**IN THE SUPREME COURT OF FLORIDA**

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Petitioner, CASE NO.: SC10-116

v.

GILDA MENENDEZ, FABIOLA G. LLANES
FABIOLA P. LLANES AND ROGER LLANES,

Respondents.
_______________________________________//

DISCRETIONARY REVIEW FROM A DECISION OF
THE THIRD DISTRICT COURT OF APPEALS

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AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE ASSOCIATION
IN SUPPORT OF RESPONDENTS, GILDA MENENDEZ,
FABIOLA G. LLANES, FABIOLA P. LLANES AND ROGER LLANES

FILED BY CONSENT OF THE PARTIES AND BY LEAVE OF THE COURT

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# PREFACE

"MENENDEZ" – Refers to to Gilda Menendez, Respondent.

"STATE FARM" – Refers to State Farm Mutual Automobile Insurance Company, Petitioner.

## IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Association, formerly the Academy of Florida Trial Lawyers ("FJA"), is a voluntary statewide association of more than 3,000 trial lawyers representing individual and corporate citizens of Florida in litigation concerning all areas of the law. Members of the FJA are pledged to foster the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law and the right of access to courts. The FJA has been involved as *amicus curiae* in hundreds of cases in this Court and Florida's District Courts of Appeal. The FJA believes this case involves an issue that is significant to the vast number of individuals in the State of Florida who purchased and were issued insurance policies protecting them against claims of bodily injury, requiring its participation on their behalf.

## SUMMARY OF ARGUMENT

STATE FARM's use of the term "the insured" in its policies of insurance is subject to different reasonable interpretations and is therefore ambiguous. As such, this Court should interpret the policy in favor of coverage. The Third District Court of Appeals' opinion is but one opinion in a long line of opinions that has determined the household exclusion to be ambiguous. The Third District's opinion does not represent a change in Florida law. STATE FARM has been on notice since 1974 that Florida courts interpret the phrase "the insured" in the STATE FARM policy to mean "the named insured". STATE FARM has altered the exclusion over the years and not changed its use of "the insured" in the relevant part of the exclusion. Having failed to clearly exclude the claims of Fabiola P. Llanes and Roger Llanes against MENENDEZ, there is coverage for their claims against MENENDEZ in this case.

## ARGUMENT

### I. The language of the household exclusion is ambiguous and should be construed narrowly in favor of coverage.

Magicians employ "sleight of hand" to distract the viewer, focusing the audience's attention on one hand while they manipulate the objects with the other. In the same manner, STATE FARM seeks to distract this Court from the plain language of the STATE FARM policy by instead focusing on whether STATE FARM was permitted to exclude the claims of Fabiola P. Llanes and Roger Llanes against MENENDEZ. While STATE FARM could have excluded those claims, it did not. In this case, Fabiola P. Llanes and Roger LLANES did not live with MENENDEZ and, therefore, their claims against MENENDEZ are not excluded.

#### A. Florida cannons of insurance policy construction.

If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the policy is ambiguous and must be construed against the carrier. Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29 (Fla. 2000). "Proof of the pudding" of ambiguity is appropriately found where the reasoned judgment of numerous courts come to opposite or differing conclusions from a study of essentially the same policy language. Security Ins. Co. of Hartford v. Investors Diversified Limited, 407 So. 2d 314 (Fla. 4th DCA 1981).

An insurance policy is a contract of adhesion, and accordingly, Florida follows the *in contra perforatum* rules of construction against the drafter. In the interpretation of insurance policies, it is axiomatic that an interpretation of an insurance policy is construed against its drafter. Westmoreland v. Lumbermens Mut. Cas. Co., 704 So. 2d 176 (Fla. 4th DCA 1997); Hudson v. Prudential Prop. & Cas. Ins. Co., 450 So. 2d 565 (Fla. 2d DCA 1984); and Nat'l Merch. Co. v. United Serv. Auto. Asso., 400 So. 2d 526 (Fla. 1st DCA 1981). Specifically, provisions of an insurance policy which define insuring or coverage clauses are construed in the broadest possible manner to effect the greatest extent of coverage. Westmoreland, 704 So. 2d at 179. In contrast to insuring clauses, however, exclusionary clauses in liability insurance policies are **always** narrowly construed against the insurer. Demshar v. AAACon Auto Transport, Inc., 337 So. 2d 963 (Fla. 1976); Westmoreland, 704 So. 2d 176; Smith v. General Accident Ins. Co. of Am., 641 So. 2d 123 (Fla. 4th DCA 1994). If insurance coverage is to be excluded based upon the definition of coverage, or a policy exclusion, the policy should so state in clear, unmistakable language. Progressive Ins. Co. v. Estate of Wesley, 702 So. 2d 513 (Fla. 2d DCA 1997). As the Fourth District Court of Appeals observed in Westmoreland:

> The current Florida rule is that strict construction is required of exclusionary clauses in insurance contracts, only in the sense that the insurer is required to make clear precisely what is excluded from

> coverage. If the insurer fails in the duty of clarity by drafting an exclusion that is capable of being fairly and reasonably read both for and against coverage, the exclusionary clause will be construed in favor of coverage.

