State of New Hampshire
Supreme Court

NO. 95-727

1996 TERM

APRIL SESSION

JANET TAYLOR-SCARPONI

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY &a.

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF APPELLEE/PLAINTIFF, JANET TAYLOR-SCARPONI

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OTHER AUTHORITIES

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Janet Taylor-Scarponi was hit by a car while crossing Lafayette Road (Route 1) in Portsmouth. At the time she was injured, she was an independent-contractor real estate agent. Ms Scarponi went to a house located at 1621 Lafayette Road to unlock it for an agent of another real estate company, who was showing the home to prospective buyers. The Defendants have agreed that opening the door was the totality of Ms. Scarponi's job-related duties. Agreed to Statement of Facts, Appendix at 109. As soon as she opened the door, a dog ran out of the house, and into Lafayette Road. Ms. Scarponi went to retrieve the dog. Traffic on Lafayette Road was stopped, but an impatient driver improperly pulled a car into the left-turn-only lane, striking Ms. Scarponi. Ms. Scarponi collected $50,000 -- the limit of the driver's policy -- from the driver's insurance carrier, but her medical bills far exceed that. Ms. Scarponi did not have any available underinsured motorist coverage, and because she was an independent contract she was not entitled to any worker's compensation benefits.

Ms. Scarponi sought coverage under her husband's family medical insurance policy for the rest of her medical bills related to her injuries. The Defendants claim that Ms. Scarponi's injuries are excluded by the terms of the policy and denied coverage. Ms. Scarponi thereafter brought this action, and the Superior Court *(Goode, J)* granted Ms. Scarponi's petition for a declaratory judgment. The Defendants brought this appeal.

SUMMARY OF ARGUMENT

Ms. Scarponi first argues that the Defendants' insurance policy purporting to exclude coverage for employment-related injuries is ambiguous and susceptible of several different meanings. The intent of the clause is to exclude injuries that are otherwise covered by worker's compensation, but Ms. Scarponi had none available. The interpretation of this claimed exclusion presents a question of first impression for this Court, but the Plaintiff cites cases from other jurisdictions holding that policies with similar language are ambiguous. Because ambiguities must be construed in favor of the insured, the Defendants may not refuse coverage.

Ms. Scarponi next argues that even if the policy excludes employment-related injuries, at the time of her accident she was outside of the scope of her employment, not engaging in a work-related activity, or was on a "frolic" from work.

She then argues that the Defendants' insurance policy claimed exclusion purporting to exclude from coverage injuries caused by third persons was not sufficiently clear and conspicuous such that Ms. Scarponi, a reasonable person, was not aware of it. She also argues that the clause was misleadingly and ambiguously captioned, and that the clause itself is ambiguous. For these reasons, she argues that the insurance company cannot refuse her coverage.

Based on Ms. Scarponi's Petition for Declaratory Judgment, the Defendants have the burden of proving the absence of coverage pursuant to RSA 491:22. The Defendants failed to meet their burden.

ARGUMENT

I. THE NO-EMPLOYMENT-INJURIES CLAUSE

The Defendants have claimed an exclusion based on its no-employment-injuries clause, which provides:

> "Benefits will not be paid for charges for:
> • An injury or illness arising from any employment or occupation other than employment or occupation with Colonial, except when the injury is covered by workers' compensation."

Appendix at 35, amended by letter, Appendix at 16.

A. The No-Employment-Injuries Clause Can be Read With Several Different Meanings

Language in insurance policies must be read in its plain, ordinary and popular meaning. Robbins Auto Parts Inc. v. Granite State Ins. Co., 121 N.H. 760, 764 (1981); McCaffrey v. St. Paul Fire & Marine Ins. Co., 108 N.H. 373 (1967). When an insurance policy can be taken to mean more than one thing to a reasonable reader upon a casual reading, the ambiguity is construed in favor of the insured. Trombley v. Blue Cross/Blue Shield, 120 N.H. 764 (1980); State Farm Mutual Auto Ins. Co. v. Desfosses, 130 N.H. 260 (1987); City of Manchester v. General Reinsurance Corp., 127 N.H. 806 (1986); Town of Epping v. St. Paul fire & Marine Ins. Co., 122 N.H. 248 (1982). These rules are applied closely in exclusion clauses. Haley v. Allstate Ins. Co., 129 N.H. 512 (1987); Trombley, 120 N.H. at 764.

The exclusion clause in this case can be read in at least three ways:

• the policy will not pay for an occupational injury if that occupational injury occurred while employed for someone other than Colonial; but the policy will pay for an occupational injury, regardless of employer, when the injury is covered by worker's compensation.

• the policy will not pay for an occupational injury if that occupational injury occurred while employed for someone other than Colonial; but the policy will pay for an occupational injury, if the occupational injury occurred while employed by Colonial, when the injury is covered by worker's compensation.

