IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-116

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

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

Respondents.

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

RESPONDENT GILDA MENENDEZ, ANSWER BRIEF

Respectfully Submitted,

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STATEMENT OF THE CASE AND FACTS[1]

The jurisdiction of this esteemed Court has been summoned by Petitioner, State Farm Mutual Automobile Insurance Company ("Insurer"), to announce that Respondents, the trial court judge, and three appellate court judges have all failed to grasp the definition of the word "the." The Court's upcoming linguistic exercise flows from Insurer's use of the word "the" in an automobile insurance policy it sold to the named insured, Respondent, Gilda Menendez (the "Policy") (R.70, 78).

While the Policy was in effect, Menendez allowed Fabiola G. Llanes ("Driver") to drive Menendez' car. (R.51, 387) While driving Menendez' car, Driver was involved in a car accident. At the time of the accident, Menendez, her daughter, Fabiola P. Llanes ("Mother"), and her son-in-law, Roger Llanes ("Father") all rode as passengers. (R.51, 122, 352, 374-375). [2] As a result of the accident, Mother and Father were severely injured. (R.122, 355, 395). Importantly, at the time of the accident, Mother, Father, and Driver lived with each other, but did not live with Menendez. (R.354-56).

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[1] Menendez adopts the procedural history of the case in Respondents Mother and Father's Answer Brief. (Llanes' AB at pp. 9-11.)

[2] Although not relevant, Menendez notes for completeness that Driver is the daughter of Mother and Father and the granddaughter of Menendez.

After Menendez, Mother, Father, and Driver were in the car accident, Mother and Father brought a claim for bodily injuries against Menendez' Policy. Insurer denied the claims (R.122), causing Menendez to bring a declaratory action seeking a declaration that the Policy did not exclude Mother and Father's claim for bodily injuries.[3] The trial court and Third District Court of Appeal both determined that the Policy's exclusionary language could be read to permit a covered claim by Mother and Father.

SUMMARY OF THE ARGUMENT

The Policy obligates Insurer to pay the damages for bodily injuries caused by the Policy's "insureds." Undisputedly, the term "insureds" includes Menendez and all drivers Menendez allows to drive her car. Because Mother and Father received bodily injuries as passengers in Menendez' car while it was being driven by Driver, Insurer is obligated to pay Mother and Father for their bodily injuries, unless there is a Policy exclusion precluding Mother and Father's claim.

The Policy exclusion that Insurer has raised to shield itself from liability, fails to stop a claim by Mother and Father because it only excludes claims by

[3] A claim was also brought against the Llanes' as indispensible parties. Contrary to Insurer's suggestion, (IB at p.4), the lawsuit never involved a claim by Menendez against Insurer for bodily injury.

persons who reside with Menendez in her household. Here, it is undisputed that Mother, Father, and Driver do not live with Menendez.

To affirm, the Court need only determine that Respondents' interpretation of the exclusion is reasonable. Notably, whether Respondents' interpretation is reasonable has little to do with how Insurer interprets the Policy and has everything to do with the Policy's plain language. As the Court will soon see, Insurer's poor choice of words creates an exclusion that is reasonably read to exempt from coverage only those people who live with Menendez, the named insured. Since Driver does not fall into this category, Mother and Father's claims are viable.

The reasonableness of Respondents' position is foremost evident from the plain language of the Policy. Not only does "the" carry a particular meaning in the English language, but in Policy provisions other than the relevant exclusion, Insurer refers to Menendez as "the insured."

Moreover, even if the plain language of the Policy does not convince the collective conscience of the Court that "the insured" refers exclusively to Menendez, Respondent still wins because any ambiguity as to the word "the" is construed against Insurer. This is doubly true here, where Insurer drafted the Policy and the provision at issue is an *exclusion* to coverage that is strictly construed.

