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COURT OF APPEALS, STATE OF COLORADO

Court Address: 101 West Colfax Avenue, Suite 800
Denver, Colorado 80202

District Court, Jefferson County, Colorado
Case No. 2014CV32056
Honorable Todd Vriesman

▲ **COURT USE ONLY** ▲

Plaintiff/Appellee: State Farm Mutual Automobile Insurance Company,

v.

Defendant / Appellant: Mabel Garcia.

Case Number:
2015 CA 1771

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 40(b).
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✓ For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Signed original on file in the offices of Patterson & Salg, P.C.

s/ Brian D. Kennedy
Brian D. Kennedy, #33023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Appellee State Farm Mutual Automobile Insurance Company (hereinafter "State Farm" or "Plaintiff") respectfully submits this Answer Brief, requesting the orders and judgment of the District Court be affirmed.

I. STATEMENT OF THE ISSUES

The following is the issue on appeal:

- Whether the District Court erred when it concluded that the State Farm policy insuring a 2004 Ford Expedition owned by Susan Leavitt did not provide liability coverage for Ms Leavitt when she was involved in an accident while driving a different vehicle not listed on that policy.

II. NATURE OF THE CASE

This appeal arises from an insurance coverage dispute. State Farm issued two policies of automobile insurance to Susan Leavitt and her husband. Mabel Garcia (hereafter "Garcia" or "Defendant") was involved in an automobile accident with Leavitt and asserted liability claims against Leavitt as a result of the collision. State Farm agreed that the policy covering the vehicle operated by Leavitt at the time of the accident, a 2007 Volvo XC70, provided liability coverage. However, State Farm did not agree that a second policy listing a 2004 Ford Explorer that was

not involved in the accident afforded coverage for the collision. State Farm brought a declaratory relief action against Leavitt and Garcia to resolve the coverage question. In that action, State Farm sought and obtained a declaration that Leavitt did not qualify as an insured for purposes of liability coverage for the subject accident under the policy covering the 2004 Ford Explorer and that State Farm, therefore, had no obligation to indemnify Leavitt under that policy. This appeal followed. The appeal poses issues of insurance contract interpretation.

III. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On November 25, 2012, Susan Lynette Leavitt was driving a 2007 Volvo XC70 near the intersection of County Road W and Highway 287 in Baca County, Colorado. The Volvo was owned by Leavitt. At the same time, Garcia was driving a Nissan Altima at the same location. The two vehicles were involved in a collision, and Garcia claims to have sustained injuries and damages in the accident. R. CF, p. 116.

Prior to the accident, State Farm issued two policies of automobile insurance to Susan Leavitt and her husband, Terry J. Leavitt. The first policy, State Farm Policy # 1, covered the 2007 Volvo XC70 and listed both Defendant Leavitt and her husband as named insureds. State Farm policy #1 has an applicable liability limit of $100,000 per claimant and $300,000 per accident. R. CF, p. 116. The

second policy, State Farm Policy # 2, covered a 2004 Ford Explorer also owned by Defendant Leavitt and her husband and, again, listed Defendant Leavitt and her husband as named insureds. It has an applicable policy limit of $500,000 per claimant and $500,000 per accident. R. CF, p. 117.

State Farm Policy # 2 contains the following relevant language:

DEFINITIONS

…

Newly Acquired Car means a ***car*** newly ***owned by you***. A ***car*** ceases to be a ***newly acquired car*** on the earlier of:

1. the effective date and time of a policy, including any binder, issued by ***us*** or any other company that describes the ***car*** as an insured vehicle; or
2. the end of the 14th calendar day immediately following the date the ***car*** is delivered to ***you***.

If a ***newly acquired car*** is not otherwise afforded comprehensive coverage or collision coverage by this or any other policy, then this policy will provide Comprehensive Coverage or Collision Coverage for that ***newly acquired car***, subject to a deductible of $500. Any coverage provided as a result of this paragraph will apply only until the end of the 5th calendar day immediately following the date the ***newly acquired car*** is delivered to ***you***.

Non-Owned Car means a ***car*** that is in the lawful possession of ***you*** or any ***resident relative*** and that neither:

1. is ***owned by***:
    a. ***you***;
    b. any ***resident relative***;
    c. any other ***person*** who resides primarily in ***your*** household;

or

    d. an employer of any ***person*** described in a., b., or c. above;

2. has been operated by, rented by, or in the possession of:
    a. ***you***; or
    b. any ***resident relative***

during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or ***loss***.

Owned By means:
1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

Temporary Substitute Car means a ***car*** that is in the lawful possession of the ***person*** operating it and that:
1. replaces ***your car*** for a short time while ***your car*** is out of use due to its:
a. breakdown;
b. repair;
c. servicing;
d. damage; or
e. theft; and
2. neither ***you*** nor the ***person*** operating it own or have registered.

If a ***car*** qualifies as both a ***non-owned car*** and a ***temporary substitute car***, then it is considered a ***temporary substitute car*** only.

You or ***Your*** means the named insured or named insureds shown on the Declarations Page. If a named insured shown on the Declarations Page is a ***person***, then "***you***" or "***your***" includes the spouse of the first ***person*** shown as a named insured if the spouse resides primarily with that named insured.

