 (Fla. 5th DCA 1991) ("*Ming*"). There are at least two distinct reasons why this claim fails. First, as previously noted, the Second District decision was expressly predicated on the particular language of the exclusion incorporated into Ms. Steck's policy, while the *Ming* decision does not even disclose the wording of the exclusion involved in that case. A decision predicated on the specific language of a particular policy exclusion cannot expressly and directly conflict with a decision involving an exclusion from another policy whose wording is unspecified. Second, the *Ming* opinion

demonstrates on its face that the issue decided there was not the applicability of an intoxication exclusion, but rather whether the insurer had waived the right to assert any policy exclusions by failing to address the claim in a timely fashion. Once again, a decision cannot be in express and direct conflict with another decision in which the allegedly conflicting point of law was not even at issue.

Ming involved a health insurance policy issued to an insured who, while driving drunk, caused an accident which both injured him and caused a death for which the insured was ultimately convicted of the felony offense of manslaughter or vehicular homicide. The *Ming* opinion states that the policy contained exclusions for injury resulting from an insured's participation in a felony and from being drunk, but does not quote the language of these exclusions. The policy also contained a provision which stated that the insurer "has sixty (60) days to make a decision on your claim after we receive the claim." *Ming, supra,* 579 So. 2d at 772.

A doctor who had treated the insured after the accident submitted a claim under the policy. Blue Cross did not make a decision on the claim within the 60-day period, although it subsequently denied the claim based on the exclusions. The doctor sued and obtained a summary judgment. On appeal, the Fifth District reversed with directions to enter summary judgment for the insurer. The opinion makes it clear that

the applicability of the exclusions was not contested and that the only issue was whether the failure to make a decision on the claim within 60 days precluded Blue Cross from thereafter refusing to pay.

The Second District's opinion was expressly based on the wording of Mrs. Steck's policy, and in particular the absence of language extending the exclusion to injuries "indirectly" caused by intoxication; the *Ming* opinion does not even disclose the wording of the exclusions involved there. In its jurisdictional brief, Blue Cross first attempts to deal with this obvious distinction between the cases by ignoring it and taking the position that conflict exists merely because of the difference in result. However, the suggestion that policy language does not matter is belied by the Second District decision, which expressly acknowledges that a properly worded intoxication exclusion can extend to the indirect effects of alcohol abuse. In fact, the Second District cited the exclusionary language of the policy examined by this Court in *Harris v. Carolina Life Ins. Co.,* 233 So. 2d 833 (Fla. 1970)("*Harris*"), and pronounced it "an excellent example of the type of exclusion Blue Cross clearly thought it had provided but did not." (A.5-6). The exclusion at issue in *Harris* provided for the following exceptions from coverage:

> "Death. . . resulting **directly or indirectly wholly or partially** from any of the following causes are risks not assumed under this policy: .

> . .c. Bodily injury or under the influence of alcohol or drug. . . . "
> (emphasis added).

Inasmuch as the Second District expressly acknowledged that a differently worded exclusion would pass muster under *Mason II,* Blue Cross's claim that conflict exists merely because the Second District found coverage is meritless.

Blue Cross also states on several occasions that both this case and *Ming* involved policies issued by the "same insurer," thereby suggesting that the policy language may have been the same. Even if that were correct, this would at most create an inherent or implied conflict which cannot serve as a jurisdictional basis for discretionary review under Fla. R. App. P. 9.030(a)(2)(A)(iv). *See Dept. of Health v. Nat. Adoption Counseling,* 498 So. 2d 888 (Fla. 1986). However, it is clear the exclusions are not the same. The exclusion in Ms. Steck's policy is a combined exclusion for conditions resulting from either alcohol or drug abuse. The description of the exclusion in the *Ming* opinion makes no reference to drugs; accordingly, while the specific language employed in the *Ming* exclusion involved is unknown, it was not the same as that used in Ms. Steck's policy.

The second fundamental reason why no conflict exists is that *Ming* did not decide the same point of law as the Second District below. The *Ming* opinion on its

face demonstrates that the applicability of the policy's exclusions was not in dispute, and that the Fifth District considered the sole issue presented to be whether the insurer had forfeited its right to rely on policy exclusions by failing to meet the policy's deadline for responding to claims. Specifically, the *Ming* court stated:

> Without considering the insured's "standing defense" the facts relating to the insured's injuries resulting from his drunk condition and felonious conduct are not in dispute and both exclusions obviously apply.
>
> Apparently the decision below results from the failure of the insurer to make an explained denial during the 60 day period. This appears to mean that the policy has been interpreted as denying the insurer the right to defend a claim based on a coverage exclusion if the insurer fails to make an explained denial within the 60 day period and this interpretation is simply in error. 579 So. 2d at 772.

