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 LLANES,

Respondents.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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A. The Respondents' Reading of the Household Exclusion is Unreasonable.

The household exclusion provides as follows:

> There is no coverage: . . .
> 2. for any ***bodily injury*** to: . . .
> c. any ***insured*** or any member of an ***insured's*** family residing in the ***insured's*** household.

(R Vol 1, pp 77-78) (changed from upper case).

For purposes of several arguments below, it is important to recognize that the exclusion has two parts: (1) it excludes coverage for bodily injury to "any ***insured***"; and (2) it excludes coverage for bodily injury to "any member of an ***insured's*** family residing in the ***insured's*** household."

This case concerns only the second part of the exclusion. The issue is whether it excludes coverage for injuries to resident family members of a permissive driver, who is undisputedly an "***insured***" by virtue of being a permissive user.

The Respondents argue that the exclusion is ambiguous because the underscored phrase above, "the ***insured***," could mean the named insured only. The result is that injury to a family member of a permissive driver is excluded only if the injured family member resides with the named insured rather than with the family member driver. This interpretation is unreasonable and illogical for a number of reasons:

First, to equate "the ***insured***" with "the named insured" requires inserting language that is not there and requires disregarding the policy's definition of "***insured***." The policy states that defined words are printed in boldface italics. The word "***insured***" is defined as "the ***person***, ***persons*** or organization defined as ***insureds*** in the specific coverage." With regard to liability coverage for the described vehicle, the policy defines "***insured***" to include not just the named insured, but five separate categories of people or entities:

1. ***you***;
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***; and
5. any other ***person*** or organization liable for the use of such a ***car*** by one of the above ***insureds***.

(R Vol 1, p 76). Each instance of the word "***insured***" in the household exclusion is in boldface italics.

The word "***insured"*** must be given its defined meaning -- even when it appears in an exclusion and even when it is preceded by the article "the." See Webb v. American Fire & Cas. Co., 148 Fla. 714, 5 So. 2d 252 (1942). In Webb, the policy excluded coverage for bodily injury to "any employee of the Insured while engaged in the business of the Insured . . . ." See id. at 715. Louis Davidson was driving the covered vehicle when an accident resulted in injury to his

employee who was riding as a passenger. See id. at 716-17. There was apparently a dispute as to the identity of the named insured, but this Court held that the exclusion applied whether Louis Davidson was the named insured or merely a permissive driver:

> We then come to the question as to whether or not the plaintiff is excluded under sub-paragraph (f), *supra*, of the exclusion clause of the policy. ***To determine that question, we look to the definition in the policy of the word 'insured' as it appears in the policy*** and we find from the provisions of paragraph III, supra, that the unqualified word 'insured' as used in sub-paragraph (f), supra, 'includes not only the named Insured but also any person while using the automobile when such actual use is with the permission of the named Insured'.
>
> . . . . If Louis Davidson was the named insured, then the plaintiff could not recover because the accident occurred while she was engaged as an employee of the insured, and while she was being transported within the terms of her employment; and ***if Sophie Davidson was the named insured, plaintiff could not recover because the exclusion clause applies not only to the named insured but also applied to Louis Davidson who was using the automobile with the knowledge and consent of the named insured to transport his employee under his contract of employment with the plaintiff.***

Id. at 717-18 (emphasis added).

This makes clear that the policy's definition of "***insured,***" including a permissive driver, must be applied to the exclusionary phrase "the ***insured***." There was no basis for the district court to disregard the policy's clear definition of

"***insured***," hold the phrase "the ***insured***" to be ambiguous, and equate it with "the named insured."

It is also significant that the State Farm policy uses the defined word "***you***" when it refers to the named insured. If the subject exclusion were intended to apply only to family members of the named insured, it would have referred to "***you***" and "***relatives***."[1] The exclusion does not use those words. It applies more broadly to family members of an "***insured"*** residing in the "***insured's"*** household.

Second, the Respondents' reading is contrary to ordinary grammatical understanding. The policy excludes coverage for injury to "any member of an ***insured's*** family residing in the ***insured's*** household." "The ***insured***" obviously and logically means the same "***insured***" referenced immediately previously as "an ***insured***." Thus, the only reasonable interpretation is that injury to a family member of a permissive driver insured is excluded if the injured person resides in the permissive driver's household, not in the named insured's household.