• the policy will not pay for an occupational injury if that occupational injury occurred while employed for someone other than Colonial if that occupational injury was covered by worker's compensation.

The ambiguity was aptly summed up in the decision of the Superior Court.

> "As written, this exclusionary language appears to provide that no benefits are afforded for injuries sustained from any employment or occupation unless that injury is covered by worker's compensation. Alternatively, perhaps the intent, though poorly expressed, is that only injuries sustained while in the employ of colonial are covered, unless such injury was subject to worker's compensation benefits."

Ruling on Defendants' Motion for Summary Judgment, Appendix at 2-3.

The subjective understanding of an exclusion clause is important in determining whether the clause is ambiguous. V & V Corp. v. American Policyholders' Ins. Co., 127 N.H. 372 (1985). The Plaintiff herself stated that:

> "The language relating to employment or occupation is confusing because I understood that this coverage would not apply only if I had workers' compensation because workers' compensation would pay my bills."

Affidavit of Janet Taylor-Scarponi, Appendix at 104, ¶ 7.

Numerous jurisdictions have found that this language is ambiguous and therefore construed in favor of the insured. In Crawford v. Prudential Ins. Co., 783 P.2d 900 (Kan 1989), Crawford was injured when he fell through a roof which he was repairing. There was no worker's compensation coverage because his employer did not carry any and Crawford was

probably an independent contractor anyway. Crawford's wife was employed by a company who had a group health insurance policy with Prudential, the defendant. The wife's policy contained a provision stating:

> "Generally Excluded Charges:
> (1) Occupational Injury or Disease charges -- charges incurred in connection with (a) injury arising out of, or in the course of, any employment for wage or profit or (b) disease covered, with respect to such employment, by any workers' compensation law, occupation disease law or similar legislation."

Crawford, 783 P.2d at 902.

As here, the plaintiff in Crawford claimed an ambiguity. The defendant insurance company:

> "contends that subparts (a) and (b) of the exclusionary clause should be read and considered as separate exclusions and subpart (a) should be literally applied according to its terms, resulting in no coverage for Crawford. On the other hand, Crawford contends that the exclusionary clause should be read and considered in its entirety, that the modifying clause at the end applies to subpart (a) as well as (b), and that a clear reading of the entire clause will show that it does not apply in this case."

Id. The Kansas court found that there was indeed an ambiguity and found for the injured plaintiff.

Likewise, in General American Life Ins. Co. v. Fisher, 517 So. 2d 31 (Fla. App. 1987), appeal dismissed, 523 So. 2d 577, the plaintiff and a co-worker were playing a prank on their manager. In the course of their prank a can of denatured alcohol exploded and badly burned the plaintiff, who was denied worker's compensation because the incident was a "deviation" from his job. Fisher, 517 So. 2d at 32. Plaintiff then sought coverage under his employer's group medical plan, but was denied based on exclusion that said that benefits are not payable for:

> "sickness covered by Worker's Compensation . . . ; or injury if it arises out of employment for pay, profit, or gain."

The plaintiff argued that:

> "the provision creates a single exclusion which comes into play only when worker's compensation benefits are recoverable for either injuries or illnesses. Plaintiff contends the provision was designed to avoid coverage when worker's compensation is or should be present, so that the insurance policy cannot be used as a substitute for worker's compensation or provide double coverage. In short, the purpose of the exclusion is to supplement worker's compensation coverage. When there is no recovery under worker's compensation, the group insurance policy should protect the employee and pay benefits. . . .
>
> "Conversely, defendant contends the provision contains two separate and distinct exclusions. The first exclusion pertains to a sickness covered by worker's compensation, while the second exclusion pertains to any injury arising out of employment, regardless of worker's compensation coverage. . . ."

Id. The Florida court found that "the provision in the General American insurance policy is ambiguous, in that two inconsistent interpretations are possible," and therefore decided for the injured plaintiff. Id. at 34.

In Montoya v. Travelers Ins. Co., 579 P.2d 793 (NM 1978), the insured's son was injured while working at a gas station. Because the son was working on a part time basis, he was not eligible for worker's compensation. The father/insured's health insurance policy contained an exclusion clause that provided:

> "No payment shall be made . . . with respect to
> (1) charges incurred in connection with (a) injury sustained while doing any act or thing pertaining to any occupation or employment for remuneration or profit, or (b) disease for which benefits are payable in accordance with the provisions of any workmen's compensation or similar law."

Montoya, 579 P.2d at 794. The court found two possible ambiguities. The clause was:

> "ambiguous because it is unclear whether the workmen's compensation proviso applies to both subclauses (a) and (b) or only to subclause (b), and should therefore be interpreted liberally to apply to both (a) and (b) since its purpose is to prevent double recovery by the insured, and not to deprive the insured from recovering under the policy when the charges for medical expenses are not covered by workmen's compensation."

