Electronically Filed 06/28/2013 02:27:50 PM ET

RECEIVED, 6/28/2013 14:28:35, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

Fourth District Court of Appeal Case
No.: 4D11-3803

BENJAMIN AND BETH
ERGAS,

Petitioners,

v.

UNIVERSAL PROPERTY AND
CASUALTY INSURANCE, CO.

Respondent.
_____/

JURISDICTIONAL BRIEF OF PETITIONERS

On Discretionary Conflict Review Article V, Section 3(b)(3), Florida Constitution

PAUL B. FELTMAN, ESQUIRE
ALVAREZ, CARBONELL, FELTMAN & DASILVA, P.L.
2100 Ponce De Leon Boulevard, Suite 800
Coral Gables, FL 33134
Telephone: (305) 444-5885
Facsimile: (305) 444-8986
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Florida Rules of Appellate Procedure

STATEMENT OF THE CASE AND THE FACTS

This is a case of first impression in the State of Florida as to what the undefined, ambiguous "marring" exclusion in an all-risk homeowner's policy excludes from coverage.[1] However, it is not a case of first impression regarding the manner in which an undefined, ambiguous exclusionary clause in an all-risk policy is to be construed. The Fourth District's Opinion in this matter has far reaching consequences for homeowners in this state, in that it gives the broadest definition to the undefined, ambiguous exclusion in an all-risk homeowner's insurance policy in contravention to the well settled law of the State of Florida as established by this Court and the District Courts in this state.[2]

Plaintiff suddenly and accidently dropped a hammer causing damage to his tile floor. Op.-1. He made a claim for damage under his homeowner's policy that was denied. *Id.* The Defendant claimed the damage constituted "marring" an undefined, ambiguous exclusion in the all-risk policy at issue. *Id.* After the homeowner filed suit, the trial court entered summary judgment applying the marring exclusion. *Id.*

The District Court recognized the long held principles of construction of ambiguous exclusions in all-risk homeowner's policies in the State of Florida in that when an ambiguous exclusionary term is not defined, as in this case, it must be

---

[1] The exclusion reads in full: "wear and tear, marring, deterioration."

[2] The Opinion will be cited in this Brief as "Op." followed by the page number.

given its narrowest construction. Op.-2-3. That when there are two possible definitions in an all-risk policy and one provides coverage and one does not then the one that provides coverage is to be applied. *Id.* The District Court recognized that the Defendant's definitions could include almost all damage to property, which the insured would expect to be covered. Op.-4 n. 1. It also recognized that this is an absurd result. *Id.* In spite of this it accepted the sweeping definition offered by the Defendant. Op-4-5. It rejected the Plaintiffs' argument that "marring" should be taken in context of the exclusion in which it was contained: "wear and tear, marring, deterioration" applying the principle of *ejusdem generis* *Id.* at 4.[3] Because the other terms in the undefined, ambiguous exclusion of the all-risk policy "suggest ordinary damage to property occurring gradually or over time" not damage or injury "caused by an accidental risk, which as dropping a hammer on the tile floor, which was sudden." *Id.*[4] However, the District Court rejected

---

[3] This Court applied the principle of *ejusdem generis* as the correct rule of construction to be used when construing an undefined, ambiguous exclusion in an all-risk policy in the case of *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1089-1090 (Fla. 2005) (This interpretation is consistent with the principle of *ejusdem generis.* Distilled to its essence, this rule provides that where general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned. *See Arnold v. Shumpert,* 217 So.2d 116, 119 (Fla.1968)).

[4] The Record will reflect that the Plaintiffs also offered without objection the industry definition of "marring." Plaintiffs presented the most useful insurance industry-standard definition given by the widely-accepted and reliable interpretation provided by the National Underwriter Company, which annually

Plaintiffs' argument that marring be defined as occurring over time (which would provide coverage) and disregarded other arguments without addressing them and affirmed the broadest definition of "marring," an undefined, ambiguous exclusion in the all-risk policy at issue, upholding the trial court's grant of summary judgment. *Id.* at 5. This appeal follows.

