DATE FILED: July 1, 2016 4:54 PM

COLORADO COURT OF APPEALS

Court Address: 2 East 14th Avenue
Denver, CO 80203

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

Appellant–Defendant: MABEL GARCIA

v.

Plaintiff–Appellee: STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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Court of Appeals
Case Number: 2015CA1771

APPELLANT'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 5,545 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Timothy Garvey
Timothy M. Garvey, Esq.

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I. SUMMARY OF THE REPLY

In her Opening Brief, Appellant Mabel Garcia ("Ms. Garcia") argued that the district court erred as a matter of law when it granted summary judgment for State Farm Mutual Automobile Insurance Company ("State Farm") after concluding that State Farm Policy #2 provided no coverage for Susan Leavitt's ("Ms. Leavitt") collision with Ms. Garcia. To support this argument, Ms. Garcia cited record evidence demonstrating that under the plain language of State Farm Policy #2, Ms. Leavitt was an ***insured***[1] entitled to benefits pursuant to the insuring agreement, under which State Farm promised to pay for damages an ***insured*** became legally liable to pay because of an accident involving "a vehicle." Opening Brief at 8–12. Further, Ms. Garcia's Opening Brief demonstrated how the district court erred by imposing a limitation on coverage not clearly expressed in State Farm Policy #2, by failing to construe the policy's ambiguity in favor of Ms. Leavitt, and by failing to apply Ms. Leavitt's reasonable expectations of coverage. Opening Brief at 14–27.

Rather than directly addressing Ms. Garcia's arguments, State Farm's Answer Brief obfuscates the issues before this Court by erecting straw men and then knocking them down. Specifically, State Farm urges this Court to adopt an

[1] Throughout this Reply Brief, where the term "insured" is emphasized with bold and italic font, it is being used with the same meaning as that term is defined in State Farm Policy #2.

interpretation of State Farm Policy #2 that (1) relies on policy terms irrelevant to the determination of coverage, and (2) inserts limitations found nowhere in the policy. Moreover, while State Farm calls Ms. Garcia's interpretation of State Farm Policy #2 "strained," and her argument based on the reasonable expectations doctrine "inapplicable," absent from State Farm's Answer Brief is any response to several critical questions raised in Ms. Garcia's Opening Brief. For instance, if, as State Farm argues, State Farm Policy #2 provided coverage only for "situations involving" the 2004 Ford Explorer listed on the policy's declarations page,[2] then why did State Farm: (1) tie coverage to the person insured rather than the vehicle insured; (2) provide Ms. Leavitt coverage for the ownership (not just the use) of the 2004 Ford Explorer; (3) extend coverage to Ms. Leavitt for damages "caused by an accident that involves a vehicle" (as opposed to the defined term "your car"); and (4) promise to pay benefits equal to the highest limit provided by any one policy when multiple policies were implicated?

Unlike State Farm, this Court does not have the liberty to ignore these crucial points. Nor can this Court do as State Farm has and overlook the plain language of State Farm Policy #2, which clearly includes Ms. Leavitt as an ***insured***. Instead,

[2] Answer Brief at 34 (stating that State Farm Policy #2 defines an insured "with respect to situations involving 'your car' … .").

under the *de novo* standard of review applicable here, this Court must take a "fresh look" at the disputed policy interpretations and make its own independent assessment regarding whether the district court erred when it concluded that Ms. Leavitt was not an insured under State Farm Policy #2, despite her having paid for the policy, which listed her as a named insured and covered a vehicle she owned. *See, e.g., Waste Mgmt of Colo., Inc. v. City of Commerce City*, 250 P.3d 722, 725 (Colo. App. 2010). Upon such analysis, it becomes evident that the district court erred when it entered summary judgment for State Farm.

II. MS. GARCIA'S RESPONSE TO APPELLEE'S STATEMENT OF FACTS

While State Farm cites to numerous policy provisions and circumstances surrounding the issuance of Ms. Leavitt's automobile policies, this undisputed fact is seminal: Ms. Leavitt owned both the 2004 Ford Explorer listed on the declarations page of State Farm Policy #2 and the 2007 Volvo XC70 involved in the collision with Ms. Garcia and listed on the declarations page of State Farm Policy #1. *See, e.g.,* R. CF, pp. 252–53; Answer Brief at 14. Because State Farm Policy #2 provides liability insurance coverage for the ownership of the 2004 Ford Explorer, Ms. Leavitt undoubtedly qualifies as an ***insured*** under that policy.