> ***Your Car*** means the vehicle shown under YOUR CAR on the Declarations Page. ***Your Car*** does not include a vehicle that ***you*** no longer own or lease.
>
> If a ***car*** is shown on the Declarations Page under "YOUR CAR," and ***you*** ask ***us*** to replace it with a ***car*** newly ***owned by you***, then the ***car*** being replaced will continue to be considered ***your car*** until the earliest of:
> 1. the end of the 30th calendar day immediately following the date the ***car*** newly ***owned by you*** is delivered to ***you***;
> 2. the date this policy is no longer in force; or
> 3. the date ***you*** no longer own or lease the ***car*** being replaced.

R. CF, pp. 153-155. With respect to liability coverage, the State Farm policy further provides:

> **Insuring Agreement**
> I. ***We*** will pay damages an ***insured*** becomes legally liable to pay because of:
> a. ***bodily injury*** to others; and
> b. damage to property
>
> caused by an accident that involves a vehicle for which that ***insured*** is provided Liability Coverage by this policy.

R. CF, p. 156. Relevant here, the policy defines "insured" in the context of liability coverage as follows:

> ***Insured*** means:
> 1. ***you*** and ***resident relatives*** for:
> a. the ownership, maintenance, or: use of:
> (1) ***your car***;
> (2) a ***newly acquired car***; or .....
> (3) a **trailer**; and
> b. the maintenance or use of:

(1) a ***non-owned car***; or
(2) a ***temporary substitute car***….

R. CF, p. 155.

Following the collision, Garcia filed a lawsuit against Susan Leavitt alleging that Leavitt was negligent and seeking to collect damages. State Farm was called upon to defend and indemnify Leavitt under both State Farm policies. R. CF, pp. 5, 116. There is no dispute that the policy covering the 2007 Volvo, State Farm policy #1, affords liability coverage to Defendant Leavitt. State Farm provided a defense to Defendant Leavitt in the tort action and has paid the full $100,000 limit of liability under that policy to resolve claims against Leavitt. However, State Farm has consistently maintained that State Farm Policy #2 does not provide liability coverage for the November, 2012 collision. R. CF, pp. 4-6. The accident did not involve the 2004 Ford. For that reason, State Farm concluded that Leavitt did not fit the definition of an insured for purposes of liability coverage under State Farm Policy #2. State Farm filed a declaratory relief action, asking the District Court to determine that the company had no obligation to indemnify Leavitt under that policy. R. CF, pp. 3-8.

In the District Court, the parties stipulated to the facts of the accident. R. C,F pp. 115-118. The parties further stipulated that State Farm issued a policy of automobile insurance to Susan Lynette Leavitt, policy number 058520006G

("State Farm Policy #1"). State Farm Policy #1 insured a 2007 Volvo XC70. The State Farm Policy #1 was delivered in the State of Colorado. It contained liability limits of $100,000. State Farm Policy #1 was in force and effect at the time of the November 25, 2012 collision. R., CF pp. 115-118.

Susan Lynette Leavitt also owned a 2004 Ford Explorer which was insured with State Farm for automobile liability. State Farm Policy number 043113806H ("State Farm Policy #2") covers Leavitt's 2004 Ford Explorer and names Terry J. Leavitt and S. Lynette Leavitt as insureds on the declarations page, and it was delivered in the State of Colorado. It contained liability limits of $500,000. State Farm Policy #2 was also in force on the date of the collision. The 2004 Ford Explorer was not involved in the November 25, 2012 accident. R. CF, pp. 115-118. It was undisputed that the 2004 Ford Explorer had not been damaged, stolen or experienced a mechanical breakdown at the time of the accident, and there was no evidence that it was being repaired. R. CF, p. 175.

Shortly after State Farm commenced the declaratory relief action against Leavitt and Garcia, Leavitt disclaimed any interest in the proceedings. R. CF, pp. 99-103. Based upon the pleadings and stipulations of State Farm and Garcia, both State Farm and Garcia asked the District Court to enter summary judgment, pursuant to C.R.C.P. 56. The court granted State Farm's Motion for Summary

Judgment and denied Garcia's Motion, finding that State Farm Policy #2 was unambiguous and that it did not provide coverage for the subject accident. R. CF, pp. 252-255. The court noted and rejected Garcia's argument that, because State Farm here uses the term "a vehicle" in the insuring agreement rather than a defined term such as "your car," any vehicle, including the 2007 Volvo XC70 is covered by State Farm Policy #2. R. CF, pp. 254-255. The court further rejected Garcia's contention that Ms. Leavitt meets the definition of an "insured" under State Farm Policy #2 and that, because she was the driver of the car involved in the collision, State Farm is obligated to provide coverage under State Farm Policy #2. *Id.* This appeal followed.

IV. SUMMARY OF THE ARGUMENT

The District Court correctly concluded that State Farm Policy #2 is unambiguous and that, by its terms, it does not afford coverage for the Leavitt/Garcia collision. In contrast, the interpretation of the policy advocated by Garcia is strained and would result in large portions of the definition of an "insured" under the liability portion of the policy, as well as substantial portions of the insuring agreement provision being rendered superfluous. Such a result would be inconsistent with both the parties' intent and Colorado Supreme Court precedent.