Westmoreland, 704 So. 2d at 179 (quoting State Farm Fire & Cas. Co. v. Deni Assoc. of Fla., 678 So. 2d 397, 401 (Fla. 4th DCA 1996), affirmed 711 So. 2d 1135 (Fla. 1998).)

In keeping with the liberal interpretation of insurance policies in favor of the insured, any and all ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the subject policy of insurance. Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So. 2d 467 (Fla. 1993); Westmoreland, 704 So. 2d 176; and Hartnett v. Southern Ins. Co., 181 So. 2d 524, 528 (Fla. 1965). As this Court noted in Hartnett:

> ... so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.

Hartnett, 181 So. 2d at 528. The insurer, as draftsman of the form policy, will not be allowed to use obscure terms to defeat the **purpose** for which the policy is purchased. Id. Terms must be liberally construed in favor of coverage so that if two interpretations are available, one allowing greater indemnity will always prevail. Weldon v. All Am. Life Ins. Co., 605 So. 2d 911 (Fla. 2d DCA 1992) and

Braley v. American Home Assur. Co., 354 So. 2d 904 (Fla. 2d DCA 1978), cert. denied, 359 So. 2d 1210 (Fla. 1978). While courts should be cognizant of the purposes of the policies of insurance, this interpretive tool should only be used to further the intent of the parties, not usurp or contradict the language of the policy as written. U.S. Fire Ins. Co. v. J.S.U.B. Inc., 979 So. 2d 871 (Fla. 2007).

Where critical terms in a policy are not defined, these terms must be liberally construed in favor of the insured. See Westmoreland, 704 So. 2d at 180 and State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245 (Fla. 1986). When an insurer fails to define a **term found in an exclusion or limitation on policy language,** the insurer cannot insist upon a narrow, restrictive interpretation of the coverage provided under the subject insurance policy. See Westmoreland, 704 So. 2d 176 and Nat'l Merch., 400 So. 2d at 530. Where an exclusion is capable of being fairly read both for and against coverage, the exclusion will be interpreted in favor of coverage. Deni Assocs., 678 So. 2d 397.

**B. The STATE FARM policy.**

STATE FARM's policy provides as follows:

> **When Coverage A [Liability Coverage] Does Not Apply**
>
> There is no coverage: * * *
>
> 2. for any ***bodily injury*** to: * * *

c. any ***insured*** or any member of an **[**7]** ***insured's*** family residing in the insured's household.

Under the plain language of the STATE FARM policy, "the insured" means MENENDEZ. See, Cochran v. State Farm, 298 So. 2d 173 (Fla. 4th DCA 1974). Any claims by MENENDEZ (the named insured) and Fabiola G. Llanes (an "insured" by virtue of driving the vehicle) are excluded. Plainly, the claims of Fabiola P. Llanes and Roger Llanes are not excluded as they did not reside in MENENDEZ's household.

If STATE FARM had written its policy to say "any insured's household" instead of "the insured's household" there would be no coverage under the policy for the claims of Fabiola P. Llanes and Roger Llanes as they resided with Fabiola G. Llanes, the driver of the vehicle. Because exclusions must be read narrowly under Florida law and terms must be liberally construed in favor of coverage where there are two interpretations available, this Court should affirm the Third District Court of Appeals' decision that found that "the insured's" could reasonably refer to MENENDEZ. Because Fabiola P. Llanes and Roger Llanes did not reside with MENENDEZ, there is coverage for their claims under the STATE FARM policy.

The rule of statutory construction purportedly applied by the Court of Appeals is expressed in the Latin maxim: *expressio unius est exclusio alterius*. Black's Law Dictionary defines this maxim as follows:

> Expression of one thing is the exclusion of another. Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.
>
> *Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.*

Black's Law Dictionary, Fourth Edition (1951), p. 692 (citations omitted) (emphasis added).

STATE FARM used "any insured" in the beginning of the exclusion and "the insured" in the latter part. STATE FARM cannot now claim that "the insured" means "any insured" as it has used the undefined term "the insured".

## II. The Third District Court of Appeals' decision does not represent a departure from established Florida law, and this Court should affirm the Third District's decision.

There is no dispute that STATE FARM could have written a policy which would have excluded the claims of Fabiola P. Llanes and Roger Llanes against MENENDEZ. However, Florida courts continue to read policies applying the Florida cannons of construction to determine whether there is liability coverage for a claim made between relatives under the specific language of each policy.

STATE FARM relies on the case of Linehan v. Alkhabbaz, 398 So. 2nd 989 (Fla. 4th DCA 1981) for the proposition that the STATE FARM policy does not

provide coverage for claims against MENENDEZ. In fact, Linehan foreshadowed the result in this case.

