IN THE FLORIDA SUPREME COURT
CASE NO: SC01-464

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Defendant/Petitioner,

v.

ANGELA STECK,

Plaintiff/Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 2D00-932

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PRELIMINARY STATEMENT

For purposes of this Reply Brief, Appellee, Angela Steck, will be referred to as "Angela Steck" or "Ms. Steck." Appellant, Blue Cross and Blue Shield of Florida, Inc., will be referred to as "BCBSF." References to the appendix submitted with BCBSF's initial brief will be referred to by the designation "App.," followed by the tab number of the reference. References to Ms. Steck's Answer brief will be referred to by the prefix "AB" followed by the page number of the reference.

SUMMARY OF THE ARGUMENT

Ms. Steck's argument is based upon an incorrect premise and, as a result, reaches an incorrect conclusion.

Her argument is premised upon the assertion that BCBSF could have included a broader, more expansive "drunkenness exclusion" in Ms. Steck's health insurance policy (presumably one which specifically excluded both direct and indirect results of drunkenness). Ms. Steck concludes that because BCBSF did not use such broader language, the "drunkenness exclusion" in the policy at issue only applies to the direct effects of drunkenness on her biological system.

In fact, Section 627.629, Florida Statutes prescribes the language BCBSF was required to include in its "drunkenness exclusion". Moreover, Section 627.618, Florida Statutes prohibits BCBSF from adding broader exclusionary language that would be less favorable to the insured, as Ms. Steck argued. Consequently, BCBSF included in Ms. Steck's policy the only alcohol exclusion permitted under Florida law and this Court must determine whether the legislatively authorized drunkenness exclusion for losses "resulting from the insured being drunk", excludes the "indirect" effects of drunkenness, such as injuries suffered by drunk drivers and drunken pedestrians or whether it is limited to expenses incurred to treat alcohol toxicity.

BCBSF submits that the case on which the argument for a limited application of the drunkenness exclusion is based, Mason II, was either reversed by Harris v. Carolina Life Ins. Co., 233 So.2d 833 (Fla. 1970), was wrongly decided, or its rationale has been superceded by the passage of Section 627.629, Florida Statutes. In any event, Steck and Mason II should be specifically reversed and this Court should hold that "drunkenness exclusions" in health insurance policies drafted in conformance to Florida law exclude coverage for both direct and indirect effects of an insured's drunkenness.

ARGUMENT

I. FLORIDA LAW PERMITS HEALTH INSURERS TO EXCLUDE THE INDIRECT EFFECTS OF DRUNKENNESS FROM COVERAGE UNDER THEIR POLICIES.

A. Section 627.629, Florida Statutes and Section 627.618, Florida Statutes Define The Permitted Language of a Drunkenness Exclusion

Section 627.629 permits health insurers to include in their policies an exclusion which states: ". . .The insurer will not be liable for any loss resulting from the insured being drunk . . ." Section 627.618, Florida Statutes prevents health insurers from including a broader exclusion which would have the effect of limiting coverage to

their insureds any further than is authorized by Section 627.629. Section 627.618 states:

> . . .no health insurance policy delivered or issued for delivery to any person in this state shall contain any provision respecting the matters set forth in ss. 627.619-627.629, inclusive, unless such provision is in the words in which the same appears in the applicable section, except that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording approved by the Department which is not less favorable in any respect to the insured or the beneficiary. (Emphasis supplied).

Ms. Steck's answer brief and the decision by the Steck court below fail to recognize or address the interplay of these two statutes. Ms. Steck argued that: "BCBSF is in effect asking this Court to rewrite its policy after the fact to add language it could have but did not include" (AB at 4). The Second District Court of Appeal also failed to recognize that Section 627.629 and Section 627.618 limited BCBSF's ability to craft a drunkenness exclusion more broadly than its "resulting from" language, when it held that BCBSF could have utilized the exclusionary language construed in Harris if it wished to exclude "indirect" effects of intoxication. Blue Cross and Blue Shield of Florida, Inc. v. Steck, 778 So.2d 374, 376 (Fla. 2d DCA 2001).