Despite Garcia's argument to the contrary, the policy is not ambiguous and does not seek to impose an exclusion in an unclear manner. Because the policy is not ambiguous, it should be enforced as it is written, just as the District Court found. The doctrine of reasonable expectations does not apply to change this result. There is no evidence in the record that the insureds under the policy had any expectation that State Farm Policy #2 would cover the accident with Garcia, and there is no evidence in the record of any procedural or substantive deception on State Farm's part.

Garcia's argument that Exclusion Number 10 demonstrates ambiguity in the policy is improper. Garcia did not assert this contention in the District Court and has therefore waived it. Equally important, the exclusion does not demonstrate or create any ambiguity. It simply deals with another portion of the definition of an "insured" under the liability provisions of the policy.

The District Court reached the correct result in determining that State Farm Policy #2 did not afford coverage to Leavitt for the accident involving Garcia. Therefore, the judgment of the District Court should be affirmed.

V. ARGUMENT

A. Standard of Review and Preservation of the Issue.

Determining coverage requires the Court interpret the State Farm policy. State Farm agrees with Garcia that interpretation of contracts is a question of law that is reviewed *de novo*. *Lake Durango Water Co., Inc. v. Pub. Utils. Comm'n.*, 67 P.3d 12, 20 (Colo. 2003).

State Farm generally agrees that the issue raised in this appeal was properly preserved. However, as more fully set forth in section V(D)(4) below, State Farm objects to Plaintiffs' arguments concerning Exclusion number 10 in State Farm Policy #2. *See* Appellant's Opening Brief, p. 16. That argument was never raised in the District Court. Arguments never presented to, considered by, or ruled upon by a trial court may not be raised for the first time on appeal. When a party fails to assert an argument in the trial court but raises it for the first time on appeal, the assertion is deemed waived. *O'Connell v. Biomet, Inc.*, 250 P.3d 1278, 1282 (Colo.App. 2010); *Brown v. Silvern*, 141 P.3d 871, 874 (Colo.App.2005); *Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 722 n. 5 (Colo.1992).

B. The District Court Did Not Err When it Found that, By its Terms, State Farm Policy #2 Does Not Afford Coverage.

Insurance policies are contracts. *American Family Mutual Ins. Co. v. Allen*, 102 P.3d 333, 340 (Colo. 2004). Terms in an insurance contract are to be given their plain, ordinary meaning, unless otherwise indicated by the parties' intent. *Id*., citing *Cotter Corp. v. American Surplus Lines Ins. Co.*, 90 P.3d 814 (Colo. 2004).

The primary goal of contract interpretation is to determine and effectuate the intent of the parties. *Copper Mt., Inc. v. Indus. Sys.*, 208 P.3d 692, 697 (Colo. 2009). To determine the intent of the parties, the court should give effect to the plain and generally accepted meaning of the contractual language. *Id.* The Court should interpret a contract "in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." *Id.* quoting *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984). The Court should choose a construction of the contract that harmonizes provisions instead of rendering them superfluous. *Id.* at 700.

Garcia's claim against Leavitt is a liability claim. By the terms of State Farm Policy #2, liability coverage is available only to a person who qualifies as an "insured." There is only coverage available if Leavitt meets the definition of an "insured" under the liability portion of the policy. Looking at the definition, the result depends on whether the 2007 Volvo Ms Leavitt was driving falls within the definition of "your car" or of a "non-owned car," a "newly acquired car" or a "temporary substitute car."[1] If the 2007 Volvo does not fall into one of those categories, there is no liability coverage. The 2007 Volvo is not listed on the Declarations Page under "YOUR CAR." R. CF, p. 143. Thus, the only real

[1] The Volvo is clearly not a trailer.

question is whether it qualifies as a “non-owned car,” a “newly acquired car” or as a “temporary substitute car.”

In order to qualify as a “non-owned car,” the 2007 Volvo must not be owned by “you,” as that term is defined in State Farm Policy #2. “You” is defined as “the named insured or named insureds shown on the Declarations Page.” The Declarations page of State Farm Policy #2 lists Ms Leavitt. R. CF, p. 143. Defendant Leavitt is the owner of the Volvo involved in the accident. Therefore, because the 2007 Volvo is “owned by you,” it does not qualify as a “non-owned car.”

In order to be a “newly acquired car,” the 2007 Volvo would need to be owned by one or both named insureds, which it is. However, State Farm Policy # 2 provides that a car loses its status as a “newly acquired car” at the earlier of two events: the effective date and time of a policy, including any binder, issued by State Far, or any other company that describes the new car as an insured vehicle; or the end of the 14th calendar day immediately following the date the car is delivered to “you.” “You” means the named insureds. R. CF, p. 155. Both of those events occurred prior to the subject accident. The 2007 Volvo was listed on another State Farm policy, State Farm Policy #1. Furthermore, it had been owned, registered and titled in the name of Leavitt for more than 14 days before the

accident.[2] Either one of those occurrences individually would be enough to make the 2007 Volvo no longer a "newly acquired car."