The Missouri Supreme Court reached this precise conclusion in State Farm Mut. Auto. Ins. Co. v. Ballmer, 899 S.W.2d 523 (Mo. 1995), which involved identical policy language and analogous facts. In Ballmer, a permissive driver

[1] "***You***" is defined as "the named insured or named insureds shown on the declarations page." (R Vol 1, p 73). "Relative" is defined in our context as "a ***person*** related to ***you*** or ***your spouse*** by blood, marriage or adoption (including a ward or foster child) who resides primarily with ***you***. It includes ***your*** unmarried and unemancipated child away at school." (R Vol 1, p 73).

killed his resident half-brother who was riding as a passenger. The Court held that the household exclusion unambiguously applied and rejected the notion that there was any ambiguity in the phrase "the ***insured***." The Court explained:

> The meaning of the household exclusion is clear in light of the definition of "insured;" as used in the household exclusion, "an insured" refers to any person or organization falling within the definition of "insured." *See Swift & Co. v. Zurich Ins. Co.*, 511 S.W.2d 826, 829 (Mo.1974) (whenever the unqualified term "insured" is used, it includes not only the named insured but such other persons as are protected by the omnibus clause). ***Because there are five categories included in the definition of "insured," the definite article "the" is used in the household exclusion to refer to the specific category of "insured" that applies to the situation. The term "the insured," therefore, refers to the person or organization identified previously in the exclusion as "an insured."***
>
> Reading the exclusion and the definition of "insured" together so that all relevant portions of the contract are given meaning, *see J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. banc 1973), Wilbur Ballmer was "an insured" because Kulenkamp granted him permission to use the car. The deceased and Wilbur Ballmer, members of the same family, lived together. The deceased, therefore, was a "MEMBER OF AN INSURED'S FAMILY RESIDING IN THE INSURED'S HOUSEHOLD." Under the plain language of the household exclusion, the policy provided no coverage for bodily injury, including death, to the deceased . . . .

Id. at 526 (emphasis added).[2]

The same result was reached in Zipperer v. State Farm Mut. Auto. Ins. Co., 254 F.2d 853 (5th Cir. 1958) (applying Florida law), which was cited in Reid. In Zipperer, a permissive driver's resident step-son was injured while riding as a passenger. The owner's policy excluded coverage for injury to "the insured or any member of the family of the insured residing in the same household as the insured." See id. at 855. The vehicle owner was sued. Like the Respondents here, the claimant argued that "inasmuch as he was not a member of the family and residing in the same household of the named insured, the exclusion clause should not apply." See id. The court rejected that argument, and held the exclusion applicable.

These cases, along with Reid and Linehan v. Alkhabbaz, 398 So. 2d 989 (Fla. 4th DCA 1981), represent the proper application of the household exclusion.

Third, the Respondents' reading is untenable because it gives additional insureds greater coverage under the policy than the named insured. See Hartford Ins. Co. of the Midwest v. BellSouth Telecommunications, Inc., 824 So. 2d 234, 241 (Fla. 4th DCA 2002) ("the rights of the additional insured can be no greater

[2] Because Missouri law mandates $25,000 in liability coverage, Ballmer held the household exclusion unenforceable up to that sum but valid as to any additional coverage. See id. at 526. Florida law does not mandate bodily injury liability coverage and imposes no impediment to, or limitation upon, the household exclusion. See Reid v. State Farm Fire & Cas. Co., 352 So. 2d 1172 (Fla. 1977).

than those of the named insured"); see, e.g., State Farm Fire and Cas. Co. v. Oliveras, 441 So. 2d 175, 178 (Fla. 4th DCA 1983) (holding that an excess policy provision addressing the failure of "the Insured" to carry underlying coverage applied not just to the named insured, but to the person meeting the definition of "insured" who claimed liability protection; "[t]o hold otherwise would provide greater coverage for the daughter [i.e., the additional insured] than the father at no cost to the daughter").

It is undisputed that the named insured, Gilda Menendez, would have no liability protection if her operation of her car resulted in injury to her resident family members. But under the Respondents' interpretation, a stranger to Ms. Menendez's insurance policy driving Ms. Menendez's car *is* afforded liability protection for injury he causes to his resident family members.

Fourth, the Respondents' interpretation is unreasonable because it renders the second part of the household exclusion superfluous except in extremely narrow and unlikely scenarios. This is because resident relatives of the named insured are themselves "***insureds***," so their injuries are already excluded under the first part of the household exclusion as injuries to "any ***insured***."

Fifth, the Respondents' reading goes a long way to defeating the purpose of the household exclusion, which is to protect the insurance company from over friendly or collusive lawsuits between family members. See Reid, 352 So. 2d at

1173. The Third District's interpretation nullifies the household exclusion when the risk of friendly or collusive lawsuits is greatest. The risk of collusive lawsuits is presumably increased when the family members reside together. In addition, the risk of collusive lawsuits between family members is just as real when a third party's car is involved and is likely even greater when a third party's insurance policy is being invoked.