Further, the definitions of "**newly acquired car**," "**non-owned car**," and "**temporary substitute car**" that State Farm repeats throughout its Answer Brief do

not affect this Court's consideration of coverage. Neither the 2004 Ford Explorer listed on the declarations page of State Farm Policy #2, nor the 2007 Volvo XC70 involved in the collision with Ms. Garcia and listed on the declarations page of State Farm Policy #1, falls within the aegis of these additional terms. Accordingly, they are impertinent to the cogent issue before this Court, and any reference to these additional terms, and State Farm's policy interpretations based on these terms, serve only to confound the question of whether State Farm Policy #2 affords coverage to Ms. Leavitt, as an ***insured*** under that policy, for her collision with Ms. Garcia.

III. ARGUMENT

In response to Ms. Garcia's Opening Brief, State Farm posits four main grounds for affirming the district court's Order. Each argument fails.

A. STATE FARM POLICY #2 AFFORDS COVERAGE TO STATE FARM'S INSURED, MS. LEAVITT, FOR HER COLLISION WITH MS. GARCIA.

State Farm first argues that the district court did not err when it concluded Ms. Garcia did not fall within the definition of an ***insured*** under State Farm Policy #2. This argument, however, rests on the false premise that whether Ms. Garcia meets the definition "depends on whether the 2007 Volvo Ms[.] Leavitt was driving [when she collided with Ms. Garcia] falls within the definition of 'your car' or of a 'non-owned car,' a 'newly acquired car' or a 'temporary substitute car.'"

Answer Brief at 18 (footnote omitted). State Farm Policy #2 contains no such limitation.

As State Farm concedes, "[t]here is only coverage available if Leavitt meets the definition of an 'insured' under the liability portion of the policy." *Id*. at 18. However, contrary to State Farm's assertions, State Farm Policy #2 does not define an ***insured*** based on what vehicle is involved in the accident. Rather, State Farm Policy #2 ties coverage to the person insured—not the vehicle.

Pursuant to State Farm Policy #2, State Farm promised to:

> 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. 77.

State Farm Policy #2 defines the term ***insured*** to mean:

> 1. ***you*** and ***resident relatives*** for:
>
> a. the ownership, maintenance, or use of:
>
> (1) ***your car***; …

Id. at 76.

The term "***you***" 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***' … includes the spouse of the first ***person*** shown as a named insured if the spouse resides primarily with that named insured." *Id*. The term "***your car***" means "the vehicle shown under 'YOUR CAR' on the Declarations Page." *Id*.

Here, Ms. Leavitt was listed as a named insured on the declarations page of State Farm Policy #2, and therefore meets the policy's definition of ***you***. *Id*. at 58. The vehicle shown under "YOUR CAR" on the declarations page of State Farm Policy #2 is a 2004 Ford Explorer, which Ms. Leavitt owned. *Id*.; Answer Brief at 14. Thus, under the plain language of State Farm Policy #2, Ms. Leavitt—as the named insured who owned the 2004 Ford Explorer listed on the declarations page—was an ***insured*** under that policy.

Further, as an ***insured*** who was provided Liability Coverage under State Farm Policy #2, Ms. Leavitt became legally liable to pay damages because of bodily injury and property damage that she caused to Ms. Garcia in an accident involving "a vehicle"—triggering the insuring agreement of State Farm Policy #2.

State Farm's arguments supporting the district court's contrary conclusion fail to survive scrutiny. State Farm is simply wrong when it argues that coverage under State Farm Policy #2 turns on whether the 2007 Volvo she was driving in the

collision with Ms. Garcia meets the definition of "**your car**," a "**non-owned car**," a "**newly acquired car**," or a "**temporary substitute car**." Answer Brief at 18. Such a limitation is found nowhere in State Farm Policy #2, and seems to have been developed solely to evade coverage in this litigation.