Since *Ming* and the decision below adjudicated different issues, there is no express and direct conflict between their holdings.

II. THIS COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY REVIEW.

Even if jurisdiction were presumed to exist merely because *Ming* reached a different result, albeit on different issues and different facts, this Court should decline to exercise discretionary review. Blue Cross's jurisdictional brief argues that this Court should grant review by characterizing the Second District decision as an aberration, and stating that "every Florida court construing drunkenness exclusions

in life or health insurance policies. . . has ceased to rely on *Mason II.*" (I.B. 7). Actually, the reverse is true. Since the decision in *Mason II,* Florida insurers wishing to extend their intoxication exclusions to exclude the indirect effects of alcohol abuse have incorporated language into those exclusions expressly informing the insured that losses caused "directly or indirectly" by intoxication are excluded. For example, in *Harris* this Court construed an exclusion which expressly excluded injuries which resulted "directly or indirectly, wholly or partially" from being under the influence of alcohol. *Rivers v. Conger Life Insurance Company,* 229 So. 2d 625 (Fla. 4th DCA 1969), the other decision cited by Blue Cross in its jurisdictional brief, similarly involved an exclusion for injury which results "directly or indirectly" while the insured is under the influence of alcohol. These decisions heed *Mason II*'s admonition that an intoxication exclusion must expressly exclude the indirect effects of alcohol abuse in order to exclude accidental injuries. Blue Cross made this same argument to the Second District, which noted that, in those cases which had applied the intoxication exclusion to accidental injuries, the difference in the language of the exclusions explained the differing outcome of those cases. (A.5).

Blue Cross also suggests there is significance in the fact that the Florida legislature in 1953 adopted a statute expressly authorizing health insurers to include

intoxication exclusions in their policy. This argument was also made to the Second District, which correctly pointed out that *Mason II* had assumed the validity of the intoxication exclusion, and that the statute merely codified what insurance companies had previously excluded.

No general principle of public policy is involved in this case. Rather, Blue Cross is simply asking this Court to accept jurisdiction to rewrite its policy after the fact to, in the words of the Second District, transform its exclusion into the exclusion Blue Cross "thought it had provided but did not." (A.6). This Court should decline the invitation.

CONCLUSION

Discretionary review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that, on March 20, 2001, a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished via U.S. Mail to:

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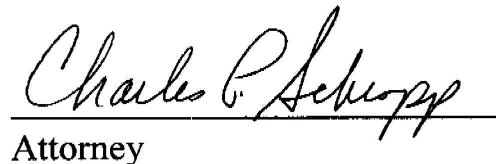

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CERTIFICATE OF COMPLIANCE

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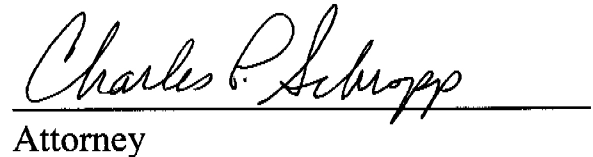

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Appellant,

v.

ANGELA STECK,

Appellee.

Case No. 2D00-932

Opinion filed January 17, 2001.

Appeal from the Circuit Court for Hillsborough County; Sam D. Pendino, Judge.

Charles C. Lane of Lau, Lane, Pieper, Conley & McCreadie, P.A., Tampa, for Appellant.

Charles P. Schropp of Schropp, Buell & Elligett, P.A., Tampa, for Appellee.

PER CURIAM.

Blue Cross and Blue Shield of Florida, Inc. appeals the summary judgment in favor of Angela Steck, which found as a matter of law that Ms. Steck's health insurance policy with Blue Cross covered certain hospital and medical expenses she incurred when she was hit by a vehicle while attempting to cross a busy street. We affirm.

For purposes of the summary judgment, the parties stipulated that the unfortunate accident in which Ms. Steck was involved was occasioned by her inebriated

condition. At 11:00 P.M. one night in June 1997, she stepped off a curb to cross a busy multilane highway into the path of an oncoming vehicle that had the right of way. Witnesses to the accident testified by deposition that the driver of the vehicle was not at fault and could not have avoided hitting her. Ms. Steck was hospitalized for fifty-three days, ultimately lost a leg, and incurred hospital bills in excess of $350,000. Her blood alcohol level at the time she was admitted to the hospital was more than three times the legal limit.[1]

At the time of the accident, Ms. Steck was covered by a "Conversion Option III" health insurance contract issued by Blue Cross. The policy contained an exclusion couched in the following language:

> This contract does not provide benefits for: . . . a condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician.