SUMMARY OF ARGUMENT

The District Court's Opinion is in conflict with the well established principles of construction of undefined, ambiguous exclusionary terms in an all-risk homeowner's policy. It gave the broadest definition to the term "marring" to include almost all damage under the policy at issue. Instead of finding that marring means damage that occurs over time applying this Court's rule of

---

publishes its industry standard "Glossary of Insurance Terms & Concepts," as reported in its "Field Guide for Property & Casualty Agents and Practitioners," which provides the following interpretation of the standard "wear and tear" and "marring" exclusionary provision:

> Wear and tear exclusion: A common heading for an "all risks" exclusion relating to a group of events that do not represent risk at all, Property will become worn out and torn; it will rust, settle, become rotted, infested, marred, scratched, etc. It is easy to distinguish however between the marring that occurs over time (excluded) and marring that occurs when a concrete block is dropped onto a fine wooden table.

It is prophetic that the Field Guide chose a falling object as the single illustration of an event that is not wear and tear or marring as used in the exclusion. The Record will also show that Plaintiffs did argue that the Defendant's definition was over inclusive of damage and could apply to any type of loss contrary to the District Court's statement to the contrary.

construction of *ejusdem generis* to construe a term in the context of the other terms in the exclusion at issue. Instead of strictly construing the exclusion as this Court and every other District Court of Appeal does under these circumstances, it gave it the broadest possible definition to the exclusion.

It also goes against the law as established by this Court and followed by all the other District Courts of Appeal that when an insurer seeks to exclude coverage under an all-risk homeowner's policy it is the insurer's duty to *specifically* define the exclusionary term if it seeks a broad definition.

Instead of strictly construing the undefined, ambiguous exclusion to *provide* coverage (damage occurring over time), the District Court gave the broadest definition to *deny* coverage. This turns the law in the State of Florida on its head and puts the Opinion of the District Court in conflict with this Court's decisions and those of the other District Courts. By using the common dictionary definition of the verb *mar*, rather than defining the term *marring* in the context of the category of exclusions it is listed in the middle of pursuant to the proper rule of construction of *ejusdem generis* applied by this Court in *Fayed* the exclusion is clearly over-inclusive of damage and contrary to the precedents of this Court and the District Courts that require an undefined, ambiguous exclusionary term in an all-risk homeowner's policy be construed to provide coverage if there is one of two definitions that allow coverage, which there certainly is in this matter.

STANDARD OF REVIEW

The standard of review to grant jurisdiction is whether there is conflict jurisdiction given the manner in which the District Court construed the undefined, ambiguous exclusion in the all-risk policy. *Fayad*, 899 So. 2d 1082.

ARGUMENT

A. THE DISTRICT COURT IMPROPERLY GAVE THE BROADEST DEFINITION TO THE UNDEFINED AMBIGUOUS TERM "MAR" IN AN ALL-RISK POLICY IN CONTRAVENTION OF THE LAW OF THE STATE OF FLORIDA

As the Fourth District recognized in its Opinion, the broad definition given to the term "mar" in the all-risk homeowner's policy at issue could "gut coverage under the insurance policy." Opinion at p. 4 fn. 1. And, it would cover "most of what an insured would expect the policy to cover." *Id.* The wide breadth of the Opinion giving the broadest definition of marring possible to an undefined, ambiguous exclusionary term in the all-risk policy at issue in this matter is an improper construction of the policy exclusion pursuant to the law of the State of Florida. That construction/interpretation of the term is contrary to the law of every other District Court of Appeal and this Court.

This Court set forth the proper analysis of an undefined, ambiguous exclusion in an all-risk homeowner's policy in *Fayad*, 899 So. 2d at 1086.