The Third District, in January 2010, was not the first appellate court in Florida to interpret "the insured" to mean only the named insured. In fact, this same issue was decided over thirty-five years ago by the Fourth District in Cochran v. State Farm Mut. Auto. Ins. Co., 298 So. 2d 1974 (Fla. 4th DCA 1974).

Insurer has failed to cite Cochran in its Initial Brief. Instead, Insurer belabors the irrelevant fact that household exclusions are permissible. Reid v. State Farm & Cas. Co., 352 So. 2d 1172 (Fla. 1978). For two reasons, however, Reid has no bearing on whether the terms of this particular Policy are ambiguous. First, the claimants here do not live in the same household as the named insured, as was the case in Reid. Thus, the interpretation now advanced by Respondents was never addressed. Second, unlike Reid and Linehan v. Alkhabbaz, 398 So. 2d 989 (Fla. 4th DCA 1981), the case at bar is one of construction not validity.

Rather than a substantive and public policy driven case where the validity of a family-household exclusion is at issue, the case at bar is of a more factual variety, involving an interpretation of a particular exclusion in the Policy as applied to the particular facts of this case. Thus, the Court should be guided by cases addressing construction not validity. Likewise, the Court should decline Insurer's invitation to compare Respondents' and Insurer's interpretations to determine which is *better*, and focus instead on whether Respondents' interpretation is *reasonable*.

STANDARD OF REVIEW

Courts review de novo the construction and interpretation of an insurance policy. Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005).

JURISDICTION

The Court accepted review of the case at bar pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). Respectfully, Respondent Menendez joins Respondents Llanes' position that jurisdiction is inappropriate here, where the Third District's opinion is based on an interpretation of a Policy exclusion as it relates to people who, as a matter of fact, do not live with the named insured. This is quite different from Reid and Linehan, where the courts either did not decipher the language of a policy or addressed a materially different class of claimant, *i.e.*, a claimant residing with the named insured. See Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962); Shaw v. Jain, 914 So. 2d 458, 461 (Fla. 1st DCA 2005) ("[I]t is elementary that the holding in an appellate decision is limited to the actual facts recited in the opinion.") (quoting Adams v. Aetna Cas. & Sur. Co., 574 So. 2d 1142, 1153 (Fla. 1st DCA 1991)); Benson v. Norwegian Cruise Line Ltd., 859 So. 2d 1213, 1217 (Fla. 3d DCA 2003) ("[N]o decision is authority on any question not raised and considered, although it may be involved in the facts of the case.") (quoting State v. Du Bose, 128 So. 4, 6 (1930)).

ARGUMENT

A. The Policy

The Policy is the starting point of the Court's analysis. The three relevant sections of the Policy are Definitions, Coverage A, and the "Exclusion."

Definitions:

> ***Insured*** - means the ***person***, ***persons*** or ***organization*** defined as ***insureds*** in the specific coverage . . . . [Here, Coverage A].
>
> ***You*** or ***Your*** – means the named insured or named insureds shown on the declarations page. [Here, Menendez].
>
> In Coverage A, ***insured*** means:
>
> 1. ***you*** [Menendez];
> 2. ***your spouse;***
> 3. the ***relatives*** of the first ***person*** named in the declarations;
> 4. any other ***person*** while using such a ***car*** if its use is within the scope of consent of ***you*** or ***your spouse*** [Driver]; and
> 5. any other person or organization liable for the use of such a ***car*** by one of the above ***insureds***.

Coverage A:

> We will pay damages which an ***insured*** becomes legally liable to pay because of (a) ***bodily injury*** to others . . . caused by accident resulting from ownership, maintenance, or use of ***your car***

The Exclusion:

> There is no coverage for any bodily injury to any ***insured*** or any member of an ***insured's*** family residing in the ***insured's*** household. (underline added).

A review of the plain language of Coverage A reveals that absent an exclusion, Insurer is obligated to pay for Mother and Father's bodily injuries. Insurer claims, however, that the Exclusion precludes Mother and Father, as family members residing with Driver, from making a claim against the Policy. Insurer is wrong. Although Driver is an insured under the policy, she is not the insured whose household is determinative.