Id. The clause was also ambiguous:

> "in that it does not make clear whether it applies to the insured employee only, to the insured employee and dependents, or only to dependents of the insured employee."

Id. The New Mexico court said that "[s]ince there are two inconsistent interpretations possible, we hold that the exclusionary clause at issue is ambiguous," id. , and allowed the son to recover on his father's policy.

Each of these cases are essentially the same as Ms. Scarponi's case. In each of them, an injured person did not have worker's compensation available to pay for their injuries. In each the plaintiff then turned to a family member's group insurance for coverage. In each, the insurance company denied coverage, standing behind exclusion clauses that were similar in kind, language, and intent as the clause here. In each, the court found that the language was ambiguous, that the coverage may have been intended to merely supplement worker's compensation, and the plaintiff ought to recover.

The following cases are substantially identical to those described above. The only difference is that in the following cases the policy exclusion was invoked to exclude coverage to the insured her/himself rather than to a member of the insured's family. In each of them, worker's compensation was unavailable, the injured worker looked for coverage from a group insurance plan, and was denied based on an exclusion purporting to not cover work-related injuries. In each case, for reasons similar to those in the cases described above, the exclusion was found to be ambiguous, and the injured plaintiff was able to recover.

In Dayal v. Provident Life & Acc. Ins. Co., 321 S.E.2d 452 (N.C. App. 1984), the owner of a store was sleeping in the back room while his son tended the store. A fan fell off the ceiling and injured the owner, but was not compensable under worker's compensation because the

owner was not working. The health insurance policy purporting to exclude injuries arising out of employment held to not apply because it was ambiguous.

In Rankin v. New York Life Ins. Co., 240 So. 2d 758 (La App. 1970), cert den, 242 So. 2d 247 (1971), a woman who was working in a clothing store. She was injured when struck by a bullet which was accidentally discharged from a pistol in an customer's purse which had fallen to floor. The injury was not covered under Louisiana's worker's compensation statute. Her health insurance policy, which excluded injuries arising in the course of employment, was held not to apply because it was ambiguous.

In Johnson v. Northern Assurance Co. of America, 193 So. 2d 920 (La. App. 1967), a Deputy sheriff was injured while working. He was not covered by worker's compensation, however, because the nature of his position made him not an "employee." His health insurance policy, which excluded injuries arising out of employment did not apply because it was ambiguous. See also Sanders v. General American Life Ins. Co., 364 So. 2d 1373 (La. App. 1978) (no worker's compensation because illness was pre-existing; policy construed to exclude only injuries covered by worker's compensation; insurance company held liable).

In United Benefit Life Ins. Co. v. Glisson, 123 S.E.2d 350, 352 (Ga. 1961), Glisson was injured while working for a railroad, but his injuries were not compensable under the Georgia worker's compensation statute. The court found that because of the ambiguity of the exclusion "it does not relieve the [insurer] of liability . . . simply because he sustained [his] injuries while performing duties in the course of his employment, unless he would have a cause of action for such expenses under the Workmen's Compensation Act or similar legislation." Glisson, 123 S.E.2d at 352.

Although some courts have found similar exclusions unambiguous, see e.g., General American Life Ins. Co. v. Barth, 307 S.E.2d 113 (Ga. 1983); Wilson v. Prudential Ins. Co., 645 P.2d 521 (Ok 1982), the weight of authority comes down on the side of ambiguity. Moreover, when there is division among courts as to the meaning of a clause, that is a sure sign of enough ambiguity such that the clause should be read in favor of the insured. Crawford, 783 P.2d at 906-08.

B. Intent of Exclusion is to Preclude Double Coverage

An insurance policy is a type of contract. While there are some special rules of construction, see e.g. Trombley v. Blue Cross/Blue Shield, 120 N.H. 764 (1980), like all contracts they must be read according to the intent of the parties. Metropolitan Life Ins. Co. v. Olsen, 81 N.H. 143 (1923).

The intent of the exclusion clause at issue here is to preclude double coverage. In Royal Globe Ins. Co. v. Graf, 122 N.H. 978, 980 (1982) this Court construed an exclusion which provided that "bodily injury to any employee of the insured arising out of an in the course of employment by the insured . . . ." The Court found the clause was intended to avoid duplication by excluding coverage for injuries covered by worker's compensation, and not to exclude all employment-related injuries. Graf, 122 N.H. at 980. This Court construed the same exclusion in Royal Globe Ins. Co. v. Poirer, 120 N.H. 422 (1980). In Poirer the facts are nearly identical to Ms. Scarponi's case. Because Poirer was a minor working without a permit, he was ineligible for worker's compensation for his injury. Coverage was thus sought from Royal Globe, which invoked the exclusion. The Court found that to apply the exclusion would require employers:

> "to indemnify damages that are not compensable under the workmen's compensation statute, damages from which his insurer is immunized. We regard

> this as an anomalous result. Instead, we adopt that interpretation of the exclusionary language that most clearly coincides with what must have been the intent of the parties. We hold that [the] exclusion does no more than exclude from liability coverage those damages that are compensable under a workmen's compensation policy."