B. The Third District's Decision Cannot be Reconciled with *Reid* or *Linehan*.

The Respondents claim that Reid v. State Farm Fire & Cas. Co., 352 So. 2d 1172 (Fla. 1977), and Linehan v. Alkhabbaz, 398 So. 2d 989 (Fla. 4th DCA 1981), considered only the validity of the household exclusion and that neither case actually applied the exclusion or considered whether it was ambiguous. These arguments are misplaced. In both cases, a household exclusion substantively the same as ours was applied where the claimant was a resident family member of the permissive driver. The fact that neither opinion specifically stated that the exclusion was unambiguous indicates only that the courts applied the exclusion as written.

The exclusion in Reid was described as "a provision in the policy that the insurance does not apply to bodily injury to any insured or any member of the family of an insured residing in the same household as the insured." See 352 So.

2d at 1173. This is substantively the same as ours. Reid involved a permissive driver whose sister, a passenger, was injured while the permissive user was driving a car borrowed from their father. The Respondents say the critical fact was that the injured sister resided with the named insured, but the opinion reflects that it was the fact that she resided with her sister, the permissive driver, that was significant:

> Appellant filed suit against her sister and State Farm alleging that she was injured as a proximate result of her sister's negligence. State Farm denied liability, relying upon a provision in the policy that the insurance does not apply to bodily injury to any insured or any member of the family of an insured residing in the same household as the insured. **Appellant and her sister resided in the same household.** If the exclusion is valid, it applies.

352 So. 2d at 1172-1173 (emphasis added). It is also apparent from this passage that the Court considered the applicability of the exclusion.

Similarly, the notion that Linehan addressed only the validity of the exclusion, and not its applicability, is incorrect. This Court in Reid validated the household exclusion four years earlier, so there was no reason for the Fourth District to recite all the pertinent facts simply to hold the exclusion valid. It is clear from the Linehan opinion that the court applied the household exclusion to facts analogous to ours. The named insured loaned her car to her aunt. See Linehan, 298 So. 2d at 990. The aunt's daughter was driving the car when the aunt was killed. See id. State Farm acknowledged that the driver was an insured, as she was operating the vehicle with the owner's consent, and State Farm asserted that

there was no coverage because the aunt and her daughter were residents of the same household. See id. at 990. The trial court granted summary judgment in State Farm's favor and the Fourth District affirmed. See id.

The household exclusion in Linehan was paraphrased as follows: "this insurance does not apply under coverage A to bodily injury to any insured or any member of the family of any insured residing in the same household as the insured." See id. at 990 n.1. It is immaterial that the exclusion was paraphrased rather than quoted. The opinion described the exclusion with specificity and it is substantively the same as ours.

There is no way a trial court in this State could follow both Linehan and the Third District decision under review. Express and direct conflict exists.

Unlike the Respondents, the Florida Justice Association (FJA) seems to acknowledge that Linehan considered the applicability of the household exclusion. In this regard, the FJA argues that Linehan somehow supports the Respondents -- a position even the Respondents have not articulated. Specifically, the FJA points out that tort liability in Linehan was governed by Wisconsin law, which does not impose vicarious liability on vehicle owners. From this, the FJA concludes (without any explanation) that if the Linehan accident had occurred in Florida, then the vehicle owner's liability would have been covered by the policy.

The FJA's argument confuses liability with insurance coverage. Under Linehan, the household exclusion precludes coverage for bodily injury to a resident family member of a permissive driver. The policy simply provides no *coverage* for such injuries. It does not matter who may be held *liable* for them. See Zipperer (applying the household exclusion to a claim against the vehicle owner where the permissive driver's resident step-son was injured); Webb (coverage for claims against both the vehicle owner and the driver held excluded by an employee exclusion where the claimant was an employee of the driver only); Mercury Ins. Co. of Florida v. Charlie's Tree Service, Inc., 29 So. 3d 375, 377 (Fla. 4th DCA 2010) (applying an exclusion for injury to an employee of an insured even though the particular insured sued was not the employer; "The exclusion is not confined to the parameters of a particular lawsuit, but is directed at the facts of the accident for which coverage is sought.").

C. *Cochran v. State Farm* is inapposite

The Respondents place great emphasis on Cochran v. State Farm Mut. Auto. Ins. Co., 298 So. 2d 173 (Fla. 4th DCA 1974). Cochran, however, involved a different issue, different facts, and different policy language. Moreover, even on its facts, Cochran is contrary to precedent from this Court.

Cochran involved the first part of the household exclusion, not the second part which is at issue here. The question in Cochran was whether the named

insured's policy covered a claim against her for negligent maintenance of the vehicle that resulted in injury to a permissive driver insured.