Similarly, State Farm's argument that State Farm Policy #2 defines an ***insured*** only "with respect to situations involving 'your car'," *id.* at 34, is incorrect. Such a reading of the policy ignores that it provides liability coverage not just for "situations involving 'your car'," but also for any damages "caused by an accident that involves a vehicle for which that ***insured*** is provided Liability Coverage by this policy." R. CF, p. 77 (emphasis added). Thus, by tying coverage to the ***insured*** (*i.e.*, Ms. Leavitt), rather than to the vehicle identified on the declarations page as ***your car*** (*i.e.*, the 2004 Ford Explorer), State Farm chose to extend coverage beyond "situations involving 'your car'" or any other defined vehicles. Indeed, State Farm essentially concedes this fact by failing to address the stacking provision in State Farm Policy #2, which states that when State Farm issues multiple policies to any ***insured***, "the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies." *Id.* at 79–80; Opening Brief at 18.

To be sure, State Farm could have drafted State Farm Policy #2 to clearly express the limitation State Farm now seeks to impose on Ms. Leavitt.[3] In her Opening Brief, Ms. Garcia cited multiple cases involving numerous insurers who have done just that—including State Farm. Opening Brief at 15–19.[4] However, rather than drafting State Farm Policy #2 to include the same limiting language used in those cases, State Farm chose to tie coverage to the person insured, and it further extended coverage limits to the "single highest applicable limit provided by any one of the policies." R. CF, pp. 79–80. Having chosen to do so, State Farm cannot now reduce coverage on the purported basis that State Farm Policy #2 limits coverage to only those "situations involving 'your car'" when no such limitation is clearly

[3] Under a different definition of an ***insured***, which is not applicable here, State Farm expressly limited coverage to "any other ***person*** for his or her use of: a. ***your car*** … ." R. CF, p. 76. Certainly, had State Farm intended the same limitation to apply to the definition of an ***insured*** involved here, it could have used that same language. *See also* Opening Brief at 15–19.

[4] State Farm's Answer Brief includes a short section arguing that policies issued by other insurers are irrelevant. Answer Brief at 31. However, Colorado case law holds otherwise. *See, e.g., Roberts v. Am. Family Ins. Co.*, 144 P.3d 546, 548–49 (Colo. 2006) ("*Unlike many automobile insurance policies* … the policies issued to the Robertses clearly prohibited no more than the stacking of benefits provided in policies issued by the same company.")(internal citation omitted and emphasis added). Language in other policies can be useful to demonstrate, as here, that the *absence* of limiting language evinces an intent to afford a broader scope of coverage to insureds. State Farm also ignores that Ms. Garcia cited not only policies issued by other insurers, but policies previously issued by State Farm. Opening Brief at 15–19.

expressed in State Farm Policy #2. Answer Brief at 34. *See Tepe v. Rocky Mountain Hosp. and Medical Srvcs*, 893 P.2d 1323, 1327 (Colo. App. 1994) (when insurers seek to restrict coverage, they must clearly express any such limitations).

Accordingly, because State Farm Policy #2 provides liability coverage to Ms. Leavitt as an ***insured***, which encompasses the claims by Ms. Garcia for accident-related injuries and damages, the district court's Order concluding otherwise must be reversed.

B. MS. GARCIA'S POLICY INTERPRETATION IS REASONABLE AND DOES NOT RENDER SUPERFLUOUS OTHER DEFINITIONS OF AN *INSURED*.

State Farm argues that Ms. Garcia's interpretation of State Farm Policy #2 renders superfluous the policy's language concerning coverage for a "non-owned car," a "newly acquired car," or a "temporary substitute car." Answer Brief at 22. Not so.

If State Farm Policy #2 limited coverage to only those named insureds who own, use, or maintain the vehicle identified on the declarations page (i.e., "**your car**"), then it would preclude coverage in situations where the insured would reasonably expect it to exist. For instance, if the day before Ms. Leavitt collided with Ms. Garcia, she traded in the 2004 Ford Explorer for something new, applying only the "**your car**" definition of an "***insured***", her coverage would have terminated and should would be driving bare (*i.e.*, without insurance). The same applies if

Ms. Leavitt was driving a loaner car while the Explorer was being repaired. By adding the terms "**newly acquired car**" and "**temporary substitute car**" to the definition of an ***insured***, State Farm remedies these potential coverage gaps.

The analysis is similar for a **non-owned car**. By extending the definition of an ***insured*** to include a **non-owned car**, State Farm Policy #2 clarifies that the named insured remains an ***insured*** when using or maintaining a **non-owned car**, regardless of whether the named insured qualifies as an ***insured*** under any other definition. For instance, imagine that rather than trading-in the 2004 Ford Explorer, Ms. Leavitt decided to just sell it and while she is considering what vehicle to purchase as a replacement, she borrows a friend's car (*i.e.*, a **non-owned car**). By including coverage for the use or maintenance of a **non-owned car**, State Farm Policy #2 ensures that Ms. Leavitt remains an ***insured*** entitled to liability insurance protection in this situation.