To qualify as a "temporary substitute car," a vehicle must be in the lawful possession of the operator, and it must be replacing "your car," which is the car listed on the declarations page of the applicable policy, for a short period of time because of breakdown, repair, servicing, damage or theft. R. CF, pp. 153-155. Additionally, in order to qualify as a "temporary substitute car," the replacement vehicle must not be owned by "you" or the person operating the car. R. CF, p. 154. Again, "you" is defined in State Farm policy #2 to include the named insureds. R. CF, p. 155. Susan Leavitt is a named insured under State Farm Policy #1 and State Farm Policy #2. She was also the owner of the 2007 Volvo. Thus, the Volvo fails to qualify as a "temporary substitute car" in two different ways. First, it was not serving as a substitute for Ms Leavitt's 2004 Ford Explorer. There is no evidence that the 2004 Ford was experiencing a breakdown, undergoing repair or service, that it was damaged or that it had been stolen. Second, even if the 2007 Volvo were serving as a replacement because of breakdown, repair, servicing, damage or theft of the 2004 Ford, the 2007 Volvo does not meet the

[2] In fact, the declarations page shows that it had been insured for more than 14 days. R. CF, p. 143.

second requirement, that it not be owned by the named insured on the applicable policy, State Farm Policy #2, because the owner, Ms Leavitt, is a named insured on that policy. Because Leavitt is a named insured on State Farm Policy #2 and because she owns the vehicle involved in the accident, the 2007 Volvo, it does not qualify for coverage under State Farm Policy #2 as a "temporary substitute car."

The 2007 Volvo is not listed on State Farm policy #2, meaning that it is not "your car," as that term is defined in the policy. It also does not qualify as of a "non-owned car," a "newly acquired car" or a "temporary substitute car." Consequently, Ms Leavitt cannot meet the definition of an "insured" while driving the 2007 Volvo. Because she was not an "insured," there is no liability coverage available. Coverage is limited to that already afforded by State Farm Policy #1, precisely as the District Court determined.

C. The Interpretation of the Policy Advocated by Garcia is Strained and Incorrect.

Garcia argues, however, that the definition of "insured" is broad enough to include Defendant Leavitt while she was driving the 2007 Volvo at the time of the subject accident. Garcia maintains that this requires that the policy provide Leavitt with coverage, even though the 2004 Ford listed on State Farm Policy #2 was not involved in the accident in any way because Leavitt was one of the owners of the 2004 Ford listed on the policy. Such a result is not in accord with the policy terms

and would not accurately reflect the expressed intent of the parties to the insurance contract.

Garcia's position that, because Leavitt was an owner of the 2004 Ford, all liability claims against Defendant Leavitt involving any vehicle are covered makes little sense. For one thing, it would render the language concerning a "non-owned car," a "newly acquired car" or a "temporary substitute car" essentially superfluous, which is contrary to Colorado Supreme Court precedent. *Copper Mt., Inc.*, 208 P.3d at 697. Contracts should generally be interpreted to harmonize their provisions. *Id*. The definition portion of the policy describing what is meant by a "non-owned car" is particularly important to consider. The definition makes it clear that, to qualify as a covered vehicle under the policy for liability purposes, a vehicle in the lawful possession of a named insured or a resident relative must not be owned by the named insured, a resident relative or anyone else living primarily in the named insured's household. The obvious intent of this definition is to make clear that other cars owned by the named insured(s) but not listed on this policy as "your car" are not covered by this policy for liability purposes and that even the named insured will not qualify for liability coverage while driving such a car. It is undisputed here that the 2007 Volvo was owned by Defendant Leavitt, rendering liability coverage unavailable under State Farm Policy #2. Garcia' proposed

interpretation of State Farm Policy #2 would render the definition of a "non-owned car" effectively a nullity.

The interpretation advocated by Garcia also ignores the context. Looking at the policy as a whole is important under the decisional law, which speaks of harmonizing provisions. *Id*. The definition of "insured" for liability coverage indicates that a person is an insured "for" the ownership, maintenance, or: use of: (1) your car; (2) a newly acquired car; or (3) a trailer. R. CF, p. 155. The word, "for," is significant. The policy protects an insured in the event of different types of occurrences. The definition makes reference to this by indicating that a qualifying person is an "insured" for the use of a specific vehicle, for instance. In this case, Defendant Leavitt would be an insured for a claim arising out of the "ownership, maintenance or use" of a qualifying vehicle, such as the car listed on the policy or a temporary replacement car used while the listed vehicle was being repaired. This tracks statutory requirements contained in C.R.S. §§ 10-4-619 and 10-4-620.

In addition to considering the definitions provisions, the Court should also look at the insuring agreement portion of the liability provisions of the policy. The policy provides that:

> **We** will pay damages an **insured** becomes legally liable to pay because of:

a. **bodily injury** to others; and
b. damage to property

caused by an accident that involves a vehicle for which that **insured** is provided Liability Coverage by this policy.

R. CF, p. 156. The policy provision states clearly that liability coverage is only afforded when an insured becomes legally liable to pay because of "an accident that involves a vehicle for which that insured is provided liability coverage by this policy. If this policy were to be interpreted as Garcia suggests, this language would be meaningless, because, by her ownership interest in the 2004 Ford, Leavitt would be covered for any accident involving any vehicle. Such an interpretation is simply not reasonable and is not in accord with Colorado decisional law. *See Copper Mt., Inc.,* 208 P.3d at 697.

