

NO. A07-1627

State of Minnesota
In Court of Appeals

Michael Bundul as Trustee for the Heirs and
Next of Kin of Carol Bundul, and individually,
Plaintiff-Respondent,

and

Benjamin Bundul,
Involuntary Plaintiff,

vs.

Travelers Indemnity Company d/b/a Travelers,
Defendant-Appellant,

and

Dick Devine and David Agency, Inc.,
Defendant.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellant Travelers Indemnity Company d/b/a Travelers ("Travelers") submits this reply brief in further support of its appeal of the trial court's erroneous determination that a household exclusion in a Personal Liability Umbrella of Security Policy ("PLUS policy") is invalid and unenforceable on the grounds that the exclusion is subject to Minnesota's No-Fault Act.

Plaintiff-Respondent Michael Bundul as Trustee for the Heirs and Next of Kin of Carol Bundul, and Individually, ("Bundul") and the Amicus Curiae, the Minnesota Association for Justice, attempt to convince this Court that an umbrella policy is really an automobile policy. They then adopt the trial court's rationale to justify their argument, asserting that the rule of law, which only a small minority of jurisdictions in the United States have adopted, invalidating household exclusions in umbrella policies, should be followed. However, Minnesota continues to recognize the validity of such exclusions beyond automobile policies.

Bundul, the Amicus Curiae and the trial court fail to realize that a household exclusion set forth in an umbrella policy - as distinct from an automobile policy - simply is not contrary to Minnesota law. The Minnesota Supreme Court has long held that so long as the coverage required by law is not omitted, and the policy provision at issue is not contrary to applicable statutes, an insurance company is free to contract with its insured for certain risks at the exclusion of others. A decision by this Court in contravention to this precedent would reverse a long line of prior decisions backed only by an emotional plea of the Bunduls.

STATEMENT OF FACTS

Although the facts relevant to this appeal are entirely undisputed by the parties, Bundul has nevertheless taken much time to compose a vivid biography of the Bundul family. Since the facts leading up to the accident and the policy language are admittedly not at issue, this recitation is little more than a detour from the real issue on appeal – whether a household exclusion in an umbrella policy is valid and enforceable under Minnesota law.

ARGUMENT

Bundul's argument is simple, but flawed. Bundul argues, simply, that policy terms that conflict with statutes are unenforceable and as a result, the household exclusion at issue is unenforceable. (Respondent's brief at 5). The flaw is that Bundul cannot cite to any Minnesota statute (or even case law) that conflicts with the umbrella policy's terms, making it unenforceable. Bundul suggests that surely, the No-Fault Act should be enough to create this necessary authority, but, once again, Bundul cannot point to any Minnesota authority to support his argument that the No-Fault Act extends to umbrella policies. The reason, quite simply, is because none exists since umbrella policies clearly are not automobile policies.

Instead, household exclusions have consistently been found to be permissible in Minnesota with the sole exception being in automobile policies because there, mandatory coverage has created an exception to the otherwise general rule that such exclusions are valid. Because the No-Fault Act's mandatory coverage does not extend to optional umbrella coverage, the reasons relied upon by Bundul and the trial court in prohibiting

household exclusions in automobile policies do not transfer to umbrella policies. Accordingly, this Court should find that the household exclusion in Bundul's PLUS policy is valid and enforceable.

I. THE NO-FAULT ACT COMPENSATES ACCIDENT VICTIMS TO THE EXTENT OF MANDATED INSURANCE AND THEREFORE SHOULD NOT EXTEND TO OPTIONAL, ADDITIONAL COVERAGE.

Bundul engages in a lengthy discussion of the history and purpose of the No-Fault Act, which he identifies as to compensate victims of automobile accidents. (Respondent's brief at 6-9). To be sure, the Minnesota Supreme Court has declared that "the purpose of the no-fault Act is to fully compensate the insured *to the extent of the mandated insurance.*" Scheibel v. Illinois Farmers Ins. Co., 615 N.W.2d 34, 39 (Minn. 2000) (emphasis added). This qualification articulated by the Minnesota Supreme Court is critical – the No-Fault Act seeks to compensate accident victims to the extent of the *mandated* insurance, NOT to the extent of any additional umbrella coverage an insured may voluntarily choose to purchase.

Thus, Bundul's argument that the household exclusion in an umbrella policy is invalid under the auspice that it conflicts with the purpose of the No-Fault Act is incorrect. In other words, Bundul argues the household exclusion in the umbrella policy is invalid because the Bunduls were involved in an automobile accident that implicated the need for the additional automobile coverage in their umbrella policy. But this is not what the Minnesota Supreme Court declared in Scheibel. Instead, the intent of the Act is to compensate the insured *to the extent of mandated* insurance.