Thus, State Farm is simply wrong when it argues that Ms. Garcia's interpretation renders superfluous "language concerning a 'non-owned car,' a 'newly acquired car' or a 'temporary substitute car'."[5] Answer Brief at 22. Indeed, State

[5] Regarding whether Ms. Garcia's interpretation renders superfluous other aspects of the policy, as explained in the Opening Brief, under State Farm's interpretation of State Farm Policy #2, Exclusion No. 10 becomes superfluous. Opening Brief at 16–21.

Farm's interpretation that the ***non-owned car*** provision is intended to limit rather than expand coverage for the named insured is unsupported by the policy or the law.

State Farm also argues that Ms. Garcia's interpretation ignores the policy as a whole. *Id.* at 23. That's not true. Actually, it is State Farm that ignores important policy language. For instance, State Farm avers that "[t]he policy protects an insured in the event of different types of occurrences." *Id.* (emphasis added). Yet, absent from its Answer Brief is any explanation as to why—under its interpretation—coverage follows the insured vehicle rather than the insured person.

Similarly, State Farm acknowledges that "[i]n this case, Defendant Leavitt would be an insured for a claim arising out of the 'ownership, maintenance or use' of a qualifying vehicle … ." *Id.*[6] Yet, throughout the rest of its Answer Brief, State Farm ignores the term "*ownership*" and instead bases all its arguments on the false premise that Ms. Leavitt cannot be covered for her collision with Ms. Garcia because she was not driving (*i.e.*, using) the 2004 Ford Explorer when she collided with Ms. Garcia—despite it being undisputed that Ms. Garcia owned that vehicle.

[6] State Farm seems to acknowledge the limitations of its own argument, when it states: "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." Answer Brief at 23. Of course, there exist other instances for which the named insured might qualify as an ***insured***—for instance, the ownership of the vehicle listed on the declarations page.

State Farm's averments notwithstanding, State Farm Policy #2 plainly extends coverage beyond use of the 2004 Ford Explorer and provides coverage to the ***insured*** for *ownership* of the 2004 Ford Explorer. This Court should seek to harmonize State Farm's use of the term *ownership* with the policy's grant of coverage to the ***insured*** person rather than a specific vehicle. *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 700 (Colo. 2009). Only Ms. Garcia's interpretation accomplishes this. Indeed, State Farm proffers no explanation for why coverage is not triggered by Ms. Leavitt's *ownership* of the 2004 Ford Explorer, and delineates no instances where, if not here, coverage might be triggered for the *ownership* of the 2004 Ford Explorer.

State Farm maintains that Ms. Garcia's interpretation contradicts the insuring agreement, which affords coverage only "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.'" Answer Brief at 24 (emphasis in original). As Ms. Garcia explicated in her Opening Brief, this provision means Ms. Leavitt is entitled to coverage because: (1) she was an ***insured*** who was provided liability coverage by State Farm Policy #2; (2) she was involved in an accident that involved "a vehicle"; and (3) she became legally liable to pay damages to Ms. Garcia because of that accident. Opening Brief at 8–11.

State Farm, on the other hand, appears to read the insuring agreement to mean Ms. Leavitt is entitled to coverage only if the accident involved a vehicle meeting the policy definitions of "**your car**," a "**non-owned car**," a "**newly acquired car**," or a "**temporary substitute car**." Had State Farm intended such a limitation, it could have—and should have—clearly expressed that intention, just as it did in Exclusion No. 10.[7] Instead, State Farm chose to afford coverage to an ***insured*** for ownership of the vehicle listed on the policy's declarations page and to extend that coverage to all accidents involving "a vehicle." R. CF, pp. 76–77. Having done so, State Farm cannot now retreat from its insuring promise and argue that it intended to provide more restrictive coverage.