Moreover, as the District court pointed out in its order, "this policy" is explained. "The outline under 'This Policy' in the policy booklet includes a description of what the policy entails, the parties agreeing to the policy, and the provisions of coverage under the policy." R. CF, p. 254. The section entitled, "This Policy," provides that:

1. This policy consists of:
a. the most recently issued Declarations Page;

b. the policy booklet version shown on the Declarations Page; and

> c. any endorsements that apply, including those listed on the Declarations Page as well as those issued in connection with any subsequent renewal of this policy.
>
> 2. This policy contains all of the agreements between all named insureds who are shown on the Declarations Page and all applicants and:
>
> a. ***us***; and
>
> b. any of ***our*** agents.

R. CF, p.152. The District Court correctly concluded that the policy being described is a specific one, namely, State Farm Policy #2. State Farm Policy #2 has a particular Declarations Page, which identifies the policy by its policy number, and that Declarations Page identifies the named insureds on State Farm Policy #2, the vehicle identified as "YOUR CAR," the policy's coverage levels, the premiums to be paid, and the documents that make up the policy. The "This Policy" section also provides that State Farm "agrees to provide insurance according to the terms of this policy." R. CF, p.152. Conversely, State Farm does not agree to provide insurance according to the terms of any other policy, whether issued by State Farm or anyone else. Indeed "The Policy" section states expressly that the described documents comprise the entirety of the agreements between State Farm and its named insureds. It would not be reasonable for the Court to construe the policy to

cover accidents involving vehicles listed on a different declarations page that is not a part of State Farm Policy #2.

Garcia's proposed interpretation would also be contrary to the actual practice by the Leavitts and State Farm. The Leavitts obtained separate policies for each vehicle, each with separate liability limits and separate premiums charged for liability coverage. The obvious intent of the parties, as expressed in the insurance contracts, is that State Farm Policy #1 would provide liability coverage for accidents involving the 2007 Volvo and that State Farm Policy #2 would provide liability coverage for accidents involving the 2004 Ford. Garcia's proposed interpretation of State Farm Policy #2 is simply not reasonable looking at the policy as a whole and in light of the circumstances.

D. The District Court Did Not Err When it Found State Farm Policy #2 Was Not Ambiguous.

1. The Policy is not Subject to More than One Reasonable Interpretation

Defendant Garcia argues, in the alternative, that State Farm Policy #2 is ambiguous. Again, Garcia is incorrect. An insurance policy provision is only ambiguous of it is "susceptible to more than one reasonable interpretation." *Cary v. United of Omaha Life Ins. Co.*, 108 P.3d 288, 290 (Colo. 2005)(emphasis added). In determining whether there is an ambiguity in a policy provision, the court must evaluate the policy as a whole using the generally accepted meaning of

the words employed. *Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1061 (Colo. 1994). "A mere disagreement between the parties regarding the interpretation of the policy does not create an ambiguity." *Id.* "A court may not rewrite an unambiguous policy nor limit its effect by a strained construction." *Terranova v. State Farm Mut. Auto. Ins. Co.*, 800 P.2d 58, 60 (Colo. 1990). In other words, if the competing interpretation advocated by Garcia is strained or unreasonable, it must be rejected, and the policy must be deemed unambiguous. *Id*.

Garcia argues that the definition of an "insured" is ambiguous and that the insuring agreement portion of the liability coverage provisions is consequently ambiguous, because the provisions could be read to apply to any accident involving any vehicle, so long as the party seeking coverage has an ownership interest in the vehicle listed as "Your Car" on the declarations page. Alternatively, Garcia contends that the policy is ambiguous, because the insuring agreement provision contained in the liability portion of the policy, which states that coverage is limited to "an accident that involves a vehicle for which that **insured** is provided Liability Coverage by this policy," is unclear, because the word, vehicle, is not specifically defined in the policy. Both these contentions lack merit.

The interpretation of "insured" advocated by Garcia overlooks the overall use of the term throughout the policy. As discussed above, it ignores the fact that

the definition refers to a person being insured "for" different types of claims. It ignores the fact that the term "this policy" is specifically described in the policy itself. It also renders meaningless whole portions of the policy discussing a "non-owned car," "newly acquired car" and "temporary substitute car." In short, this interpretation tortures the policy language. The only reasonable way to interpret the policy here is to view it as a whole and in context and to read it to define an insured, for liability purposes, as a person who is driving "your car," a "newly acquired car," a "non-owned car" or a "temporary substitute car." This interpretation is also consistent with Leavitt's and State Farm's actual practice, as the Leavitts had separate policies with separate liability coverages for their different vehicles. Because the competing interpretation offered by Garcia is unreasonable and would result in significant portions of the policy being rendered superfluous, it should be rejected. *See Copper Mt., Inc.*, 208 P.3d at 697. Since the policy cannot be reasonably interpreted in more than one way, there is no ambiguity.

Defendant Garcia's argument concerning the word, "vehicle," is specious. Rather, where a term is not defined, it must be given its plain, ordinary meaning. *See Allen*, 102 P.3d at 340, citing *Cotter Corp.*, 90 P.3d 814. In the context it is used here, Merriam-Webster defines a vehicle as "a means of carrying or

transporting something (planes, trains, and other vehicles): as (a) motor vehicle (b) a piece of mechanized equipment…." *See* http://www.merriam-webster.com/dictionary/vehicle. In an automobile insurance policy, "vehicle" clearly refers to a car, pickup or other motor-vehicle. Thus, the policy's reference to "a vehicle for which that **insured** is provided Liability Coverage by this policy" is not rendered ambiguous by the fact that the word, vehicle, is not specifically defined.