In short, because BCBSF chose to include a drunkenness exclusion in the policy it sold to Ms. Steck (and thousands of other insureds), it was required to state the exclusion in the language of Section 627.629 or, if it chose to use other exclusionary language, such language could not produce an exclusion less favorable to Ms. Steck than the "resulting from" language included in Section 627.629. Consequently, if Mason II remains good law, BCBSF and other Florida health insurers may not exclude the indirect effects of drunkenness from coverage under their policies.

B. A Drunkenness Exclusion For Loss "Resulting From" Drunkenness Must Logically Include Both The Direct and Indirect Effects of Drunkenness

The court in Mason II equated the exclusion "death resulting directly from the use of intoxicating liquors", Mason I, 41 So.2d at 154, (emphasis supplied) with the broader exclusion "loss or injury resulting from the use of intoxicating liquors", Mason II, 41 So.2d at 155 (emphasis supplied). The Mason II court concluded that there was "no valid distinction between the facts of this case and [Mason I]." Mason II, 41 So.2d at 155. Of course, the distinction between the two cases was that one policy exclusion was limited to the direct effects of drunkenness and the other policy exclusion was not so limited, and it necessarily extended to both kinds of results, direct and indirect. BCBSF submits that this distinction was "valid" and requires specific reversal of Mason II.

In 1953, the Florida Legislature first enacted a statute permitting health insurers to exclude "any loss sustained or contracted in consequence of the insured's being intoxicated." Chapter 28027, Laws of Fla. (1953). This provision was identical to the National Association of Insurance Commissioners ("N.A.I.C.") model code provision 180-1, adopted in 1950. An exclusion using this prior statutory language was not limited to the direct effects of alcohol on the system of the insured. In fact, Rivers v. Conger Life Ins. Co., 229 So.2d 625, 628 (Fla. 4th DCA 1969) held that the alcohol exclusion authorized by the original statutory provision applied if there was a causative connection between the insured's drunkenness and a loss.

In 1979, the N.A.I.C. promulgated a new model code provision, 185-1, designed to state the drunkenness exclusion in "simplified language". The N.A.I.C. commentary also stated, however, that the "simplified language" version of the model code was not intended as a substantive revision of the previous code provision.

The Florida legislature amended its permitted alcohol exclusion in 1982, replacing the language adopted in 1953 (which tracked N.A.I.C. model code 180-1) with the "simplified language" version recommended by the N.A.I.C. in 1979. Section 627.629, Florida Statutes (1982). The approved exclusionary language remains unchanged to date. Based upon the timing of the statutory amendment and the identity of the language used in the 1979 N.A.I.C. model code and the 1982

amendment of Section 627.629, it is logical to assume that the legislature based the 1982 amendment upon the 1979 N.A.I.C. model code and commentary. It is therefore equally logical to conclude that no substantive revision in the interpretation of the drunkenness exclusion was intended and the legislature must have intended the holding in Rivers to govern interpretation of the exclusion authorized by Section 627.629, Florida Statutes (1982). In addition, if this Court affirms the Steck decision, holding that the "resulting from" language in the alcohol exclusion only applies to direct injuries to the biological system of an insured, then the same analysis would necessarily prevent any possible application of the statutorily permitted "illegal occupation" exclusion. Section 627.628, Florida Statutes, allows a health insurer to exclude: "any loss which results from the insured committing or attempting to commit a felony or from the insured engaging in an illegal occupation." Limiting the exclusion to the direct effects on the insured's biological system caused either by a felony or an illegal occupation would, however, render the illegal occupation exclusion meaningless, because there are no felonies or illegal occupations that cause direct effects on the biological system of the perpetrator. Instead, there are only health care expenses that are necessitated because someone is injured during the course of a felony or who becomes ill after engaging in an illegal occupation. Contrary to the argument in Ms. Steck's answer brief, the intent of the "drunkenness" and "illegal

occupation" exclusions is the same. Both are intended to reach the consequences of an insured's improper or forbidden behavior and to exclude the results of such behavior from insurance coverage.