[Emphasis added.] When Blue Cross discovered that she was inebriated when she stepped in front of the oncoming car, it refused to pay her hospital and other health care expenses based on the quoted exclusion.

Ms. Steck then filed this breach of contract and declaratory action against Blue Cross seeking a determination that Blue Cross should pay her medical expenses under this policy. Blue Cross answered and denied any obligation to pay contract benefits based on the exclusionary language. After the issue was joined, cross-motions for summary judgment were filed. The trial court granted Ms. Steck's motion and denied Blue Cross's, citing Mason v. Life & Casualty Insurance Co. of Tennessee, 41

[1] It was probably higher at the time of the accident because she was given 4.7 liters of intravenous fluids in the half-hour period between the accident and the blood draw.

So. 2d 153 (Fla. 1949) (Mason I), and Mason v. Life & Casualty Insurance Co. of Tennessee, 41 So. 2d 155 (Fla. 1949) (Mason II). This appeal then ensued.

Mason I and Mason II were based on two different life insurance contracts but covered the same insured. Ms. Mason was intoxicated and riding in a taxicab outside of Pensacola, Florida, when she ordered the driver to stop and let her out on a dark, deserted stretch of road in the early morning hours. While walking along the paved portion of this road in her inebriated condition, she was hit by truck properly using the highway. She died as a result of her injuries. The two insurance policies paid double benefits if death resulted from accidental causes.

The policy in Mason I also stated that the accidental death benefit did not cover death "resulting directly from the use of intoxicating liquors or narcotics." Mason I, 41 So. 2d at 154 (emphasis added). The Florida Supreme Court held the exclusion inapplicable and the double benefits payable, reasoning:

> This provision of the policy is plain, simple and unambiguous and plainly refers to the effect of the use of intoxicating liquors upon the system of an assured as distinguished from acts committed by him by reason of his being under the influence of, or his mind being affected by, intoxicants. . . .
>
> To bring a cause of death within such an exception clause of a policy, the burden is on the insurer to show that the use of intoxicants by the assured was voluntary and that it was the direct cause of death.

Id. at 155 (citations omitted). Because the supreme court found that the direct cause of Ms. Mason's death was being struck by the truck, her inebriated condition was only a "remote cause." Id. at 155. Therefore, the exclusionary language of this first policy was inapplicable.

Similar, but not identical, exclusionary language in the policy in Mason II stated: "This policy does not cover . . . loss or injury resulting from the use of intoxicating liquors." Mason II, 41 So. 2d at 155 (emphasis added). The supreme court, without much explanation, held this exclusionary language also inapplicable, stating:

> We see no valid distinction between the facts of this case and the companion case referred to above [Mason I]. In our view, the judgment in this case, as was the judgment in the companion case, must be reversed because of the failure of the insurance company to show that the death of the insured was within the exception clause of the policy.

Mason II, 41 So. 2d at 155-56.

Mason I and Mason II demonstrate that two types of injuries may result from one's intoxication: direct injury, i.e., injury to biological systems of a person, such as acute alcohol poisoning or liver damage; and indirect injuries, such as accidental injuries caused by the behavior of the person while intoxicated. Ms. Mason's and Ms. Steck's injuries were clearly the latter kind--indirect injuries. The trial court found, and we agree, that the language of Ms. Steck's policy was like the exclusionary language of Mason II. Blue Cross's exclusionary language in Ms. Steck's policy was not specific enough to exclude from coverage indirect injuries as well as direct injuries. Consequently, Mason II is controlling, as the trial court concluded.

The language of insurance policies must be construed liberally in favor of the insured and strictly against the insurer who prepared the policy, and exclusionary clauses must be construed more strictly than coverage clauses. See Purrelli v. State Farm Fire & Cas. Co., 698 So. 2d 618 (Fla. 2d DCA 1997); see also Prudential Property & Cas. Ins. Co. v. Swindal, 622 So. 2d 467 (Fla. 1993); State Farm Fire & Cas. Ins. Co.

v. Deni Assocs. of Florida, Inc., 678 So. 2d 397 (Fla. 4th DCA 1996), affirmed, 711 So. 2d 1135 (Fla.1998); Florida Farm Bureau Ins. Co. v. Birge, 659 So. 2d 310 (Fla. 2d DCA 1994); Triano v. State Farm Mut. Auto. Ins. Co., 565 So. 2d 748 (Fla. 3d DCA 1990). Like the supreme court did in construing the policy language in Mason II, we must construe Ms. Steck's policy narrowly against the insurer, i.e., only direct injuries will be excluded from coverage.