Finally, State Farm's suggestion that coverage under State Farm Policy #2 is limited to vehicles for which "this policy" (*i.e.*, State Farm Policy #2) provides coverage, *see* Answer Brief at 24–25, contradicts State Farm's clear intent to tie coverage to the ***insured*** person, rather than to a specific vehicle. Moreover, its unsupported argument that "[i]t 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," *Id.* at 25–26, is entirely inconsistent with the policy's stacking provision, which promises that if multiple State Farm

[7] *See* pp. 16–19, *infra*; *see also* Opening Brief at 16–19.

policies apply to the same accident, "the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies." R. CF, p. 80. While Ms. Garcia made this point in her Opening Brief at page 24, State Farm's Answer Brief ignores the stacking provision altogether.

Accordingly, because Ms. Garcia's interpretation is reasonable, consistent with the policy language, and gives meaning to all parts of the policy, the district court's Order must be reversed.

C. ALTERNATIVELY, STATE FARM POLICY #2 IS AMBIGUOUS.

While Ms. Garcia contends that State Farm Policy #2 unambiguously affords coverage to Ms. Leavitt for the damages resulting from the automobile collision, based on State Farm's contrary reading the policy is at the least ambiguous. To the extent State Farm Policy #2 is ambiguous, the district court erred in failing to construe such ambiguities in favor of coverage. *See, e.g., Tepe*, 893 P.2d at 1328 (insurance contracts must be construed in favor of coverage when the policy uses inconsistent or ambiguous language).

Yet, State Farm insists the policy contains no ambiguity. Answer Brief at 26–29. It asserts that the mere fact that the term "a vehicle" is undefined creates no ambiguity. *Id.* at 29. On this point, the parties agree. But, Ms. Garcia is not arguing

that State Farm Policy #2 is ambiguous because the term "a vehicle" is undefined. Precisely the opposite.

Ms. Garcia's argument is that State Farm made a deliberate choice to extend coverage to an ***insured*** for damages caused by an accident involving "a vehicle"—not just the cars defined elsewhere in the policy (*i.e.*, "**your car**," a "**newly acquired car**," a "**temporary substitute car**," or a **non-owned car**). R. CF, p. 77. Indeed, Ms. Garcia's interpretation, like State Farm's, relies on a basic understanding of "a vehicle" as a means of transportation—such as the 2007 Volvo XC70 Ms. Leavitt was driving when she collided with Ms. Garcia. Answer Brief at 28–29. Where the potential ambiguity arises is that State Farm's choice to extend coverage to "a vehicle" rather than to just the defined cars creates a potential for multiple reasonable interpretations—as evidenced by the parties' differing constructions.

That is, to the extent State Farm Policy #2 is ambiguous, it is because State Farm could have expressly limited coverage by including in the insuring agreement the same defined terms it used elsewhere in the policy, *e.g.*, Exclusion No. 10. R. CF, pp. 78–79. Or, State Farm could have limited coverage to accidents involving the use of specific vehicles, as it did in the third definition of ***insured***. R. CF, p. 76. Or, State Farm could have limited coverage to damage "caused by accident arising out of the ownership, maintenance or use, … of the owned automobile", as it did in

previous years. *See O'Herron v. State Farm Mut. Auto. Ins. Co.*, 397 P.2d 227, 228 (Colo. 1964). Or, State Farm could have limited coverage by tying it to the vehicle rather than the insured, by inserting an express exclusion, by including an anti-stacking provision, and/or by clarifying that coverage was limited to the amount shown on the declarations page for the vehicle involved in the collision. All of which are common practices in the insurance industry. *See* Opening Brief at 14–19 (citing cases). However, State Farm chose otherwise. And, in so doing, it inserted potential ambiguity into State Farm Policy #2, which is to be construed in favor of coverage. *Tepe*, 893 P.2d at 1327.

Additionally, State Farm advises the Court to ignore Exclusion No. 10 when interpreting the policy and considering whether it is ambiguous, arguing that Ms. Garcia failed to preserve this as an issue. Answer Brief at 31–34. This Court should reject State Farm's entreaty. Where the issue on appeal involves a matter of law to which no deference is required—such as interpreting insurance contracts—the Court is "not limited to the constructions of controlling law relied upon by the lower courts or offered by the parties." *Roberts v. Am. Family Ins. Co.*, 144 P.3d 546, 550–51 (Colo. 2006). Indeed, in such situations, "a reviewing court cannot be constrained by the failure of a party to specifically identify the misreading and bring

it to the trial court's attention." *Id.*; *see also Melat, Pressman, Higbie, LLP v. Hannon Law Firm, LLC*, 287 P.3d 842, 853 (Colo. 2012) (J. Coats, dissenting).