Moreover, the application of other exclusions pertaining to injuries or illnesses "resulting from" certain behavior is neither unfair nor inequitable when the "service in the armed forces" or "act of war" exclusions are considered. At present, if certain injuries or diseases are proven to be the result of service in the armed forces, then coverage is afforded through military doctors or the Department of Veterans' Affairs and is not imposed on private insurers and their policyholders. Likewise, health insurers cannot be expected to charge premiums large enough to cover unknown and unanticipated acts of war such as the recent terrorist attacks, and the cost of treating injuries from such events is therefore appropriately borne by society as a whole (just as relief efforts and industry bailouts are being funded through private donations and emergency legislation). The "resulting from" exclusions are properly applied to the "indirect effects" of drunken behavior, the commission of a felony, engaging in an illegal occupation, serving in the armed forces, or being the victim of an act of war.

Ms. Steck's effort to distinguish several of the relevant Florida cases is disingenuous. Thus, by quoting the policy exclusion in Rivers v. Conger Life Ins. Co., 229 So. 2d 625 (Fla 4th DCA 1969), containing the "directly or indirectly"

language, she implies that the court's decision rested upon an interpretation of that language. To the contrary, the court held that the policy exclusion was broader than that permitted by law and construed the then existing statutory provision permitting an exclusion "for any loss sustained or contracted in consequence of the insured's being intoxicated." The Rivers court acknowledged that the insurer could have come within the terms of the statutorily authorized exclusion if it had proven that the insured's intoxication had a causal connection with the fire and his resulting death.

Ms. Steck correctly states that the policy provision in Blue Cross and Blue Shield v. Ming, 579 So. 2d 771 (Fla. 5th DCA 1991), is not quoted. However, the opinion points out that the policy excluded benefits for "injury resulting from an insured's participation in a felony and from the insured's being drunk." In rejecting the claim for medical expenses incurred by a drunk driver who was injured in an accident and later convicted of manslaughter, the court said that "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." Coincidentally, the policy was a BCBSF policy and, as previously stated, Section 627.618, Florida Statutes would have precluded a policy exclusion any broader than the statutory language allowed by Section 627.629, Florida Statutes.

Ms. Steck seeks to distinguish Hastie v. J. C. Penney Life Ins. Co., 115 F. 3d 895 (11th Cir. 1997), by stating that the case involved an extremely broad exclusion which purports to be triggered merely by the fact of intoxication. The exclusion stated that "[n]o benefit shall be paid for any Loss . . . which is caused by or results from . . . an Injury occurring while the Covered Person is intoxicated." While the Eleventh Circuit Court of Appeals rejected the contention that the insured's status as intoxicated triggered the exclusion, the court went on to point out that the exclusion would be applicable if the insurance company showed a causal connection between the insured's intoxication and his death in a motorcycle accident.

Significantly, Ms. Steck does not even try to distinguish the recent decision in American Heritage Life Ins. Co. v. English, 786 So. 2d 1280 (Fla. 5th DCA 2001). The fact remains that only Mason II and the decision below hold that an alcohol exclusion drafted in conformity with the language permitted by Section 627.629, Florida Statutes, is limited to the direct effects of alcohol on the biological system of an insured. The holdings in American Heritage Life Ins. Co. v. English, 786 So. 2d 1280 (Fla. 5th DCA 2001), Blue Cross and Blue Shield of Florida, Inc., v. Ming, 579 So.2d 771 (Fla. 5th DCA 1991), Hastie v. J.C. Penney Life Ins. Co., 115 F. 3d 895 (11th Cir. 1997), Rivers v. Congers Life Ins. Co., 229 So. 2d 625 (Fla 4th DCA 1969), Interstate Life & Acc. Ins. Co. v. Gammons, 408 S.W.2d 897, 56 Tenn. App. 441