In Linehan, Alkhabbaz owned a car which she loaned to her aunt, Marianna R. Linehan, for a trip to Wisconsin. Id. at 990. Marianna's daughter, Laura, was driving the car in Wisconsin. Id. While Laura was driving the car, she was involved in an accident which killed Marianna R. Linehan. Id. Marianna and Laura resided in the same household. Id. Laura did not reside with the vehicle owner, Alkhabbaz. The estate of Marianna R. Linehan filed suit against the vehicle owner, the driver Laura, and State Farm. Id.

The court pointed out a crucial factual distinction which made Linehan different from the present case, thereby foreshadowing the Third District Court of Appeals' opinion in this matter. The vehicle owner, Alkhabbaz, was never served in that case and, under Wisconsin law, she had no liability because the dangerous instrumentality doctrine did not apply. In this case, MENENDEZ has legal liability due to the dangerous instrumentality doctrine. The only reason for the Fourth District to point out that the vehicle owner had no liability and was not a party to the case is that State Farm policy language provides coverage for the vehicle owner (such as MENENDEZ or Alkhabbaz) for claims made by family members or relatives who do not reside with the vehicle owner. In Linehan, had

the accident occurred in Florida, the owner would have liability and coverage. In sum, Linehan actually supports the Third District's opinion in this case.

Florida courts have not blindly found an absence of coverage where insurers assert the family or household exclusion. In Bethel v. Security National Insurance Company, 949 So. 2d 219 (Fla. 3d DCA 2006), the insurance policy was found ambiguous due to a failure to define the phrase "any member of the family". The policy in that case did define the term "family member". Id.

Gregory and Evelyn Bethel were named insureds on the Security National policy. Id. at 220. Evelyn's sister, Laika, was living with the Bethels at the time of the accident. Id. The case involved a one car accident where Gregory was driving and Laika was injured. Although Gregory and Evelyn were both insureds and related to Laika, the Court found that the policy was ambiguous due to the failure of Security National to define "any member of the family". Id. The key term in the Security National policy was that a family member was only excluded if the family member did not own a private passenger auto. Id. at 222. Because Laika owned a motor vehicle, her claims against Gregory were not excluded. Similarly, because STATE FARM in this case chose to use the term "the insured" and Fabiola P. Llanes and Roger Llanes did not live with MENENDEZ, there is coverage under the STATE FARM policy.

In First Floridian v. Thompson, 763 So. 2d 407 (Fla. 2d DCA 2000), the Court found coverage because the insurance company failed to define the term "residents of the same household". Id. at 408. There was no dispute that an adult daughter was visiting with her mother and the Court found that the daughter was not excluded from the liability coverage on her mother's policy. Id. Again, if any ambiguity exists through failure to define crucial terms in the policy, as in this case, the Court should construe the policy in favor of coverage and against the insurer. In this case, if STATE FARM wanted to exclude claims by anyone living with any insured, all STATE FARM had to do was substitute the word "any" for the word "the". Having failed to do so, STATE FARM cannot complain there is coverage for the claims of Fabiola P. Llanes and Roger Llanes against MENENDEZ because they did not reside with MENENDEZ. See also, Estate of Wesley, 702 So. 2d 513 ("living in household" ambiguous where parents are divorced).

A Florida court has already decided that the phrase "the insured" in the STATE FARM policy means the "named insured". Cochran, 298 So. 2d 173. In Cochran, the accident occurred in 1970. The State Farm policy in effect in 1970 provided as follows:

> This insurance does not apply under: … (i) coverage A,to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured … (Emphasis Added).

Cochran, 298 So. 2d 173.

The STATE FARM liability policy in force and effect in 2006 for this case provides as follows:

**When Coverage A [Liability Coverage] Does Not Apply**

There is no coverage: * * *

2. for any ***bodily injury*** to: * * *

c. any ***insured*** or any member of an [**7] *insured's* family residing in the ***insured's*** household.

It is apparent from reviewing the Cochran opinion that STATE FARM changed the scope of its family exclusion. STATE FARM changed the first "the insured" to "any insured" to exclude permissive driver claims. It did not change the second "the insured" which refers to family residing with "the insured". STATE FARM did not change its use of the term "the insured" even after the Fourth District Court of Appeals told STATE FARM that Florida courts would interpret "the insured" to mean "the named insured" in 1974. Sometime between 1970 and 2006 STATE FARM changed from using "the insured" at the beginning of the exclusion to using "any insured". STATE FARM clearly could have done this in the latter part of the exclusion thus excluding the claims of Fabiola P. Llanes and Roger Llanes against MENENDEZ. Having failed to do so and presumably being fully aware of the Cochran case, STATE FARM'S arguments must fail and this Court should affirm the Third District Court's opinion.

## CONCLUSION

The language of the STATE FARM household exclusion is subject to different reasonable interpretations, is ambiguous under Florida law, and should be interpreted to provide coverage for the claims of Fabiola P. Llanes and Roger Llanes against MENENDEZ. The Third District's opinion is consistent with Florida cases interpreting household or family exclusions and should be affirmed.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy hereof has been furnished by U. S. Mail to on this ____ day of September, 2010 to:

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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