The only reasonable way to interpret State Farm Policy #2 is to conclude that it provides liability protection for insureds when they become legally liable to pay damages for an accident involving a motor vehicle that is covered by the policy. That would include "Your Car," which is the car listed on the declarations page. It would also include a "newly acquired car," a "temporary replacement car" and a "non-owned car," as those terms are defined by the policy. However, it does not include the use of a car that does not fit within any of those definitions, like the 2007 Volvo involved in the subject accident.

2. The District Court's Interpretation of the Policy Does Not Result in the Creation of an Additional Exclusion.

Garcia spends considerable time arguing that the definition of an "insured" under the liability portion of the policy operates to limit coverage and that it should, therefore, be treated as an exclusion. Garcia argues that the provision

should, therefore, be subject to additional scrutiny. Garcia suggests that the District Court's Order somehow operates to create an exclusion that is not sufficiently expressed in State Farm Policy #2 itself. Garcia's contention is incorrect.

Generally, an exclusion is a provision in an insurance policy that operates to remove a claim or occurrence from coverage, even though that claim or occurrence would ordinarily fall within the insuring agreement portion of the policy. In such a situation, Colorado appellate courts require that exclusions be clearly expressed. *See Tepe v. Rocky Mountain Hosp. & Med. Servs.*, 893 P.2d 1323, 1327 (Colo.App. 1994). To benefit from an exclusionary provision in a particular contract of insurance the insurer must establish that the exemption claimed applies in the particular case and that the exclusions are not subject to any other reasonable interpretations. *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 953 (Colo. 1991). Garcia's argument, however, misconstrues the definition of an "insured." The State Farm policy is not constructed in such a fashion where Leavitt would be entitled to coverage for this action under the insuring agreement portion of the policy but for the existence of a particular exclusion. Rather, the State Farm policy only provides coverage in situations where the person seeking coverage qualifies as an "insured," as that term is defined in the liability portion of the policy.

Because Leavitt does not qualify as an insured from the outset, there could never be coverage. The collision never fell within the insuring language of the policy to begin with. There was no need for a specific exclusion. Of course, even if we assume, for the sake of argument, that the definition of an "insured" were treated as an exclusion, that portion of the policy is clear and unambiguous. The only reasonable interpretation of State Farm Policy #2 is that, because of the definition of "insured" in the liability portion of the policy, it does not afford coverage for the Leavitt/Garcia accident.

3. Policies Issued by Other Insurers are Irrelevant.

Garcia points out that insurers not parties to this action have elected to structure automobile insurance policies differently with respect to its liability coverage provisions. Such a difference is irrelevant. The fact that a competing company put together its policy in a somewhat different fashion does not logically suggest that State Farm's policy construction is ambiguous. It is simply different.

4. Garcia's Argument Concerning Exclusion Number 10 is Improper, and the Exclusion Does not Demonstrate any Ambiguity in the Policy.

Garcia also argues that Exclusionary language contained within the State Farm policy, Exclusion Number 10, demonstrates inconsistency in the policy and shows that State Farm actually intended for State Farm Policy #2 to cover vehicles other than those falling within the definition of "your car," a "newly acquired car,"

or a "temporary substitute car." Thus, Garcia maintains, the policy is ambiguous, because limiting coverage to situations involving "your car," a "newly acquired car," or a "temporary substitute car" would render Exclusion Number 10 superfluous. This contention should be rejected. First, Garcia did not make this argument in the District Court, and the District Court did not have the opportunity to address it or to rule on it. Nowhere is there any discussion of Exclusion Number 10 in Defendant's response and cross-motion for summary judgment or even in Defendant's reply brief. *See* R. CF, pp. 193-204, 242-251. The District Court did not raise the issue in its Order either. R. CF, pp. 252-255. When a party fails to assert an argument in the trial court but raises it for the first time on appeal, the assertion is deemed waived and cannot be raised for the first time on appeal. *O'Connell*, 250 P.3d at 1282; *Brown* , 141 P.3d at 874; *Estate of Stevenson*, 832 P.2d at 722 n. 5. Consequently, this Court should reject Garcia's argument concerning Exclusion Number 10 and decline to address it.

However, even if the Court chooses to consider the argument on its merits, Garcia is simply incorrect. With respect to that exclusion, the policy states:

> **Exclusions**
> THERE IS NO COVERAGE FOR AN ***INSURED***:
> …
>
> 10. WHILE MAINTAINING OR USING ANY VEHICLE OTHER THAN ***YOUR CAR***, A ***NEWLY ACQUIRED CAR***, A

> ***TEMPORARY SUBSTITUTE CAR*** OR A ***TRAILER*** IN ANY BUSINESS OR OCCUPATION OTHER THAN A ***CAR BUSINESS*** OR VALET PARKING. This exclusion does not apply to the use or maintenance of a ***private passenger car***.