Ultimately, this case comes down to the question of who is "the insured." Respondents' reasonably believe, based on the express language of the Policy, that "the insured" is Menendez. Insurer disagrees and believes that "the insured" refers to anyone within several indefinite groups of individuals who Coverage A defines as "**insureds**."

B. Plain Language Supports Respondents' Position

The Court is guided initially by the plain language of the Policy. Fayad v. Clarendon Nat. Ins. Co., 899 So. 2d 1082, 1086 (Fla. 2005) ("[I]nsurance contracts are construed in accordance with the 'plain language of the polic[y] as bargained for by the parties.'") (quoting Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29,

33 (Fla. 2000)); Westmoreland v. Lumbermens Mutual Cas. Co., 704 So. 2d 176, 180 (Fla. 4th DCA 1997) ("[Courts] may not ignore the plain meaning of the words employed in order to contort clarity into ambiguity.").

Applying the plain language of the Policy requires the Court to recognize that the word "the" differs substantially from the words "an" and "any." As a matter of diction, the reason Respondents reasonably interpret "the insured" to mean Menendez, rather than Menendez, Mother, Father, Driver, Spouse, and all other permissive drivers, is because **in the English language, "the" refers to a particular person**. Purdue Online Writing Lab – Using Articles, http://owl.english.purdue.edu/owl/resource/540/01. Thus, "the insured" cannot mean "any permissive driver," as such reading would effectively rewrite the Policy by replacing the definite article "the" with the indefinite article "any" or "an." Courts should not rewrite the plain language of a contract. Flaxman v. Government Employees Ins. Co., 993 So. 2d 597, 599 (Fla. 4th DCA 2008).

The use of the definite article "the" leaves no room for doubt as to its meaning. Because the Policy states "the" rather than "an" or "any," only a definite person may be inserted in place of "the insured." The only definite person in the Contract is Menendez, as the named insured. All other insureds are part of an open class of unidentified people, *e.g.*, spouse, relative, permissive driver.

It should come as no surprise to Insurer that four judges have looked at the relevant Exclusion language and determined that Respondents reasonably believe that "the insured" means Menendez. Thirty-six years ago, in Cochran, the Fourth District came to the same conclusion. Cochran, 298 So. 2d 1974.

In Cochran, the court dealt with an identical coverage section and an exclusion identical except that the word "the" was capitalized. Id. at 174. In Cochran, the Court synthesized the issue as follows: "Do the words 'the insured' used in the exclusionary provisions of the policy mean the same as the word 'insured' in the definition provisions of the policy?" Id. The Court explained, "The word 'the' qualifies the word 'insured' and means the person specifically named in the policy, rather than someone who might become an additional insured by reason of his use of a vehicle owned by the insured with the latter's permission." Id. at 175.

After recognizing that "the" modifies the word insured, the court noted that its conclusion was strengthened by the fact that elsewhere in the policy it appeared that "the insured" referred to the named insured. Id. Thus, the Court, "[saw] no reason to give the word 'the insured' any different color or context than that given by State Farm in its policy." Id.

Therefore, it is **significant** that throughout our Policy, Insurer uses the phrase "the insured" to mean Menendez and only Menendez. For example in the Coverage A section of the Policy titled "Financial Responsibility Law" ("FRL"), Insurer states "The insured agrees to repay us for any payment we would not have had to make under the terms of this policy except for this agreement." (emphasis added) (R.78). In the Coverage A FLR section, Insurer necessarily refers to Menendez (the named insured) as "the insured" because the only two parties who can "agree" in this Policy are Insurer and Menendez, the named insured.