> We begin with the guiding principle that insurance contracts are construed in accordance with "the plain language of the polic[y] as bargained for by the parties." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 33 (Fla. 2000) (quoting *Prudential Prop. & Cas. Ins. Co. v.*

> *Swindal*, 622 So. 2d 467, 470 (1993)) (alteration in original). However, if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage the policy is considered ambiguous. *See Anderson*, 756 So, 2d at 34; *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). Ambiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured. (Citations omitted). Further, ambiguous "exclusionary clauses are construed even more strictly against the insurer than coverage clauses." *Anderson*, 756 So. 2d at 34; *see also Demshar v. AAACon Auto Transport, Inc.*, 337 So. 2d 963, 965 (Fla. 1976). ("Exclusionary clauses in liability insurance policies are always strictly construed."). Thus, the insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy.[5]

All other District Courts follow the rule of strict construction enunciated in *Fayed*, which was disregarded by the Fourth District. This puts the Opinion at issue in this matter in direct conflict with this Court each of the other District Courts. *See, Allstate Ins. Co. v. Shofner*, 573 So. 2d 47, 49 (Fla. 1st DCA 1990) (ambiguities in insurance policy must be strictly construed against the insurer and in favor of the insured – exclusionary clauses are to be more strictly construed than coverage clauses); *Purrelli v. State Farm Fire and Cas. Co.*, 698 So. 2d 618, 620 (Fla. 2d DCA 1997) (ambiguities in insurance contract must be construed liberally in favor of the insured and strictly against the insurer who prepared the policy - exclusionary clauses in insurance policies are construed more strictly than coverage clauses); *Triano v. State Farm Mut. Automobile Ins. Co.*, 565 So. 2d 748,

---

[5] In *Fayed*, this Court stated the principle of *ejusdem generis* is the correct rule of construction to be used when construing an undefined, ambiguous exclusion in an all-risk policy. *Fayed*, 899 So. 2d at 1089-1090.

749 (Fla. 3d DCA 1990) (ambiguities in insurance policy must be strictly construed against the insurer and in favor of the insured – exclusionary clauses are to be more strictly construed than coverage clauses) (multiple citations omitted); *Continental Ins. Co. v. Collinsworth*, 898 So. 2d 1085, 1088 (Fla. 5th DC 2005) (same). Thus, the Opinion of District Court at issue in this matter creates clear conflict with all the other District Courts of Appeal and this Court in that it gave the undefined, ambiguous exclusionary term in the policy the broadest definition possible such that it excludes potentially any loss suffered by an insured and effectively for all intents and purposes writes the damage definition out of the policy altogether. Instead of strictly construing the undefined, ambiguous exclusion to *provide* coverage (damage occurring over time), the District Court gave the broadest definition to *deny* coverage. It ignored the proper rule of construction under the principle of *ejusdem generis* that clearly under the exclusionary clause at issue provides that marring applies to damage that occurs over time, rather than a sudden dropped object as in this matter.

It also is contrary to the law as it relates to undefined, ambiguous exclusionary terms in an all-risk policy in that it is the insurer's duty to *specifically* define the exclusionary term if it seeks a broad definition. *See Fayad*, 899 So. 2d 1082 ("If Clarendon intended to exclude damage from earth movement caused by man-made events from coverage as it now contends, it could have done so clearly and unambiguously."); *Hartford Acc. & Indem. Co. v. Phelps*, 294 So. 2d 362, 363

(Fla. 1st DCA 1974) ("Having specifically covered plumbing system leaks, the insurer, if it had intended to exclude underground leaks in the plumbing system, would or should have specifically said so."); *Sturgis v. Fortune Ins. Co.*, 475 So. 2d 1272, 1274 (Fla. 2d DCA 1985) ("If Fortune had intended to exclude spouses from its "named insured" coverage where the spouse owns a separate vehicle for which security is required, it was incumbent upon Fortune to phrase such an exception in clear and unambiguous language."); *Pasteur Health Plan, Inc. v. Salazar*, 658 So. 2d 543, 545 (Fla. 3d DCA 1995) ("If Pasteur had intended to exclude injuries that occurred as the result of an ATC accident, they had every opportunity to say so explicitly.").