Poirer, 120 N.H. at 427-28. See Fisher, 517 So. 2d at 31; Montoya v. Travelers Ins. Co., 579 P.2d 793 (NM 1978). The policy construed in Graf and Poirer is nearly identical to that at issue here, and the Court's construction of it is controlling. The clause ensures that when a person gets injured while working and receives worker's compensation, the insurance company is not concurrently liable. The plaintiff has no qualm with the intent of the clause and would not be seeking coverage from the defendants had she been covered by worker's compensation. When the insurance company has intended its exclusion for one situation it cannot apply it to another for which it was not intended.

C. Ms. Scarponi's Dog Chase was not a Work Related Activity

Even if the policy exclusion is interpreted to mean what the Defendants assert, Ms. Scarponi was not involved in a work-related activity when she was injured. In their brief, the Defendants attempt to broaden as much as possible the relationship between Ms. Scarponi's business and her presence in the "vicinity of the accident scene." Defendants' Brief at 11. The law however, focuses more narrowly on the specific activity in which Ms. Scarponi was involved, and inquires into whether that specific activity was or was not work related.

For instance, in Allstate Ins. Co v. Crouch, 140 N.H. __, 666 A.2d 964 (1995), a homeowner ran a car repair shop in his garage. While gratuitously welding a car, Crouch started a fire. His homeowners insurance excluded from coverage business pursuits. The Court said that "[t]he injury-causing activity was the type of work that [the insured] customarily performed.

That on the particular occasion at issue the work was performed gratuitously does not take it outside the business pursuits exclusion." Crouch, 666 A.2d at 966.

Similarly, in Hanover Ins. Co. v. Ransom, 122 N.H. 609 (1982), the insured's minor son was running a summer-time lawn-mowing business for which the son had hired a friend. While operating a riding mower tending a customer's lawn, the friend was injured. The insured sought coverage under his homeowner's insurance, which excluded "business pursuits." The court found that, because the friend's injuries occurred while he was doing that which he was hired to do, he was injured in the course of business.

In American Legion Post #49 v. Jefferson Ins. Co., 125 N.H. 758 (1984), on the other hand, the legion incurred dramshop liability in the course of selling alcoholic beverages. Its insurance policy excluded coverage for injuries sustained if the Legion were in the "business of" selling alcohol. Although it frequently sold alcohol and derived much of its operating budget from those sales, the legion was a non-profit whose primary function was a service and social club and a bar; its sales were merely incidental to its primary business. Thus, the court found it was not in the "business of" selling alcohol and the exclusion did not apply.

Crouch and Ransom together show that when an injury occurs in the course of an activity that is clearly within the normal operation of the business, this court will allow the insurance company to avoid liability. American Legion, on the other hand, shows that when the injury occurs in the course of an activity that is incidental to the normal operation of the business, the insurance company will be liable.

Ms. Scarponi's case is like American Legion. She was in the business of selling real estate. Chasing dogs was not her primary business; at most it was incidental. Unlike Crouch and

Ransom, chasing dogs was not in the normal course of those activities which a real estate agent would be expected to perform. Accordingly, like American Legion, the insurance company's exclusion should not apply.

In Haley v. Allstate Ins. Co., 129 N.H. 512 (1987), this Court explored in further depth the meaning of a "business pursuit." Haley ran a full-time day care in her home, and while a child was in her care, he was bitten by a stray dog. Her homeowner's insurance policy stated:

> "We do not cover [injuries] arising out of the business pursuits of an insured person [and] [w]e do cover [] [a]ctivities normally considered non-business."

Haley (emphasis removed). The Court determined that because the day care was full time it was a business, and therefore applied the exclusion. The court then drew an analogy:

> "For example, if a salesman were entertaining a potential customer on a golf course he would be engaged in a business pursuit; i.e., promoting sales. Nevertheless, 'if, in the course of the game, he injured his customer while swinging his golf club, the injury would come within the exception . . . ' as an activity normally considered non-business."

Haley, 129 N.H. at 515 (quoting State Farm Fire & Cas. Co. v. National Union Fire Ins. Co., 230 N.E.2d 513, 515 (1967)).