Further, State Farm's preservation notion is misplaced. Preserving an issue for appeal differs from preserving an argument related to that issue. Preserving an issue for appeal requires only that the *issue* be brought to the district court's attention and that the court be given an opportunity to rule on it. *Berra v. Springer and Steinberg, P.C.*, 251 P.3d 567, 569 (Colo. App. 2010). Here, Ms. Garcia always opposed State Farm's interpretation of State Farm Policy #2 and argued that the insurer could have expressly included a vehicle-oriented limitation on coverage had it chose to do so. *See, e.g.*, R. CF, pp. 193–204, 242–51. That Ms. Garcia did not specifically identify Exclusion No. 10 as an additional basis for opposing State Farm's interpretation and demonstrating its drafting intent does not mean she failed to preserve the issue of whether the insurer's interpretation was correct. It simply provides another basis supporting her argument regarding the same (preserved) issue; namely, that State Farm Policy #2 provides coverage to Ms. Leavitt for damages arising from her collision with Ms. Garcia. *See, e.g., Roberts*, 144 P.3d at 550–51.

Even if Ms. Garcia failed to preserve the issue, "an appellate court has the discretion to notice any error appearing of record, even if not presented in the trial court." *Marcellot v. Exempla, Inc.*, 317 P.3d 1275, 1277 (Colo. App. 2012). Indeed,

"it is the prerogative of appellate courts to address errors appearing of record that are sufficiently integral to the validity of the challenged verdict, even if unpreserved." *Sanchez v. People*, 325 P.3d 553, 559 (Colo. 2014). That Exclusion No. 10 is present in State Farm Policy #2 is part of the record before this Court. R. CF, p. 79. Accordingly, in reviewing the district court's interpretation of State Farm Policy #2, this Court can—and should—consider the effect of Exclusion No. 10 on both parties' interpretations.

In her Opening Brief, Ms. Garcia demonstrated that Exclusion No. 10 further evidenced State Farm's intent to afford broad coverage to ***insureds***, regardless of whether they were driving the vehicle listed on the declarations page, unless the vehicle involved in a collision was being used for business purposes. Opening Brief at 16–17. State Farm, however, argues that Exclusion No. 10 can be read only in conjunction with subsection (2) of the definition of an ***insured***, *i.e.*, when a car owned by or furnished by an employee is involved. Answer Brief at 33–34. Nothing in the policy, however, supports that assertion.

On its face, Exclusion No. 10 applies to all ***insureds***: "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." R. CF, p. 78–79. Furthermore, State Farm does not explain why this exclusion would be necessary (even applying State Farm's narrowed interpretation of the exclusion) if its interpretation of the insuring agreement were correct. That is, State Farm provides no answer as to why it needed to exclude coverage for any other vehicles when used in a business or occupation, if (as State Farm now urges) State Farm Policy #2 wholly limits coverage to accidents involving only "**your car**," a "**newly acquired car**," or a "**temporary substitute car**"—regardless of whether they were being used for business purposes or otherwise.

In sum, to the extent State Farm Policy #2's insuring language is ambiguous, the district court erred by failing to construe the policy in favor of coverage. Its grant of summary judgment for State Farm must therefore be reversed.

D. THIS COURT MAY PROPERLY CONSIDER THE INSURED'S REASONABLE EXPECTATIONS OF COVERAGE.

State Farm's final argument is that the reasonable expectations doctrine—which holds that an insurance policy provision is unenforceable if it conflicts with an insured's objectively reasonable expectations of coverage—is inapplicable here. State Farm pronounces: "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." Answer Brief at 35. This assertion is wholly unsupported. While State Farm proceeds to quote language for *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039 (Colo. 2011), nothing in that decision even suggests the doctrine is limited to policy exclusions and does not pertain to limiting language contained in policy definitions or grants of coverage. To the contrary, the Colorado Supreme Court specified that the doctrine applies to **all** "coverage limiting provisions" in an insurance policy. *Id.* at 1048.