Furthermore, the District Court ignored the well established rule of law that once the insured has established a loss that appears to be within the terms of the all-risk policy, the burden is on the insurer to prove that the loss was caused by an excluded risk. *Hudson v. Prudential Property & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984). Thus, the Defendant had the burden of proving the exclusionary provision upon which it relies applies expressly, without any question, to the sudden and accidental falling of an object that causes damage. Plaintiffs neither need to prove or disprove anything. *See, Warfel v. Universal Ins. Co. of North America*, 36 So. 3d 136, 138 (Fla. 2d DCA 2010), *affirmed by Universal Ins. Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012). "When an insurer fails to define a term in a policy, the insurer cannot take the position that

there should be a narrow, restrictive interpretation of the coverage provided." *Bethel v. Security Nat. Ins. Co.*, 949 So. 2d 219, 222 (Fla. 3d DCA 2006) (citing *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998) (if undefined policy term is "susceptible to varying interpretations" the term must be "construed in favor of the insured"). "Policy provisions that tend to limit or avoid liability are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy, and exclusions to coverage are construed even more strictly against the insurer than coverage clauses." *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 744 (Fla. 2002) (citing *Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla.2000)). Since the undefined, ambiguous exclusion was susceptible to more than one definition (sudden/accidental damage that is covered v. damage over time that is not) the District Court should have chose the one providing coverage.

As a result of the District Court's decision to utilize the broadest definition of the verb *mar* in the "all-risk" policy, the insurance company can now exclude almost every cause of loss causing damage to the insured's property, for example: 1). *marring* excludes coverage for damage which impairs the soundness of the insured property; 2). *marring* excludes coverage for damage which impairs the integrity of the insured property; 3). *marring* excludes damage which spoils the insured property; 4). *marring* excludes coverage for damage which causes a disfiguring mark on the insured property; and 5). *marring* excludes coverage for

damage which blemishes the insured property. The breadth of the exclusion is endless. It can now even apply to damage caused by a fire. Instead of strictly construing the undefined, ambiguous exclusion to *provide* coverage (damage occurring over time), the District Court gave the broadest definition to *deny* coverage. This turns the law in the State of Florida on its head and puts the Opinion of the District Court in conflict with this Court's decisions and those of the other District Courts.

By using the common dictionary definition of the verb *mar*, rather than defining the term *marring* in the context of the category of exclusions it is listed in the middle of pursuant to the proper rule of construction of *ejusdem generis* applied by this Court in *Fayed* (and as defined by the insurance industry – over time) the exclusion is clearly over-inclusive of damage and contrary to the precedents of this Court and the District Courts that require an undefined, ambiguous exclusionary term in an all-risk homeowner's policy be construed to provide coverage if there is one of two definitions that allow coverage, which there certainly is in this matter.

CONCLUSION

For the foregoing reasons, this Court should exercise its conflict jurisdiction and grant review of the decision below.

Dated: June 28, 2013.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Electronic Correspondence to: RBD@loughren-doyle.com and lml@loughren-doyle.com) Richard B. Doyle, Jr., Esq., Loughren and Doyle, P.A., 506 SE 8th St, Ft. Lauderdale, Florida 333161 on this 28th day of June, 2013.

Respectfully submitted,

PAUL B. FELTMAN, ESQ.
Fla. Bar. No.: 992046
2100 Ponce de Leon Blvd.
Suite 800
Coral Gables, FL 33143
Tel: (305) 467 3540
Fax: (305) 444 8986

CERTIFICATE OF COMPLIANCE

I certify that this Petition has been submitted in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

PAUL B. FELTMAN, ESQ.