There is no dispute that the Bunduls were paid the full limits of their automobile liability policy, to the extent they were entitled. Therefore, the purpose of the No-Fault Act has been satisfied and it would not be against public policy to enforce the household exclusion in the Bundul's PLUS policy.

II. THE PUBLIC POLICY SURROUNDING THE ABOLITION OF INTRA-FAMILY IMMUNITY DOES NOT APPLY TO UMBRELLA POLICIES AND HAS BEEN REJECTED IN OTHER JURISDICTIONS.

Bundul further argues that the public policy that led to the abolition of household exclusions should be extended to invalidate a household exclusion in an umbrella policy. (Respondent's brief at 6-8). This theory has been rejected by both Iowa and Florida. *See Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599 (Iowa 1983); *Shelter General Ins. Co. v. Lincoln*, 590 N.W.2d 726 (Iowa 1999);¹ *see also Auto Owners Ins. Co. v. Van Gessel*, 665 So.2d 263, 267-68 (Fla. App. 2 Dist. 1995)(noting that in light of the state's public policy supporting the family exclusion clause, the Florida Court of Appeals declined to interpret the abrogation of inter-spousal immunity as an expression that a family exclusion clause is void as against public policy.)

This Court should similarly reject Bundul's reasoning because, as discussed previously, the exclusionary clause in Bundul's PLUS policy neither conflicts with the stated purpose of Minnesota's No-Fault Act nor is it prohibited by Minnesota common

¹ In *Shelter*, the Iowa Supreme Court keenly observed that, "[w]henver a court considers invalidating a contract on public policy grounds, it must also weigh in the balance the parties' freedom to contract. We will not eviscerate a contractual provision unless the preservation of the general public welfare imperatively demands it. Therefore, the power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt." *Shelter*, 590 N.W.2d at 730 (internal citations omitted.)

law. In fact, adopting Bundul and the Amicus Curiae's position would violate Minnesota's public policy in favor of allowing insurers the freedom to contract where the policy does not violate statutes or Minnesota law. See American Family Mut. Ins. Co. v. Ryan, 330 N.W.2d 113, 115 (Minn. 1983)(stating "[t]he well-settled general rule in the construction of insurance contracts...provides that parties are free to contract as they desire, and so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes, the extent of the insurer's liability is governed by the contract entered into..."); see also Bobich v. Oja, 104 N.W.2d 19, 24 (Minn. 1960). Indeed, for over forty years, the Minnesota Supreme Court has allowed insurers to limit their liability based upon the countervailing public policy favoring the parties' freedom to contract. Id.; see also American Family Mut. Ins. Co. v. Ryan, 330 N.W.2d 113 (Minn. 1983). The household exclusion in the PLUS policy does not violate any state law or statute, and this is fully known by Bundul and the Amicus Curiae.

Moreover, Minnesota has long recognized the validity of household exclusions in other types of policies, such as homeowners and property insurance. See id.; Vierkant v. AMCO Ins. Co., 543 N.W.2d 117 (Minn. Ct. App. 1996); Reinsurance Assoc. of Minnesota v. Hanks, 539 N.W.2d 793 (Minn. 1995). Clearly, the Minnesota Supreme Court has seen fit to distinguish between automobile and other types of insurance policies.

Furthermore, the Legislature is well-aware that the Minnesota Supreme Court has upheld the validity of household exclusions in homeowners' policies but not in automobile policies, and has not passed legislation to change the law with respect to

umbrella policies. It is not for this Court to change the intent of legislation. *See Mattson v. Flynn*, 13 N.W.2d 11 (Minn. 1944)(holding that the public policy of the state is determined by the legislature and not the courts, and courts cannot engraft additional limitations into law.)

III. THE ARGUMENT THAT AN UMBRELLA POLICY IS AN EXTENSION OF AN AUTOMOBILE POLICY MERELY BECAUSE THE PARTICULAR ACCIDENT IMPLICATES AUTOMOBILE COVERAGE IS ONE COURT'S MINORITY VIEW AND IS THEREFORE, NOT PERSUASIVE.

The authority cited by Bundul and the Amicus Curiae for the proposition that an umbrella policy is an extension of an automobile policy comes from a single extra-jurisdictional case in Kentucky. *See State Farm Mut. Ins. Co. v. Marley*, 151 S.W.2d 33 (Ky. 2004). However, Kentucky's reasoning has been rejected by a handful of jurisdictions.