R. CF, pp. 157-158. The terms "car business" and "private passenger car" are defined as follows:

> ***Car Business*** means a business or job where the purpose is to sell, lease, rent, repair, service, modify, transport, store, or park land motor vehicles or any type of trailer.
> …
>
> ***Private Passenger Car*** means:
>
> 1. a ***car*** of the private passenger type, other than a pickup truck, van, minivan, or sport utility vehicle, designed primarily to carry ***persons*** and their luggage; or
>
> 2. a pickup truck, van, minivan, or sport utility vehicle:
>
> a. while not used for:
>
> (1) wholesale; or
>
> (2) retail
>
> pickup or delivery; and
>
> b. that has a Gross Vehicle Weight Rating of 10,000 pounds or less.

R. CF, pp. 153-154.

What Plaintiff apparently overlooks is that this exclusion works in conjunction with a part of the definition of insured in the liability section that is not

relevant to this case. In addition to defining an insured with respect to situations involving "your car," a "newly acquired car," or a "temporary substitute car," the policy also defines the named insured and their spouse as an "insured" for liability purposes in certain situations for the maintenance or use of a car that is owned by or furnished by the employer of another person residing with the named insured. The provision, enumerated subsection 2 in the definition of an insured, is designed to afford coverage for the named insured and his or her spouse if they are using a "company car" belonging to someone else residing with them. R. CF, p. 155. Exclusion Number 10 limits the coverage available under this subsection by excluding from coverage certain business uses of such a company car. Thus, the District Court's interpretation of the policy does not render Exclusion Number 10 superfluous in any way. The exclusion simply addresses a situation that did not exist in this civil action.

E. The Reasonable Expectations Doctrine is Inapplicable and Does Not Require Coverage.

1. There is No Evidence in the Record to Support Application of the Doctrine.

Garcia's final argument is that, even if the policy does not, by its terms, provide coverage to Leavitt and even if it is not actually ambiguous, coverage

should nevertheless be required under the doctrine of reasonable expectations. Garcia is mistaken.

Absent some affirmative deception on the part of an insurer, the doctrine of reasonable expectations is limited to exclusionary provisions; it is not generally the case that a policy which never offers the coverage in the first place is subject to the doctrine. "[W]hen policy coverage-provisions may not be ambiguous in a technical sense… but are ambiguous from the perspective of an ordinary reader. In such cases, *exclusionary language* may be held unenforceable." *Bailey v. Lincoln Gen. Ins. Co*., 255 P.3d 1039, 1049 (Colo. 2011)(emphasis added). Even where it does apply, the reasonable expectations of insureds have succeeded over exclusionary policy language in Colorado only in two main situations: (1) where an ordinary, objectively reasonable person would, based on the language of the policy, fail to understand that he or she is not entitled to the coverage at issue; and (2) where, because of circumstances attributable to an insurer, an ordinary, objectively reasonable person would be deceived into believing that he or she is entitled to coverage, while the insurer would maintain otherwise. *Id.* at 1048-49. "In order for reasonable expectations to prevail over exclusionary policy language, an 'insured must demonstrate through extrinsic evidence that its expectation[s] of coverage [are] based on specific facts which make these expectations reasonable.'"

Id. at 1054, quoting *O'Neill Investigations, Inc. v. Ill. Emp. Ins. of Wasau*, 636 P.2d 1170, 1177 (Alaska 1981). "These specific facts must show that, through procedural or substantive deception attributable to the insurer, an objectively reasonable insured would have believed he or she possessed coverage later denied by an insurer." *Id.*

In the present case, State Farm policy #2 makes it clear that State Farm will pay only damages an insured becomes legally liable to pay "caused by an accident that involves a vehicle for which that **insured** is provided Liability Coverage by this policy." The vehicle the policy is intended to cover is listed clearly on the declarations page and is described in simple terms as, "Your Car." The policy also goes into detail about situations where another car could be used and still allow a person to qualify for coverage, but none of those situations were present in the Garcia/Leavitt accident. The definition of a "non-owned car" also makes it clear that a vehicle owned by the named insured, a resident relative or a member of the named insured's household but not listed on the policy does not qualify the driver as an "insured" for liability coverage, even if the driver is a named insured on the declarations page. The language used throughout the policy is relatively simple. There is nothing about it that is objectively confusing or misleading.

Moreover, Garcia failed to demonstrate in the District Court, through extrinsic evidence, that the insured's (Leavitt's, in this case) expectations of coverage were based on specific facts which make these expectations reasonable. Indeed, she failed to demonstrate that Leavitt had any expectation of coverage whatever with respect to an accident involving a vehicle not listed on the declarations page. Garcia did not make any showing of specific facts that, through procedural or substantive deception attributable to the insurer, would cause an objectively reasonable insured to believe he or she possessed coverage later denied by State Farm. Absent this showing, the District Court was correct in rejecting Garcia's reasonable expectations argument. *Bailey*, 255 P.3d at 1054.

The only evidence Garcia sought to offer was a letter purportedly from Susan Leavitt and her husband. R. CF, p. 185. In the letter, neither Leavitt nor her husband actually state that they believed that the 2007 Volvo insured under State Farm Policy #1 was also insured under State Farm Policy #2. Neither said that they believed both policies would provide liability protection for an accident involving the Volvo. Finally, neither indicated that State Farm, procedurally or substantively, deceived Defendant Leavitt into believing that coverage for the subject accident existed under State Farm Policy #2 when it did not. The Leavitts never even considered the possibility that coverage would be available under more

than one policy. In fact, the letter even explains the reason for the different levels of coverage. The 2004 Ford was used when Mr. Leavitt drove for business, making a higher level of liability coverage desirable. The Volvo, which was not, had lower limits. This demonstrates that the Leavitts understood that the liability coverages were different for the different vehicles and that the coverages did not necessarily apply to both cars. Quite simply, the doctrine of reasonable expectations does not work to create coverage in this case. The policy should be interpreted as it is written.