Likewise, the *Bailey* Court clarified that "affirmative deception" by the insurer is unnecessary for the doctrine to apply. Indeed, the *Bailey* Court distinguished between two distinct situations where the doctrine of reasonable expectations applies. The first is 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 issue. *Id.* at 1048. The second is 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. And, while State Farm argues that Ms. Garcia presented no extrinsic evidence to support her application of the doctrine, Answer Brief at 35–36, only the second situation—involving affirmative deception—requires extrinsic evidence. *Bailey*, 255 P.3d at 1050, 1053–54. Ms. Garcia's

application of the doctrine relies on the first situation, and therefore no extrinsic evidence is required. *Id.* at 1050–53.

Further, in *Bailey* the Colorado Supreme Court recognized that insurance contracts create "significant potential for insurers to take advantage of or mislead insureds." *Bailey*, 255 P.3d at 1048. The *Bailey* Court also recognized that public policy favors protecting consumers by requiring insurers to fully and fairly disclose the degree of insurance protection a policy actually provides. *Id.* at 1049. As a result, all insurance policies are to be carefully scrutinized and are subject to the doctrine of reasonable expectations, which "obligates insurers to clearly and adequately convey coverage-limiting provisions to insureds" and applies when "policy coverage-provisions may not be ambiguous in a technical sense, … but are ambiguous from the perspective of an ordinary reader." *Id.* at 1048, 1050. "When honoring the insured's expectations through this manifestation of the doctrine of reasonable expectations, insureds do not actually have to have read their policies; the test to be applied is 'what the ordinary reader and purchaser *would* have understood' insurance provisions to mean had they been read." *Id.* at 1051 (citations omitted).

Here, based on the language of State Farm Policy #2, the ordinary reader and purchaser of the policy would have understood that the policy provided coverage to

an ***insured*** for damages caused by an accident involving "a vehicle." This is so for numerous reasons, including the facts that: (1) liability insurance is an agreement "to cover a loss resulting from the *insured's* liability to a third party," Black's Law Dictionary (9th ed. 2009) (defining *liability insurance*) (emphasis added); (2) State Farm provided Ms. Leavitt with liability insurance and promised to pay damages she became legally liable to pay because of an accident involving "a vehicle," R. CF, p. 77; (3) State Farm acknowledged that multiple State Farm policies could apply to the same accident and promised to pay "the single highest applicable limit provided by any one of the policies" in such situations, R. CF, p. 80; and (4) Ms. Leavitt was a named insured under State Farm Policy #2, qualified as an ***insured*** under the policy, and paid premiums for such coverage. *See also* Opening Brief at 22–27.

Finally, even if extrinsic evidence were required, Ms. Garcia met that burden, as her response to the summary judgment motion was supported by a letter from Ms. Leavitt explaining her reasonable expectations of coverage. R. CF, p. 185. While State Farm now argues it was improper for the district court to consider this letter, Answer Brief at 38–40, State Farm has not appealed that ruling and has therefore waived any complaints of error based on the court's consideration of the letter. *See Laugesen v. Witkin Homes, Inc.*, 479 P.2d 289 (Colo. App. 1970) (strict compliance with C.A.R. 4(a) is essential).

In sum, as the *Bailey* Court stated:

> In Colorado, the doctrine of reasonable expectations is one of the principles of fairness to which insurance policies are subject, as it is designed to protect insureds from the dangers inherent in standardized insurance policies. We have earlier noted that public policy itself favors protecting consumers by requiring those who sell insurance to disclose fully and fairly to the purchasing public what insurance protection is actually being provided for the premium charged. The reason for this is because insurance is a unique product, which is purchased by insureds not to secure commercial advantage, but to protect themselves from unforeseen calamities and for peace of mind. When insurers fail to fully and fairly convey the extent of coverage provided, they undermine one of the fundamental purposes behind insureds' purchase of insurance.

Bailey, 255 P.3d at 1049–50 (citations omitted). Accordingly, because a reasonable insured would have understood State Farm Policy #2 to provide coverage for Ms. Leavitt's collision with Ms. Garcia, the reasonable expectations doctrine must be applied here to protect State Farm's ***insured*** from the dangers inherent in State Farm Policy #2. And, applying that doctrine, the district court's Order entering summary judgment for State Farm cannot be upheld.

V. CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the district court’s Order entering summary judgment for State Farm and

remand the case with instructions for the district court to enter summary judgment in favor of Appellant, Mabel Garcia.

Respectfully submitted this 1st day of July 2016,

s/ Timothy Garvey
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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of July 2016, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was filed and served electronically through ICCES, with service to:

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