Thus, when the Policy Exclusion invokes "the insured," it, like the FLR provision, refers to Menendez. The same rule announced in Cochran is equally applicable here; namely, there is "no reason to give the word 'the insured' any different color or context than that given by State Farm in its policy." Id.; see § 627.419, Fla. Stat. (2001) ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy . . . ."). [4]

[4] The Policy obligates "the insured" in other coverage sections as well. For example in the Coverage U3 section, Insurer writes, "The insured shall not enter into any settlement with any party legally liable for the insured's bodily injury without our consent if the settlement agreement precludes our right of recovery against such party." (emphasis added). (R.88). Again, in this context, "the insured" must mean Menendez, as she is the only party other than Insurer who is obligated by the Policy. The same is true in provision ## 1 and 5 of "Reporting a Claim – Insured's Duty" section (R.75).

Moreover, from a standpoint of reasonableness, which is the legal threshold Respondents must meet, it can hardly be said that an interpretation aligned with that of a Fourth District opinion, which has withstood scrutiny for more than thirty years, is unreasonable.

C. Construction Principles Support Respondents' Position

Even if the Court believed that "the" is ambiguous and could refer either to Menendez or Driver or both, well-established rules of construction require the Court to interpret the Policy against Insurer, the drafter. Fayad, 899 So. 2d at 1086 (citing Anderson, 756 So. 2d at 34). "Further, ambiguous 'exclusionary clauses are construed even more strictly against the insurer than coverage clauses.'" Id. (citing Anderson, 756 So. 2d at 34). Therefore, if the Court finds itself vacillating between which interpretation is better, Respondents have already won. Insurer, not Respondents, suffers the consequence of a poorly drafted policy. "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.

For more than three decades, Insurer has been on notice that the Exclusion was poorly drafted and that "the insured" was reasonably interpreted to refer to the named insured. See Cochran, 298 So. 2d at 174-75. Luckily, Insurer was not in

the unenviable position of having to guess how to properly draft an exclusion that precluded coverage for all members of a permissive driver's family living with the permissive driver. The dissent in Cochran gave Insurer a linguistic roadmap to avoid confusion. All confusion would have been eliminated had insurer written the Exclusion as follows: "there is no coverage for ANY bodily injury to ANY insured or any member of ANY insured's family residing in ANY insured's household." See id. at 176 (Owen, C.J., dissenting). Insurer disregarded the analysis in Cochran and declined to revise the Exclusion as diagrammed by the dissent. Thirty-five years have passed but the interpretation of the Exclusion has not changed and the word "the" has not taken on new meaning.

As Insurer recites in its initial brief, "[i]n construing policy language, courts are 'unauthorized to add or subtract even one word." (IB p.14) (citing Emmco Ins. Co. v. S. Terminal & Transp., 333 So. 2d 80, 82 (Fla. 1st DCA 1976)). Respondents agree, and that is why Insurer loses. Were the Court to accept that the Exclusion in this Policy means what the Cochran dissent describes, the Court would be replacing the word "the" with the word "any." This would be error. A court should no sooner replace in this Policy the word "the" with the word "any" than in a real estate contract should it interpret "Seller shall deliver the deed" to mean "Seller shall deliver any deed."

D. Reid and Linehan Are Not Relevant

Insurer relies heavily on Reid and Linehan. Neither is relevant to the resolution of this case. Reid addressed the public policy implications of a family-household exception and did so through the lens of facts dispositively distinct from the case at bar. Linehan merely followed the holding in Reid.

Insurer suggests that what is not relevant in Reid is that there, the named insured resided with the permissive driver and the injured family claimant. (IB at p.12). After making this lofty assertion, Insurer leaves the Court guessing as to why this fact is *not* important. To the contrary, the fact that in Reid the named insured was living with the claimant is **critical** to determining whether the interpretation raised by Respondents was at issue in Reid. If the issue now at bar was not raised in Reid, then there can be no conflict with the Third District's opinion in this case. Benson, 859 So. 2d at 1217.