At that time, the first part of State Farm's household exclusion excluded coverage for bodily injury to "the insured" (while today it excludes coverage for injury to "any insured"). See id. at 174. The Fourth District held that the phrase "the insured" in the exclusion was not necessarily the same as the word "insured" as defined in the policy. The court also placed awkward reliance on the "mutual conditions" of the policy, which referred to "the insured" in a way that led the court to equate that phrase with the first named insured (while the "mutual conditions" today do not refer to "the insured" at all). For these reasons, the court held that the exclusionary phrase "the insured" meant the named insured only; as a result, the policy did not exclude coverage for injury to the omnibus insured. Notably, Judge Mager concurred in result only and Judge Owen dissented. See id. at 175.

Even if Cochran were correct that the phrase "the insured" could, by itself, mean the named insured only, at issue is the exclusion for injury to "any member of an ***insured's*** family residing in the ***insured's*** household." As explained earlier, the phrase "the ***insured***" in this grammatical structure means the particular insured identified immediately earlier as "an ***insured***."

While Cochran is distinguishable on many levels, it also cannot be squared with this Court's decision in Webb v. American Fire & Cas. Co., 148 Fla. 714, 5 So. 2d 252 (1942). Webb held that the phrase "the insured" in an exclusion meant the word "insured" as defined, and included a permissive driver. The Cochran decision, and the Third District's decision here, conflict with Webb.

The Llanes Respondents also rely on Bethel v. Security Nat. Ins. Co., 949 So. 2d 219 (Fla. 3d DCA 2006). Bethel held that an exclusion for injury to a "member of the family of the insured" did not apply where the policy defined the term "family member" to exclude individuals who owned their own cars. The claimant owned her own car and, therefore, was not a "family member." The court held that the phrase "member of the family of the insured" in the exclusion meant the same thing as the defined term "family member." Because the claimant was not a "family member" as defined, she was also not a "member of the family of the insured" and the exclusion did not apply. Bethel offers nothing here.

D. The Alternative "Household" Argument

The Llanes Respondents alternatively argue that the policy is ambiguous because the term "household" is undefined and may require that the granddaughter, Fabiloa G. Llanes, personally own the house in which she and her parents reside together. (Llanes Ans.Br. at 24). No authority is offered to support this argument, which was not addressed by the Third District below.

The failure to define a term does not make it ambiguous. See Swire Pacific Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 166 (Fla. 2003). When the insurer has not defined a term, the common definition of the term should prevail. See Auto-Owners Ins. Co. v. Above All Roofing, LLC, 924 So. 2d 842, 847 (Fla. 2d DCA 2006).

Under the case law, "household" involves: (1) close ties of kinship; (2) fixed dwelling unit; and (3) enjoyment of all the living facilities. See Dwelle v. State Farm Mut. Auto. Ins. Co., 839 So. 2d 897, 898-99 (Fla. 1st DCA 2003). There is no requirement that the granddaughter have any ownership interest in the physical structure.

CONCLUSION

The household exclusion is clear and unambiguous. As applied in this case, the only reasonable and logical interpretation is that it excludes coverage for bodily injuries to resident family members of the permissive driver insured. This is the reading given by Reid, Linehan, and other cases. The Third District's conflicting holding stands alone and is incorrect. It is respectfully requested that this Court disapprove the decision of the Third District Court of Appeal and remand for entry of a declaration of no coverage.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was served by United States Mail this date, November 2, 2010 to: Lauri Waldman Ross, Esquire or Theresa L. Girten, Esquire, Ross & Girten, Two Datran Center, Suite 1612 9130 South Dadeland Boulevard, Miami, FL 33156-7818; Gonzalo R. Dorta, Esquire, Gonzalo R. Dorta, P.A., 334 Minorca Avenue, Coral Gables, FL 33134; Joel Bernstein, Esq., Bernstein, Chackman & Liss, 1909 Tyler Street, 7th Floor PO Box 223340, Hollywood, FL 33022; Elizabeth K. Russo, Esquire, Russo Appellate Firm, 6101 Southwest 76th Street, Miami, FL 33143; Karel Remudo, Esq., Law Office of Karel Remudo, P.A., 334 Minorca Avenue, Coral Gables, FL 33134-4304; Mark A. Boyle, Sr., Esq., Boyle & Gentile, PA, 2050 McGregor Boulevard, Fort Myers, FL 33901; and to Stephen A. Marino, Jr., Esquire, Ver Ploeg & Lumpkin, P.A., 100 S.E. Second Street, 30th Floor, Miami, FL 33131.

CERTIFICATE OF COMPLIANCE

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