Unlike the present case, the facts of Haley itself are straight forward, and the policy language more definite. However, this Court was clear in its reliance on the nature of the activity rather than the reason the injured was in the vicinity.

The golf course analogy, on which this court relied, originated in a case that involved one Bruce MacDonald who was "engaged in his usual occupation -- that of repairing an elevator." State Farm Fire & Cas. Co. v. National Union Fire Ins. Co., 230 N.E.2d 513, 515 (1967).

> "In the course of making the repairs, [he] went to look for a piece of wood to use as a prop for the elevator door. He found a rubber mallet on a work bench on the premises, which would serve the purpose. In walking back to the elevator with

> the mallet in his hand, [MacDonald] passed in front of [John] McNaughton, who was standing with his back against a fire door. While so doing and in an impulsive gesture, MacDonald suddenly raised the mallet and struck it against the fire door behind McNaughton's head. Apparently, this was done as horseplay and with no intention of touching McNaughton. Unfortunately, the hammer rebounded and struck McNaughton on the head, injuring him."

State Farm, 230 N.E.2d at 514. McNaughton made a claim against his homeowner's policy, which contained a business pursuits exclusion as here. The Court drew the golf analogy which is quoted in Haley, and held that "we find an act of horseplay at least as alien to repairing and as akin to a non-business pursuit as an inadvertent and injurious golf swing, which may have business overtones." Id. at 515.

In Ms. Scarponi's case, the act of chasing a dog is totally alien to selling a house, and is also akin to a non-business pursuit as an inadvertent and injurious golf swing, which may have business overtones.

Thus, in Haley, State Farm, and the fictitious golf course case, the court looked deeper than the mere reason for the injured's presence at the scene. In each instance, the nature of the activity determined whether the activity was business related. Like State Farm, Ms. Scarponi's dog chase was an "impulsive gesture," that was a deviation from any reasonable business pursuit.

Moreover, in Haley, this Court fully defined what constitutes a business pursuit. The Court said that "[b]usiness, in common usage, signifies an undertaking or calling for gain, profit, advantage or livelihood. Haley, 129 N.H. at 514 (quotation and citation omitted). "A pursuit is an activity that one engages in seriously and continually or frequently." Id. at 514 (citations omitted). "Thus, the definition of 'business pursuit' contains two significant elements: profit motive and continuity." Id.; Crouch, 140 N.H. __, 666 A.2d 964, 966 (1995). Chasing a dog, unless one is the town dog catcher, is not a "business," and was certainly not Ms. Scarponi's

business. Accordingly, the exclusion should not apply.

D. Ms. Scarponi was on a Frolic

In its order, the Superior Court found that Ms. Scarponi:

> "while pursuing her real estate occupation of showing a home, . . . temporarily abandoned this activity and went on a frolic of her own to chase a dog; consequently, her subsequent injuries did not result from the conditions of her employment, but were incurred during an activity of a personal nature which was not a natural incident of her employment."

Ruling on Defendants' Motion for Summary Judgment, Appendix at 4 (emphasis added).

The concept of a "frolic" comes from the law of vicarious lability. In that context, if an employee is on a frolic, the employer is not liable for the torts of the employee. If however, the employee was merely on a "detour," the employer may be vicariously liable.

> "The simplest case of detour is that of a driver who is employed to drive a truck to deliver his master's goods to a point 10 miles south of the store, but who drives the loaded truck a short block west of the prescribed direct rout to get some cigarettes, intending to return forthwith to the performance of his duty. If he negligently injures plaintiff, during the deviation, the master is generally held liable.
>
> "At the other extreme stands the case where the driver, having delivered the goods, proceeds to take a 50-mile drive further south to see his girl and on his way there injures plaintiff 25 miles south of where he delivered the goods. Here the master is not held.

5 Harper, James & Gray, The Law of Torts, § 26.8 at 38-39. Lemarier v. Towle Co., 94 N.H. 246, 248 (1947) (employee truck-driver, having gone in direction opposite of employer's instruction to change his clothes, get his hair cut, and get ready for evening's date, negligently injured plaintiff).

There are generally four factors used to determine whether employee was on a detour or a frolic:

- time and place of the deviation;

• its extent with relation to the prescribed route;

• whether its motivation is in part to serve the master; and

• whether it is a usual sort of deviation for servants on such a job.

Speiser, Krause, Gans, The American Law of Torts (1983) § 4:18. See also, Restatement (Second) of Torts, §§ 229; Trahan-Laroche v. Lockheed Sanders, Inc., 139 N.H. 483 (1995).

