

IN THE SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

MARY ELLEN LUCAS-SOLOMON  
and BRIEANNA LUCAS,

Petitioners,

vs.

Case No. SC06-

AMERICAN STRATEGIC  
INSURANCE COMPANY,

Second DCA Case No.  
2D05-1862

Respondent.

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**PETITIONERS' BRIEF ON JURISDICTION**

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## **PRELIMINARY STATEMENT**

Petitioners, Mary Ellen Lucas-Solomon and Brianna Lucas, refer to themselves as the “Lucas Claimants,” unless it is necessary to distinguish between them.

The Lucas Claimants refer to Respondent American Strategic Insurance Company as “American Strategic.”

The Lucas Claimants refer to Melvin Eugene Kennedy, Margaret Edith Kennedy and Caitlyn Kennedy as “the Kennedys,” unless it is necessary to distinguish between them.

The Lucas Claimants refer to the pages of the Appendix to this brief, which is the Second District opinion, by the prefix “A.”

## **STATEMENT OF THE CASE AND FACTS**

The Lucas Claimants sued the Kennedys for a dog bite that Brianna Lucas suffered while visiting the Kennedy daughter, Caitlyn (A 2). American Strategic filed a declaratory action seeking a determination of whether it had a duty to defend and indemnify the Kennedys (A 2). All parties moved for summary judgment (A 2).

The American Strategic policy contains an exclusion for bodily injury caused by “any dog owned or kept by you.” “You” is defined as the “named insured” and the spouse if a resident of the same household (A 2). As the Second District opinion recognizes, “insured” was defined so that this term also included the Kennedy’s minor daughter, Caitlyn, as well as her parents (A 3).

The Lucas Claimants alleged the dog was owned by the parents, Melvin and Margaret Kennedy (the “you” in the policy) and was owned and kept by Caitlyn Kennedy, their nine-year-old daughter (an “insured” under the policy, but not within the policy definition of “you”)(A 2).

The trial court found the dog exclusion excluded coverage as to the Kennedy parents. It held the exclusion did not apply to Caitlyn because she was not included within the policy definition of “you,” to which the exclusion was limited,

but rather was an “insured” to which the exclusion did not apply (and thus a person to whom the policy provided coverage)(A 3).

The Second District reversed the trial court and found the exclusion applied to Caitlyn. As its rationale for doing so, the opinion quoted from the dissent (although not identifying it as such) in a Fourth District opinion, stating a court should consider the “reasonable expectations of the parties” in interpreting an insurance contract (A 3). The Second District opinion went on to discuss what it perceived to be American Strategic’s intent in providing or not providing coverage (A 4).

### **SUMMARY OF THE ARGUMENT**

The Second District announced a rule of construction for insurance contracts based on the reasonable expectations of the parties. This rule, based on the dissent in an opinion of another district court, conflicts with this Court’s holding, which rejected the doctrine of reasonable expectations. The Second District then purported to divine the intent of the insurance company in order to rewrite the plain policy language the company itself had authored. This conflicts with Florida law holding that clear and unambiguous policy provisions are to be applied as written. When the plain language of the policy here is applied as written, there is a duty to defend Caitlyn Kennedy.

## ARGUMENT

The Second District's opinion interpreting an exclusion based on the reasonable expectations and intent of the insurance company conflicts with this Court's rejecting the doctrine of reasonable expectations in *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Company*, 711 So. 2d 1135 (Fla. 1998). The holding also conflicts by purporting to interpret clear policy language, which required application rather than interpretation.

### A. Standard of Review.

Because this Court makes the initial decision on whether it will accept this case based on conflict jurisdiction, it is not reviewing the decision of an underlying court on the merits. This Court determines as a matter of law if there is conflict between the decisions.

The district court opinion does not have to identify the conflict to create jurisdiction. *Ford Motor Company v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981).

## **B. Argument.**

In beginning its analysis, the Second District opinion cited to a dissenting opinion that “in interpreting an insurance contract we must consider the intent and reasonable expectations of the parties in entering into the agreement” (A 3, citing *Commerce National Bank in Lake Worth v. Safeco Insurance Company of America*, 252 So. 2d 248, 252 (Fla. 4th DCA 1971)).

The Second District opinion did not note that it was citing a dissent. This Court expressly rejected the doctrine of reasonable expectations in *Deni Associates of Florida, supra*, 711 So. 2d at 1140: “We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer.”

Thus, the Second District’s opinion relying on the reasonable expectations and presumed intent of the parties expressly and directly conflicts with this Court’s decision in *Deni*.