Blue Cross has valiantly argued that subsequent case law and changes in the insurance statutes have shown that Mason I and Mason II are aberrations now inconsistent with controlling authorities. We do not agree. The changes in the statute merely codified what insurance companies had previously excluded, as in the Mason cases. See ch. 28027, Laws of Fla. (1953).[2] The language of the various policies that subsequent case law has interpreted is different enough from the language in Ms. Steck's policy to explain the differing outcomes of those cases. For example, the exclusionary language of the policy examined in Harris v. Carolina Life Insurance Co., 233 So. 2d 833, 833-34 (Fla. 1970),[3] is an excellent example of the type of exclusion

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[2] Chapter 28027, Laws of Florida (1953), permitted health insurers to include the following exclusionary language:

> INTOXICANTS and NARCOTICS: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administrated on the advice of a physician.

[3] The supreme court in Harris v. Carolina Life Insurance Co., 233 So. 2d 833 (Fla. 1970), did not construe any exclusionary language but instead was confronted with a petition for writ of certiorari wherein Ms. Harris claimed that the decision of the district court finding the exclusion denied coverage despite no fault on the part of the insured, Harris v. Carolina Life Insurance Co., 226 So. 2d 710 (Fla. 4th DCA 1969), conflicted with Mason v. Life & Casualty Insurance Co. of Tennessee, 41 So. 2d 153 (Fla. 1949) (Mason I). The supreme court found the Fourth District's decision did conflict with Mason I and quashed Harris, holding instead that an insurer has the burden to show that there is some causal relationship between the injury or death and

Blue Cross clearly thought it had provided but did not: "EXCEPTIONS: Death . . . resulting directly or indirectly, wholly or partially from any of the following causes are risks not assumed under this policy: . . . c. Bodily injury while under the influence of alcohol or drug. . . ."

Because the trial court properly relied on the controlling authority of the Mason cases and correctly construed the exclusionary language of Ms. Steck's policy, we affirm.

NORTHCUTT and CASANUEVA, JJ., Concur.
ALTENBERND, A.C.J., Concurs specially.

ALTENBERND, Judge, Concurring.

I fully concur in this opinion, but do not wish to leave insurance companies with the impression that a different outcome would be guaranteed if the exclusion contained the phrase "direct or indirect, wholly or partially." Section 627.629, Florida Statutes (2000), permits an insurance company to include the following exclusion in a health insurance contract:

> Intoxicants and Narcotics: The insurer will not be liable for any loss resulting from the insured being drunk or under the influence of any narcotic unless taken on the advice of a physician.

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the intoxication before the exclusion is held to be effective. See Harris, 233 So. 2d at 834-35.

I am inclined to believe that Mason I and Mason II limit such an exclusion, as explained in the majority opinion, to direct injuries. Without clearer legislative intent, I question whether a health insurance or life insurance policy that is marketed to the general public should contain an exclusion for indirect injuries occurring when the insured is "drunk."

A person is "drunk" when operating a motor vehicle if he or she has a blood alcohol level of .08 gram per alcohol per 100 milliliters of blood. See § 316.193, Fla. Stat. (2000). Even though driving under the influence is a crime in Florida, there currently is no statutory authorization for an alcohol exclusion in a Florida No-fault Automobile Insurance PIP policy. See § 627.736(2), Fla. Stat. (2000). When the no-fault laws were first enacted, the legislature did permit an alcohol exclusion in a PIP policy if the circumstances involved a conviction for DUI. See ch. 71-252, § 7, Laws of Fla. See also Travelers Indem. Co. of Am. v. McInroy, 342 So. 2d 842 (Fla. 1st DCA 1977). Experience with that exclusion caused the legislature to withdraw its authorization in 1982. See ch. 82-243, § 554, Laws of Fla.

If the legislature does not permit an indirect alcohol exclusion in a PIP policy, even though DUI is a crime, I question whether such an exclusion is or should be permissible in other types of health, life, and accident insurance. It is completely lawful for people to consume alcoholic beverages in the privacy of their home or at a social gathering. I am not convinced that the legislature intended section 627.629 to allow insurance companies to deny health insurance benefits to an insured merely because the insured had a blood alcohol level in excess of .08 at the time of an accident unrelated to an automobile. I am not convinced that parents should have no

health coverage for a teenager who sustains bodily injuries while experimenting with alcohol.

It is possible that insurance companies should be allowed to market policies with an indirect alcohol exclusion--at a lower premium--to insureds who abstain from alcohol. However, to place this exclusion into a typical health insurance policy would create more problems than it would solve.