The hypothetical question to ask is: if Ms. Scarponi had caused a tort during her dog chase (assuming she was an employee), would she have created vicarious liability for her employer? Ms. Scarponi was finished with her work, and was not expected to be in the road. While some portion of her motivation may have been to create a public perception that real estate agents working with Ringer & Syphers Realty do public acts, her motivation more likely was that she was worried about the dog. Thus, based on the "frolic" concept, she was probably on a frolic, and not a detour, and would not have created vicarious liability. Accordingly, the insurance exclusion, insofar as it excludes injuries in the course of her employment, should not apply.

E. Ms. Scarponi's Injuries Occurred Outside of the Scope of Her Employment

The Defendants rely on cases interpreting whether or not worker's compensation coverage applies, but these cases are inapposite. In the worker's compensation context, there is an expansive definition of employment "to give the broadest reasonable effect to the remedial purpose of the [workers'] compensation legislation." Murphy v. Town of Atkinson, 128 N.H. at 645 (1986) (citing Maltais v. Assurance Society, 93 N.H. 237, 240 (1944)).

But even with the expansive definition, employees who participate in company-sponsored activities are not considered employees. In Anheuser-Busch Co., Inc. v. Pelletier, 138 N.H. 456

(1994), the company ran a bowling league in which Pelletier, an employee, participated. Pelletier hurt his back during a league game. In seeking worker's compensation coverage for his injuries, he argued "that the bowling league provided the company with the benefits of positive public relations, increased company profits, greater employee productivity potentials, and increased employee morale." Id., 138 N.H. at 460. This Court held, however, that the employee "must show that the employer derives a substantial, direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." Id., 138 N.H. at 459-460 (internal quotations and citations omitted). Similarly, in Murphy v. Town of Atkinson, 128 N.H. 641 (1986), a member of the town's volunteer fire department was injured while playing softball at the department picnic. This Court held that he was not within the scope of his employment and thus was not eligible for worker's compensation benefits. Cf. New England Telephone Co. v. Ames, 124 N.H. 661 (1984) (employee injured while negotiating with employer on behalf of union; found within course of employment as negotiations among activities employer expected her to perform). In both these cases the employer's benefit was merely "intangible," and the employee was unable to show that his employer "derived a substantial, direct benefit" from the activity.

In Ms. Scarponi's case, her agency probably derived some intangible benefit from her saving the dog but it did not derive a substantial and direct benefit. Thus, even under the expansive worker's compensation definition of the scope of employment, Ms. Scarponi was not within the scope of employment. Accordingly, the defendants cannot take advantage of an exclusion that purports to exclude injuries "arising from any employment."

F. Public Policy Supports Plaintiff's Claim that She Was Not Injured While in the Scope of Her Employment

As set out in section E, *supra*, this Court, in the context of worker's compensation, has used an expansive definition of employment. That public policy, which ensures employees the broadest reasonable coverage, applies in this case. In the context of Ms. Scarponi's injuries, this Court should narrowly interpret what constitutes a business activity under medical insurance exclusionary provisions to achieve the public policy of providing the broadest reasonable coverage. In looking at particular activities the Court should look closely at whether the specific activity was business related. When it is not, as in Ms. Scarponi's case, the exclusion should not apply and coverage should be ensured.

Moreover, an expansive definition of what constitutes a business activity, outside the context of worker's compensation, would open up this Court to claims that many activities are business- or work-related. A narrow interpretation, holding that activities incidental to the normal operation of a particular business are not work-related, would aid judicial economy.

Finding that Ms. Scarponi's act of crossing the road to retrieve the dog was a non-work activity, coverage provided to Ms. Scarponi is consistent with sound public policy and would benefit the principles of judicial economy.

G. Unclear Status of Ms. Scarponi's Activity

Insurance policy exclusions must be construed in favor of the insured not only when the policy itself is ambiguous, but also when the facts of the case make it unclear whether an otherwise unambiguous exclusion applies. 2 Rhodes, Couch on Insurance, § 15:93. In Ms. Scarponi's case, if this Court is inclined to find that the policy was unambiguous and that Ms. Scarponi was working, the issue is nonetheless at least unclear. Thus, the policy must be construed in favor of her recovery.

II. THE NO-THIRD-PERSON-INJURIES CLAUSE

A. Exclusion Was Not Clear and Conspicuous

"[I]n interpreting an insurance contract, the court will honor the reasonable expectations of the policyholder." Trombley v. Blue Cross/Blue Shield, 120 N.H. 764, 771 (1980) (quotations and citations omitted). United American Ins. Co. v. Wibrach, 825 F.2d 1196 (7th cir. 1987) (policy interpreted in light of reasonable understanding of person in insured's position, taking into account policy, brochure, application and premium, and what policy is labeled). Ambiguities are construed against the insurer and the insurer has the burden of proving exclusions. Trombley, 120 N.H. at 771. Thus, the insurer has the burden to make exclusions clear, see M. Mooney v. U.S. Fidelity, 136 N.H. 463 (1992), and conspicuous.