(1966), Landry v. J.C. Penney Life Ins. Co., 920 F. Supp. 99 (W.D. La. 1995), Bankers Life and Cas. Co. v. Jenkins, 547 S.W.2d 237 (Tenn. 1977), Old Equity Life Ins. Co. v. Combs, 437 S.W.2d 173 (Ky. App. 1969), and Cummings v. Pacific Standard Life Ins. Co., 516 P.2d 1077, 10 Wash. App. 220 (1974) are all contrary to Ms. Steck's interpretation.

II. BCBSF's FAILURE TO DEFINE THE WORD "CONDITION" IN ITS POLICY OUTLINE PROVIDED TO MS. STECK DOES NOT JUSTIFY SUMMARY JUDGMENT IN HER FAVOR.

Ms. Steck argues that because her mother claims that Ms. Steck never received a copy of the insurance policy at issue in this action (a self-serving claim at best), that BCBSF's failure to include the policy definition of the term "condition" in the policy outline that the Stecks admit receiving is somehow significant to the construction of the policy and the drunkenness exclusion. In making that argument, Ms. Steck cites two cases that considered discrepancies between a group insurance policy and a certificate of coverage issued to an insured covered under the master group policy, Rucks v. Old Republic Life Ins. Co., 345 So. 2d 795 (Fla. 4th DCA 1977), and Davis v. Crown Life Insurance Co., 696 F. 2d 1343 (11th Cir. 1983). Neither of those cases is applicable here.

In Rucks, the court specifically held that the contract at issue in that case consisted of both the master (or group) policy and the certificate of insurance issued to the insured. The Rucks court then construed the two documents together and resolved an ambiguity in the two documents in favor of coverage. Likewise, the Davis case involved both a group policy and a certificate of insurance issued to an insured which was silent on a controlling provision included in the group policy.

Again, the court determined that the discrepancy between the two portions of the same policy must be construed against the insurer.

In this case, however, there is only one insurance policy and that is the Conversion Option III Contract issued by BCBSF to Ms. Steck on September 1, 1993 (App. 17 - Affidavit of Sandra Jackson). Ms. Steck admits that the Conversion Option III policy includes both the applicable drunkenness exclusion and the definition of the term "condition" which includes "ailments, injuries, and bodily malfunctions" as well as diseases and illnesses. Unlike the individual certificates issued to group insureds in the Rucks and Davis cases, however, the advertisement or policy outline that the Steck family acknowledges receiving was not a portion of the contract under which Ms. Steck seeks benefits. Significantly, the initial page of that policy outline states:

> This brochure is an overview of the Conversion Option III program. It provides general information about the coverage, which is not the same as the coverage you had with your previous group insurance program.
>
> The complexity of today's health care makes it impossible to cover every detail about Conversion Option III in this brochure. If questions, arise, please contact your local Blue Cross and Blue Shield of Florida office, or refer to the contract. Its terms prevail. (App., Tab 10).

It would be improper for this Court to construe the nine page policy outline together with the policy that was actually issued to Ms. Steck, as the policy outline specifically states that it is not the insurance contract or a portion of the insurance

contract. Unlike the documents construed together in Rucks and Davis, Ms. Steck is relying upon a non-contractual document in an attempt to create an ambiguity which she then seeks to have construed against BCBSF. The same argument was unsuccessfully made by an assignee of the insured in Vencor Hospital South, Inc. v. Blue Cross and Blue Shield of Rhode Island, 86 F. Supp. 2d 1155 (S.D. Fla. 2000). In that case, Vencor Hospital asserted that there was an ambiguity between the outline of coverage that had been issued by Blue Cross and Blue Shield of Rhode Island and the actual "Medigap" policy issued to some of Vencor's patients. The Eleventh Circuit remanded the case to Judge Gonzalez to determine whether the outline of coverage that allegedly created the ambiguity was to be deemed a part of the insurance contract. The court in Vencor Hospital relied upon the language of the outline of coverage in concluding that it was not a portion of the contract. In that case, the outline of coverage provided in part:

> This outline of coverage provides a brief description of the important features of your policy. This is not the insurance contract, and only the actual policy provisions will control . . . . Id. at 1158.