In Reid, the named insured lived with claimants. Here the named insured does not live with claimants. If this Court, like the Third District and trial court, finds reasonable Respondents' interpretation of the Policy, then under this Exclusion only claimants living in the same household as the named insured are barred from advancing an insurance claim.

The reason Reid is not helpful to Insurer and does not conflict with this case is that *even if* Reid adopted Respondents' interpretation, the Court's holding would not have changed. The Court in Reid would still have found as it did because in Reid the named insured did live with claimants.

Like Reid, Linehan presents no conflict with the Third District's opinion. Immediately apparent from the Linehan opinion is that the court was not at all concerned with the language of the coverage exclusion. This is seen most obviously from the fact that the Court felt it unnecessary to quote the exclusion language; satisfied instead with paraphrasing. Linehan, 398 So. 2d at 990 n.1.

Nevertheless, even if the Court's paraphrase were a perfect reproduction, there is absolutely no indication that the argument presented by Respondents was at issue in Linehan. The law on this matter is crystal clear; an argument not raised, has no precedential value, even if it could have been raised given the facts of a case. See State v. Du Bose, 99 Fla. 812, 128 So. 4 (Fla. 1930).

There is in Linehan not even a glimmer of the argument raised by Respondents in this case. Therefore, it is erroneous to assert that somehow Linehan conflicts with the Third District's holding. Additionally, the import of Cochran is not diminished because Insurer has ignored it. Cochran preceded Linehan. Therefore, to accept as true Insurer's argument that Linehan conflicts with the

Third District's opinion is to accept that the Fourth District *sub silentio* receded from Cochran. This would be error. See State v. Ruiz, 863 So. 2d 1205, 1210 (Fla. 2003) ("[T]his Court does not intentionally overrule itself sub silentio.").

The Fourth District, which penned both Cochran and then Linehan has very clearly enunciated the rule that district courts must follow the case law of their own districts unless they are overruled or receded from. Carr v. Carr, 569 So. 2d 903 (Fla. 4th DCA 1990). Likewise, a district court panel should not recede from an earlier panel decision without doing so en banc. O'Brien v. State, 478 So. 2d 497, 499 (Fla. 5th DCA 1985). No case has receded from or overruled Cochran.

Given that the Linehan court 1) disregarded the importance of the exclusion's language, 2) gave no indication that the parties contested the application (as opposed to validity) of the exclusionary provision, and 3) could not have overruled itself sub silentio, it is clear that the case at bar does not conflict with Linehan.

CONCLUSION

The plain language of the Policy supports the trial and appellate court conclusions that "the insured" refers to Menendez only and not to Driver.

As a linguistic rule, "the" insured refers to a definite and identifiable insured. Therefore, to interpret "the" to mean an unidentifiable person, who is a

member of an open class of people, is a drastic departure from both the everyday and the technical meaning of the word "the." Moreover, interpreting "the insured" to mean Menendez comports perfectly with other sections of the Policy where Insurer refers to the named insured, Menendez, by using the phrase "the insured."

Strengthening Respondents' already reasonable, if not necessary, reading of the Policy are the rules of construction that at every turn militate in favor of Respondents. The Policy, as a whole, is construed against Insurer; coverage is construed in favor of Respondents; and the Exclusion is strictly construed. Given these rules of construction, the Court need only find that the language is ambiguous to rule in favor of Respondents.

In conclusion, the Court should approve the Third District's opinion and find that Respondents reasonably read the Exclusion to say, "There is no coverage for any bodily injury to any insured or any member of an insured's family residing in the Menendez household."[5]

[5] Menendez adopts the additional argument by the Llaneses regarding the ambiguity caused by the undefined term "household." (Llanes AB at p.23)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 9, 2010, a true and correct copy of the foregoing was served via United States Mail and facsimile to:

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Undersigned certifies that the foregoing Answer Brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 and has been typed in Times New Roman, 14-point font

By: _____
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