Those courts that have adopted a doctrine of reasonable expectations have done so based on the expectations of the policyholder. Here, the Second District purported to look at “reasonable expectations” from the perspective of what it opined the *insurance company intended* (A 4). Its opinion twice refers to concluding it was a strained reading to suggest American Strategic intended to

exclude the named insureds, but at the same time intended to provide coverage for their nine-year-old daughter (A 4). The Second District opinion cites to no basis in the record for such a conclusion as to intent, its rationale for directing a summary judgment be entered in favor of American Strategic.

More important, purporting to divine what the insurance company intended conflicts with *Deni Associates* and the long-recognized principle of construction that what the insurance company intended is deemed to be set forth in the policy language it chose.

Quite simply, there was no need for interpretation here because the policy language was clear: coverage was excluded for the parents based on an exclusion limited to “you,” but was not excluded for another insured covered under the policy, but not within the policy definition of “you.” Put another way, there was no need to interpret this language; the Second District needed only to apply it – as the trial court had done correctly.

Consequently, the Second District’s opinion also conflicts with Florida law that when an insurance contract is clear and unambiguous, “there is no need for judicial construction and the contract must be enforced as written.” *See, e.g., Florida Power & Light Company v. Penn America Insurance Company*, 654 So. 2d

276, 278 (Fla. 4th DCA 1995), summarizing the holding in *Great Global Assurance Company v. Shoemaker*, 599 So. 2d 1036 (Fla. 4th DCA 1992).

This Court approved the result in *Florida Power & Light* (which went on to conclude the policy language was ambiguous and had to be construed against the insurer) in *Container Corporation of America v. Maryland Casualty Company*, 707 So. 2d 733 (Fla. 1998). In *Container Corporation*, this Court rejected an argument that language in a different contract was controlling when the insurance policy contained an endorsement naming the party in question as an additional insured. As this Court succinctly stated, “the language of the policy is controlling.” 707 So. 2d at 735.

Thus, the Second District’s opinion conflicts with established case law from other district courts of appeal and this Court that requires an insurance policy be applied as written, and not to be rewritten by the court. As worded, the exclusion in this case does not apply to Caitlyn Kennedy, who is owed a defense in light of the allegations that she is liable for the acts of the dog that injured Brianna Lucas.

As is typical in such liability policies, Caitlyn as an insured was entitled to a defense for tort claims for which she was sued, unless excluded by the policy. The Second District’s opinion that society would not view Caitlyn as the owner or

keeper of the dog simply means she does not come within the wording of the exclusion, and is entitled to a defense.

The Second District concluded its opinion by citing *Hartford Insurance Company of the Midwest v. Bellsouth Telecommunications, Inc.*, 824 So. 2d 234 (Fla. 4th DCA 2002). Even if the citation of *Hartford* had been on point, it would not eliminate the conflicts discussed above. However, the Second District also erred in relying on the *Hartford* case in stating that Caitlyn was “an additional insured” (A 45). Caitlyn was not an additional insured. She was an “insured” under the policy, just not a named insured (A 3).

The Second District’s citation to *Hartford* demonstrates another error in its analysis. In *Hartford*, the court found the anti-stacking clause applied to the *policy* “issued to you by us.” 824 So. 2d at 241. The court stated the clause did not provide that it applies to “you” (the named insured), but rather to the *policy* issued to you. By contrast, here American Strategic did not word its exclusion so that it applied to the policy, but so that it applied only to “you” (and not to Caitlyn, another insured under the policy).

**CONCLUSION**

The Lucas Claimants respectfully request this Court accept jurisdiction in this case on the basis of the conflict discussed above.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: STEVEN G. SCHWARTZ, ESQ., Schwartz & Horwitz, P.L.C., 3301 N.W. Boca Raton Boulevard, Suite 200, Boca Raton, Florida 33431; JASON T. SALGADO, ESQ., Terrana, Perez, Salgado, P.A., 5301 W. Cypress Street, Suite 204, Tampa, Florida 33607, Attorneys for Respondent American Strategic Insurance Company; and AUBREY O. DICUS, JR., ESQ. and CHARLES F. WEEKS, ESQ., Battaglia, Ross, Dicus & Wein, P.A., P.O. Box 41100, St. Petersburg, Florida 33743, Attorneys for Kennedys, on May 31, 2006.

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Attorney

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief has been prepared using 14-point Times New Roman type, a font that is proportionately spaced.

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Attorney

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