In addition, the Vencor Hospital court noted the provisions of Section 627.642, Florida Statutes, which mandated that all health insurance policies issued in Florida be accompanied by an outline of coverage. Section 627.642 requires that the outline of coverage contain a statement that the outline of coverage is not the policy and that

the issued policy should be referred to for the actual contractual governing provisions. In rejecting the argument advanced by Ms. Steck here, the Vencor Hospital court stated:

> It is more than apparent that it was the intent of the regulatory scheme that the policy itself govern and that the Outline of Coverage not be considered part of the insurance contract. Had the Legislature intended that the outline be considered a part of the insurance contract, the Legislature and the Department of Insurance surely would not have mandated language to the contrary.
>
> In addition, the Outline of Coverage itself makes clear that it is not to be construed as part of the insurance contract. . . . Thus the Outline makes plain that if an insured has any doubts as to the coverage, the insured should look to the policy itself, not to the Outline. It would be nonsensical to consider the Outline to be a part of the contract when on its face and in a very conspicuous manner it declares that is not. Id. at 1159.

The Vencor Hospital court concluded that the outline of coverage was not a part of the insurance policy and could not be used to create an ambiguity to be construed against the insurer.

The same conclusion must be reached in regard to Ms. Steck's argument. The outline of coverage upon which Ms. Steck relies here specifically states that it is not the contract and that the provisions of the contract govern. BCBSF was required by Section 627.642, Florida Statutes, to provide an outline of coverage when it issued the Conversion Option III contract to Ms. Steck. Consequently, Ms. Steck cannot now

complain that the outline of coverage did not include all of the provisions included in her contract. The drunkenness exclusion in the Conversion Option III contract governs this case and the contract provision excludes "conditions," defined as including ailments, injuries, and bodily malfunctions that result either directly or indirectly from the insured's drunkenness. There is no contract ambiguity which requires construction or interpretation against BCBSF.

CONCLUSION

Ms. Steck had a blood alcohol level more than three times the legal limit for driving while intoxicated when she walked into Dale Mabry Highway, a major Tampa thoroughfare, and was struck by a car. Any reasonable, disinterested third party would agree that her injuries suffered in the accident resulted from her drunkenness.

The polestar for interpreting statutes is legislative intent. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The Legislature permits health insurers to exclude losses which result from the commission of felonies or engaging in an illegal occupation. Can anyone reasonably believe that when Section 627.629 was enacted to permit exclusions "for any loss resulting from the insured being drunk," the Legislature intended for this exclusion to be limited only to biological effects upon the body from the use of intoxicants?

This Court should follow Harris, should specifically reverse Mason II, and should hold that the drunkenness exclusion authorized by Section 627.629, Florida Statutes and included in Ms. Steck's policy excludes coverage for all expenses caused, either directly or indirectly, by her walking into the path of oncoming traffic while drunk. The summary judgment on liability in favor of Ms. Steck should be reversed, and this case should be remanded with directions that summary judgment be entered in favor of BCBSF in regard to all expenses incurred to treat injuries sustained in the June 29, 1997 accident.

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CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Timothy F. Prugh, Esquire, Prugh and Associates, P.A., 1009 West Platt Street, Tampa, Florida 33606, and Charles P. Schropp, Esquire, Schropp, Buell & Elligett, P. A., 401 East Jackson Street, Suite 2600, Tampa, Florida, 33602, this _____ day of November, 2001. I also certify that Petitioner's Reply Brief has been prepared using Times New Roman 14-point type, non-proportionally spaced.

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