2. The Letter from the Leavitts Should Not Be Considered, Because it Was Not Properly Disclosed.

Equally important, the letter was not disclosed in accordance with the requirements set forth in C.R.C.P. 26(a)(1) and 26(e). State Farm raised that issue in the District Court. R. CF, pp. 229-231.

C.R.C.P. 26(a)(1) provides in relevant part:

> Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties:
> ….
>
> (B) A listing, together with a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, as

> though a request for production of those documents had been served pursuant to C.R.C.P. 34….

A letter from Leavitt and her husband concerning State Farm Policy #1 and State Farm Policy #2 and the Leavitts' perceptions of those policies falls within the ambit of the Rule.

C.R.C.P. 37 provides an enforcement mechanism for C.R.C.P. 26. Rule 37 provides in relevant part:

> A party that without substantial justification fails to disclose information required by C.R.C.P. Rules 26(a) or 26(e) shall not, unless such failure is harmless, be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56. In addition to or in lieu of this sanction, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions, which, in addition to requiring payment of reasonable expenses including attorney fees caused by the failure, may include any of the actions authorized pursuant to subsections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of this Rule.

C.R.C.P. 37(c). Rule 37 makes it clear that, unless a failure to disclose is harmless, a trial court should not permit the party failing to disclose to benefit from its misconduct by using undisclosed evidence at trial or in the context of a motion brought pursuant to C.R.C.P. 56. In *Todd v. Bear Valley Village Apts.*, the Colorado Supreme Court emphasized that, pursuant to C.R.C.P. 37(c), trial courts have a duty to sanction parties for violation disclosure obligations, unless the non-

disclosing party can show that the failure is harmless. *Todd v. Bear Valley Village Apts.*, 980 P.2d 973, 975 (Colo. 1999). "Failure to comply with the mandate of C.RC.P. 26 is harmless when there is no prejudice to the party entitled to disclosure." *Carlson v. Ferris*, 58 P.3d 1055, 1059 (Colo. App. 2002).

The letter in question is dated October 2, 2014, roughly eight months before Garcia filed her Response and Cross-Motion. There was no reasonable justification for her failure to disclose the letter prior to seeking to use it with respect to Rule 56 motions. Furthermore, the failure to disclose was not harmless. Finding out about the letter, its contents and that Garcia intended to use the letter only after State Farm filed its Motion for Summary Judgment prevented State Farm from addressing the issue in its Motion and prevented State Farm from following up with a deposition of the Leavitts prior to the briefing of Rule 56 motions. Because the failure to disclose was neither justified nor harmless, Garcia should not have been permitted to use the undisclosed letter, and the District Court should have declined to consider the letter or argument based upon it. This court too should reject the letter. There simply is no basis to find that the State Farm policy is ambiguous or that its provisions should not be enforced. The District Court's interpretation of the policy is correct and should be affirmed.

VI. CONCLUSION

The District Court correctly determined that State Farm Policy #2 is unambiguous and that, by its terms, it does not afford coverage for the accident involving Leavitt and Garcia. The interpretation of the policy advocated by Garcia is strained and would render significant portions of the policy superfluous. The doctrine of reasonable expectations does not apply here, and, in any event, there is no evidence in the record that the insureds had any expectation that this accident would be covered by State Farm Policy #2. Indeed, their statements and their actual practice support the conclusion that the Leavitts and State Farm both understood that State Farm Policy #1 covered the Volvo involved in the accident and persons driving that car and that State Farm Policy #2 covered the 2004 Ford Explorer and persons driving that vehicle. Because the 2004 Ford was not involved in the collision, State Farm Policy #2 does not apply. State Farm Policy #2 should be interpreted and enforced as it is written and the judgment of the District Court should be affirmed.

The fact that other insurance carriers may have structured their own policies differently is irrelevant. The question is not whether State Farm could have constructed its policy differently. The issues are whether the policy affords coverage for the subject accident and whether it is ambiguous. The fact that State

Farm's policy construction differs from the way other insurers have chosen to draft their policies has no bearing on this action.

Garcia's argument that Exclusion Number 10 somehow renders the policy ambiguous is improper and incorrect. Garcia did not raise this issue in the District Court and has waived the argument. Further, the exclusion refers to a different portion of the definition of an "insured" under the liability provisions of the policy which deals with employer owned vehicles and that has nothing to do with the present action. The District Court's interpretation is does not render Exclusion Number 10 superfluous.

WHEREFORE, Plaintiff / Appellee State Farm Mutual Automobile Insurance Company prays for an Order affirming the decision and judgment of the District Court, awarding Appellee its costs and providing such other and further relief as the Court deems just and proper.

DATED this 10th day of June, 2016.

Respectfully submitted,

PATTERSON & SALG, P.C.

Original signature on file at the offices of Patterson & Salg, P.C.

By: *s/ Brian D. Kennedy*
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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was e-filed this 10th day of June, 2016, with instructions to serve:

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s/ Marina Miller
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