For example, similar to Minnesota's countervailing public policy of allowing an insurer freedom to contract and particularly on point, is a recent Louisiana case where the Court of Appeals found that, while household exclusions are precluded in the context of compulsory automobile insurance, the same policy considerations are not applicable in the context of discretionary coverage in an umbrella policy. The Court reasoned:

It is clear that a household exclusion is not valid in a primary automobile insurance policy. We must now consider whether the excess coverage provided by the umbrella policy, issued in addition to a mandatory motor vehicle policy, is subject to the same public policy considerations of the primary policy which bar application of the household exclusion.

The umbrella policy under consideration in this case is not a mandatory primary automobile liability policy. Rather, it provides excess insurance for accidents that result in personal injury or property damage. These are

not limited to automobile accidents. Because the policy is not compulsory, the same public policy considerations set forth in the *Clarke* case and La. R.S. 22:622.2 are not operable here. *Clarke, supra*, and La. R.S. 22:622.2 insure that all innocent injured victims, including spouses and residents of the tortfeasor's household, are provided a basic level of insurance coverage for their damages. **However, the insurer in an umbrella policy is not providing compulsory coverage and the insurer has the right to express the limits of its liability. The insured is free to accept or reject those terms.**

Walker v. State Farm Mut. Auto. Ins., 850 So.2d 882, 888-89 (La. App. 2 Cir. 2003)(emphasis added).² The Walker court noted that some other states have even gone so far as to declare that an umbrella policy is not an automobile policy and is not subject to the statutory requirements for such policies. Id. at 889, citing Wright v. State Farm Mut. Auto. Ins. Co., 332 Or. 1, 22 P.3d 744 (2001); *see also* Bogas v. Allstate Ins. Co., 221 Mich. App. 576, 562 N.W.2d 236 (1997), *appeal denied*, 456 Mich. 925, 573 N.W.2d 620 (1998); Weitz v. Allstate Ins. Co., 273 N.J. Super. 548, 642 A.2d 1040 (1994); State Farm Mut. Auto. Ins. Co. v. Gengelbach, 1992 WL 88025 (D. Kan. 1992)(AA-120 – AA-124); Electric Ins. Co. v. Rubin, 32 F.3d 814 (1994).

Accordingly, it was err for the trial court to assimilate an automobile policy and an umbrella policy due to the type of accident that was involved. Presumably, an umbrella policy gets its name because it acts like an umbrella, sitting over the insured's automobile and homeowners' policies. It is not simply an extension of any one particular line of

² La. R.S. 22:655 in part declares the policy underlying the creation of the direct cause of action against a liability insurer. Clarke v. Progressive American Ins. Co., 469 So.2d 319 (La. App. 2d Cir. 1985)(noting that the purpose of La. R.S. 22:655 is to provide compensation for persons injured by the operation of insured vehicles.) In Clarke, the Louisiana Court of Appeals found a household exclusion in a compulsory automobile liability insurance policy was invalid only as applied to the statutory minimum levels of coverage required by Louisiana's compulsory insurance law.

insurance, but of *all* lines of the underlying coverage. But Bundul would have this Court believe that the PLUS policy should morph into an automobile policy because that is the nature of the claim it is called upon to cover, relying on the Kentucky case of Marley. Just as certainly, other courts have found the opposite – an umbrella policy is not an automobile policy. See American Fam. Mut. Ins. Co. v. Continental Ins. Co., 1991 WL 271522 (Minn. Ct. App. 1991)(AA-125 – AA-126); Weitz v. Allstate Ins. Co., 642 A.2d 1040 (N.J. Super. 1994). Like Minnesota and Kentucky, New Jersey also is a no-fault state with compulsory automobile insurance.

Therefore, merely because Kentucky has opined that the “distinction between the automobile liability and an umbrella liability policy is a distinction without difference” is not persuasive when the majority of courts have come to the opposite conclusion. See American Fam. Mut. Ins. Co. v. Continental, 1991 WL 271522 (AA-125 – AA-126); see also Wright v. State Farm Mut. Auto. Ins. Co., 332 Or. 1, 22 P.3d 744 (2001); Bogas v. Allstate Ins. Co., 221 Mich. App. 576, 562 N.W.2d 236 (1997), *appeal denied*, 456 Mich. 925, 573 N.W.2d 620 (1998); State Farm Mut. Auto. Ins. Co. v. Gengelbach, 1992 WL 88025 (D. Kan. 1992)(AA-120 – AA-124); Electric Ins. Co. v. Rubin, 32 F.3d 814 (C.A. 3 Pa. 1994). Notably, Oregon, Michigan, Kansas and Pennsylvania are also considered to be no-fault states, just like Minnesota.