When an exclusion is given little prominence, it is not binding on the insured.

> "In fairness to the policyholders, exclusions must be so prominently placed and so clearly phrased that he who runs can read. Any exclusionary or limiting provisions conceived by reading collectively various clauses scattered throughout the basic policy .. . would not bar plaintiffs from claiming the coverage they reasonably anticipated."

Solomon v. Continental Ins. Co., 299 A.2d 413, 418 (NJ Super 1972) (quotations and citations omitted). Thus, "[i]t is the insurer's burden to . . . make exclusionary provisions plain, clear and prominent to the layman. Id. Paramount Properties Co. v. Transamerica Title Ins. Co., 463 P.2d 746, 750-51 (Cal 1970) (exclusion must be "conspicuous, plain and clear"); Mallinger v. State Farm Mut. Auto. Ins. Co., 111 N.W.2d 647, 648 (Iowa 1961) (exclusions apply when they are plainly stated and conspicuous); Owen v. Mutual Benefit Health & Accident Ass'n, 203 P.2d 196 (Kan 1949) (exclusion must be conspicuous); VanDusen v. Interstate Business Men's Ass'n, 211 N.W. 911 (Iowa 1927) (exclusion must be conspicuous).

In Ms. Scarponi's case, the exclusion clause is buried in a hard-to-find section of policy which is misleadingly captioned. The exclusion upon which the Defendants rely provides:

> "Medical care benefits are not payable to or for a person covered under this plan when the injury or illness to the covered person occurs through the act or omission of another person."

Appendix at 59. The clause, however, is not contained in the limitations and exclusions section of the policy, which is denoted with a bolded caption as "**Limitations and Exclusions**." Appendix at 53-55. Instead, the clause appears under a similarly bolded caption, denoted as "**Right of Recovery**," appendix at 59, which otherwise is concerned with subrogation rights of the insurance company against third parties. The Superior Court recognized this problem and called the misleading misplacement of the exclusion its "abstract context." Ruling on Defendants' Motion for Summary Judgment, Appendix at 4.

Thus, the caption was buried in a place in the policy where a reasonable person could not expect to find it. In order to fully understand all the exclusions in her policy, Ms. Scarponi would have had to "read[] collectively various clauses scattered throughout the basic policy." Solomon, 299 A.2d at 418. Accordingly the exclusion was not sufficiently conspicuous and should not apply.

B. The Caption was Misleading and Created an Ambiguity

Captions, although not conclusive, must be read in conjunction with the insurance contract they purport to summarize, and must be used as a guide to the intent of the contract and the expectations of the policyholder. Georgia International Life Ins. Co. v. King, 172 S.E.2d 167 (Ga. App. 1969); Amicable Life Ins. Co. v. Slaughter, 288 S.W.2d 533, 535 (Tex. Civ. App. 1956); Thompson v. State Auto. Mut. Ins. Co., 11 S.E.2d 849, 852 (WVa. 1940). See also Iowa

Life Insurance Co. v. Lewis, 187 U.S. 335, 23 S. Ct. 126 (caption printed on back of form is part of the policy); Town of Epping v. St. Paul Fire & Marine Ins. Co., 122 N.H. 248, 252 (1982) (whole policy construed to honor reasonable expectations of the policyholder).

A clause may not be miscaptioned, nor may captions be misleading or create ambiguities. In McKendree v. Southern States Life Ins. Co., 99 S.E. 806-07 (SC 1919), for instance, a life insurance policy contained a bolded caption proclaiming coverage followed by an exception. The court found that when the bolded caption says one thing and the fine print says another, the caption must control, for the bolded caption is "calculated to lure men into taking insurance who would not otherwise do so." Similarly, in Mosby v. Mutual Life. Ins. Co., 92 N.E.2d 103 (Ill. 1950), a caption indicating coverage was followed by a closely worded clause requiring notice. The court held that the difference created an ambiguity and construed the policy in favor of the insured. See also Johnson v. Lincoln Natl. Life Ins. Co., 590 N.E.2d 761 (Ohio App. 1990), reh'g denied, 568 N.E.2d 1226 (exclusion under caption of "benefits" misleading under state statute; court denied exclusion).

In Ms. Scarponi's case, the caption under which the exclusion clause appeared was misleading. A reasonable person reading the caption, if they understood it at all, would assume that the clauses appearing under it had to do with recovery by the insurance company against third parties who might be responsible for damages caused to the insurance company. Moreover, the caption crated ambiguity in that by reading the caption in conjunction with the clause, it is unclear whether the policy says that (1) an insured may not recover when the injuries are caused by a third person; or (2) when a third person causes the injuries, the insurance company will seek to recover against that third party. Ms. Scarponi in fact was a victim of this ambiguity; she states

in her affidavit:

> "I did not understand the language contained on page 41 of the policy to exclude my coverage as relating to my accident since it did not appear in the 'Exclusions and Limitations' section of the policy. The language contained on page 41 relating to acts of third parties appears under the 'Right of Recovery' section and it appeared to me to pertain to circumstances when the insurance carrier was entitled to be paid back benefits it might have paid to me."