IV. THE LUSKIN DECISION SHOULD NOT BE PUSHED ASIDE BUT INSTEAD, FOLLOWED, BECAUSE IT IS THE ONLY MINNESOTA DECISION INTERPRETING THE PRECISE ISSUE ON APPEAL.

Finally, it is ironic that Bundul suggests that this Court ignore the only decision interpreting Minnesota law that has ever considered the precise issue on appeal. That is,

Bundul dismisses the Eighth Circuit Court of Appeal's determination in Luskin v. State Farm Fire & Casualty Co., 141 F.3d 1169, 1998 WL 67760 (8th Cir. 1998), that a household exclusion in a PLUS policy is valid and enforceable under Minnesota law, arguing that a "federal court's interpretation of state law is not binding on state courts." (Respondent's brief at 15, citing Jendro v. Honeywell, Inc., 392 N.W.2d 688 (Minn. Ct. App. 1986)). While Luskin is a federal court case interpreting Minnesota law, the case nevertheless involved a similar declaratory judgment action concerning a personal liability umbrella policy coverage dispute. Luskin at *1. Importantly, like Bundul, Luskin brought suit after he was sued by his son for personal injury damages exceeding the limits of his automobile insurance policy. Id. The Eighth Circuit Court of Appeals reviewed the case and the disputed issues of state law and affirmed the district court's decision that a "household exclusion was valid and enforceable under Minnesota law." Id. Notably, in Luskin, the insured moved to certify the question to the Minnesota Supreme Court, but certification was denied. (See May 6, 1997 Order of United States District Judge James M. Rosenbaum.)

The irony of Bundul's argument is that Bundul asks this Court to set aside a ruling of the only case interpreting Minnesota law, and instead follow the directives of the extra-jurisdictional states of Kentucky, New Mexico and Washington. (Respondent's brief at 18-19.) If this Court were so inclined to look to other states for direction, this Court should follow the majority of courts that have found the household exclusion to be valid and enforceable in an umbrella policy. See e.g. Weitz v. Allstate Ins. Co., 642 A.2d 1040, 1041-42 (N.J. App. Div. 1994); Walker v. State Farm Mut. Auto. Ins., 850 So.2d

882, 886-89 (La. Ct. App. 2003); Wright v. State Farm Mut. Auto. Ins. Co., 22 P.3d 744 (Or. 2001); Bogas v. Allstate Ins. Co., 221 Mich. App. 576, 562 N.W.2d 236 (1997), *appeal denied*, 456 Mich. App. 925, 573 N.W.2d 620 (1998); State Farm Mut. Auto. Ins. Co. v. Gengelbach, 1992 WL 88025 (D. Kan. 1992)(AA-120 – AA-124); Electric Ins. Co. v. Rubin, 32 F.3d 814 (C.A. 3 Pa. 1994); Shahan v. Shahan, 988 S.W.2d 529 (Mo. 1999); Schanowitz v. State Farm Mut. Auto. Ins. Co., 702 N.E.2d 629 (Ill. 1998); Auto Owners Ins. Co. v. Van Gessel, 665 So.2d 263 (Fla.2d D.C.A. 1995), *review denied*, 671 So.2d 788 (Fla. 1996); Shelter General Ins. Co. v. Lincoln, 590 N.W.2d 726 (Iowa 1999); State Farm Mut. Auto. Ins. Co. v. Daprato, 840 A.2d 595 (Del. 2003); Howe v. Howe, 218 W.Va. 638, 625 S.E.2d 716 (2005); Costello v. Nationwide Mut. Ins. Co., 143 Md. App. 403, 795 A.2d 151, 159-60 (2002).

This would be unnecessary, however, because Luskin provides this Court with support that Minnesota law does not invalidate a household exclusion in an umbrella policy. Luskin is therefore, instructive, and should be followed by this Court.

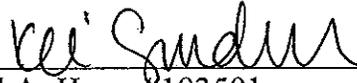
CONCLUSION

For the foregoing reasons, as well as those set forth in Travelers' initial brief, this Court should follow the well-reasoned and thoughtful decisions in Luskin and the majority of jurisdictions across the country to determine that the household exclusion in the Bundul's PLUS policy is valid, enforceable and not violative of Minnesota public policy. As the coverage afforded in the PLUS policy is not required by statute nor is it mandated by the legislature, the district court's order should be reversed.

Respectfully submitted,

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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Appellant certify that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 and contains 2,893 words, excluding the Table of Contents and Table of Authorities.

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