Affidavit of Janet Taylor-Scarponi, Appendix at 104, ¶¶ 3-4.

While the Defendants rely on Curtis v. Guaranty Trust Life, 132 N.H. 337 (1989) and City of Manchester v. General Reinsurance Corp., 127 N.H. 806, 809 (1986) to show the alleged reasonableness of its exclusion clause, the cases deal with vehicle exclusions and are inapposite. The Defendants nowhere address Ms. Scarponi's allegation that the exclusion clause is well-buried, misleading, and creates an ambiguity.

C. The Exclusion Clause is Ambiguous

The exclusion clause behind which the Defendants stand is itself ambiguous. Trombley, 120 N.H. at 764. The exclusion purports to not pay for injuries caused by a third person. It thus purports to pay only for injuries that are self-inflicted. The Superior Court commented that the provision

> "appears to limit coverage to self-inflicted wounds only. Most injuries, in terms of insurance coverage, necessarily refer to those caused by 'another person.'"

Ruling on Defendants' Motion for Summary Judgment, Appendix at 4.

Covering only self-inflicted wounds is a state of affairs not compatible with what most people think they are purchasing when they purchase health insurance. Ms. Scarponi was in fact lead to believe that she had comprehensive insurance. In his "Introduction" to the policy, Paul H. Clifton, Executive Vice President of Defendant Colonial Life & Accident Insurance Company,

wrote that the benefit program:

> • "offers extensive insurance benefits in a full range of forms -- medical, death, injury, and disability";
>
> • "is comprehensive";
>
> • is a "comprehensive benefits program"; and that
>
> • "I encourage you to take advantage of this opportunity to help protect yourself and your family . . . to give you the security you need."

Introduction to Policy, Appendix at 19 (emphasis added).

In its order, the Superior Court highlighted the language of the "Introduction," and commented that:

> "The position now taken by defendants in denying coverage to this petitioner is in marked contrast to the comprehensive nature of the insurance benefits touted by the executive vice president."

Ruling on Defendants' Motion for Summary Judgment, Appendix at 5.

At the least, the conflict between the exclusion and the Vice President's statement creates an ambiguity that must be construed in favor of Ms. Scarponi.

The Defendants are free, as they point out, to limit their policy in any way they choose. State farm Mutual Auto Ins. Co. v. Desfosses, 130 N.H. 260, 264 (1987). However, an insured may place reasonable reliance on an agent's assurance that an injury is covered. That reliance estops the company from denying insurance. Trefethen v. New Hampshire Ins. Group, 138 N.H. 710 (1994). Thus, the Defendants cannot apply the exclusion they claim.

III. INSURANCE COMPANY HAS BURDEN OF PROOF

Ms. Scarponi began this action by filing a petition for declaratory judgment. RSA 491:22. In any RSA 491:22 action, the burden of proof concerning coverage is on the insurer. RSA 491:22-a. This Court has consistently held that the insurer bears the burden of establishing lack of coverage, and that ambiguities are resolved in favor of the insured. M. Mooney v. U.S. Fidelity, 136 N.H. 463 (1992); Happy House Amusement, Inc. v. N.H. Ins. Co., 135 N.H. 719 (1992). In this case, the Defendants have not met their burden to show that there is no coverage. Accordingly, coverage should be afforded to Ms. Scarponi.

CONCLUSION

Pursuant to RSA 491:22, the Defendants have not met their burden of establishing no coverage. The ambiguity in the Defendants' policy must be resolved in favor of Ms. Scarponi. The provisions which the Defendants claim exclude coverage for employment-related injuries are ambiguous and susceptible of several different meanings. The real intent of the exclusions are only to exclude injuries covered by worker's compensation. Even if the policy excluded all employment-related injuries, Ms. Scarponi was not involved in an employment-related activity when she was injured. Finally, the claimed exclusion as to injuries caused by third persons is ambiguous, misleading, and not sufficiently clear and conspicuous. Accordingly, Ms. Scarponi is entitled to full coverage under the Defendants' policy for her injuries.

Respectfully submitted,

Janet Taylor-Scarponi
By her Attorneys,

Dated: April 1, 1996

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Janet Taylor-Scarponi request that Attorney John E. Lyons be allowed 15 minutes for oral argument.

I hereby certify that on the 1st day of April, 1996 a copy of the foregoing will be forwarded to Francis X. Quinn, Esq.

Dated: April 1, 1996

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