THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Presiding Judge

Opinion No. 2011-UP-242 Filed May 24, 2011
Withdrawn, Substituted and Refiled June 23, 2011

JOSHUA BELL ..... Petitioner

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY..... Respondent

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The Plaintiff was involved in a serious automobile accident on May 31, 2006 in which he was a passenger in a vehicle owned by his employer and driven by Plaintiff's co-worker. The liability limits of the at-fault driver were tendered and there was no underinsured motorist insurance (UIM) coverage on the involved vehicle. Plaintiff filed the instant suit seeking to recover from the UIM coverage afforded by the Progressive policy on his common law wife's vehicle.

The Defendant Progressive Direct Insurance Company issued an automobile insurance policy to Sarah K. Severn (Plaintiff's common law wife) with effective dates of November 4, 2005 to May 4, 2006. On the policy declarations page Plaintiff is listed as a "driver" and "household resident." The terms "driver" and "household resident" are not defined in the insurance policy. Prior to the accident, the Plaintiff had lived with Severn for eleven months, they had a son together and Plaintiff had given Severn a diamond ring. Also, Plaintiff had supported both Severn and their child paying the rent and all bills including the Progressive insurance premium on the one vehicle in their household.

The trial court granted Defendant's Motion for Summary Judgment finding that Plaintiff was not covered under the policy and thus not entitled to underinsured motorist coverage.

The case was heard by the South Carolina Court of Appeals and an opinion affirming the trial court was issued May 24, 2011. Thereafter a Petition for Rehearing was filed and the Court withdrew its original opinion and issued its final opinion on June 23, 2011. In the Court of Appeals' Opinion, the judges noted:

> ... even assuming for the sake of argument that the doctrine has not been explicitly rejected, because the doctrine cannot be reconciled with the rule

> that unambiguous insurance policies are subject to the traditional rules of contract construction, this court is precluded from adopting the doctrine. Such a departure from jurisprudence must be left to our Supreme Court.

Thereafter Plaintiff filed his Petition for Certiorari with this Court. On July 12, 2012, the Court issued its Order granting certiorari to review the Court of Appeals' decision in this case.

ARGUMENT

I. Reasons for applying the Doctrine of Reasonable Expectations to this case.

The Petitioner has continually asserted that the doctrine of reasonable expectations should be applied to the insurance policy in this case. The doctrine originated from Harvard Professor Robert E. Keeton who later became a United States District Court Judge. Keeton had identified a number of case interpreting insurance contracts that, in his opinion, deserved to be recognized as delineating new principles of insurance law. In his now famous two-part article entitled Keeton, *Insurance Law Rights At Variance With Policy Provisions: Part One*, 83 Harv. L. Rev. 961 (1970) and Keeton, *Insurance Law Rights At Variance With Policy Provisions: Part Two*, 83 Harv. L. Rev. 1281 (1970), he argued it was difficult to reconcile a significant number of cases with the orthodox doctrines construing contracts. Recognition of two broad principles would explain most of what otherwise appeared to be an undue number of aberrational insurance decisions. Keeton proposed the principles as follows: (1) an insurer will be denied an unconscionable advantage in an insurance transaction, and (2) the reasonable expectations of applicants and intended beneficiaries will be honored.

The second principle has received extensive discussion from courts around the country and has come to be known as the "doctrine of reasonable expectations." In one formulation or another, it has been embraced by a majority of jurisdictions.

Professor Keeton in his landmark article on the doctrine argued three reasons for the adoption of the doctrine. First is the likelihood that the insurance purchaser will not receive the actual contract, the insurance policy, until after offering to buy insurance and perhaps paying the first premium. Second is the inequality of bargaining power between large,

powerful and expert underwriters and relatively unsophisticated and dependent consumers. Third is the prevalence of standard form policies full of technical language and fine print which were sold to consumers.[1]

These three factors have prompted the courts and commentators to view the insurance policy as the archetypal adhesion contract. *Gordinier v. Aetna Casualty & Surety Co.*, 154 Ariz. 266, 742 P2d 277, 282-83 (1987) (the "typical consumer buying insurance has not assented to the myriad of essentially invisible boilerplate terms in an adhesion contract....Customers submit to these terms [in standard form insurance policies] knowing that they are not and cannot be fully aware of them.") See also *Storms v. U.S. Fidelity & Guaranty Co.*, 118 NH 427, 388 A2d 578, 580 (1978) (insurance policies "ferry the unwary reader on a trip through Wonderland.").

The courts in the United States, adopting the reasonable expectations of the insured doctrine, generally fall into three different categories of cases: (1) construing an ambiguous term in favor of the insured in order to satisfy his reasonable expectation (the "ambiguity" version of the reasonable expectations doctrine); (2) refusing to enforce the "fine print" of an insurance contract because it limits a portion of the contract that is more prominent (the "fine print" version); or (3) refusing to enforce the language of an insurance contract because doing so would frustrate the reasonable expectations of coverage that the insurer created outside of the written contract (the "whole transaction" version).

The ambiguity version of the doctrine can be found in the Nevada Supreme Court decision of *National Union Fire Insurance Co. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 682 P2d 1380, 1383-84 (1984). In that case, the insured helicopter owner bought an

[1] A fourth reason, although not cited by Keeton, applicable to this case is auto insurance is required in most states.

aviation policy covering liability for property damage. The policy contained an exclusion written to conform with Civil Aeronautics Board regulations for property "in the care, custody or control of the insured, or carried in or on any aircraft with respect to which the insurance afforded by this policy applies." The insured's helicopter crashed, damaging a passenger's camera equipment. The equipment was "carried in or on" the insured aircraft so the damage to it was unambiguously excluded by the policy. The court found the exclusion was ambiguous because it did not specific in whose possession property carried in or on the aircraft must be before the exclusion applies. The court noted that the insured "reasonably expects that the policy will cover the property which is most likely to be...the subject of claims against the insured: the property of others carried on board the aircraft."

The fine print version of the doctrine of reasonable expectations has been adopted by some courts. Those courts will not enforce clear and unambiguous contract terms that conflict with what the court determines to be the insured's reasonable expectations. Terms that an insured would see in glancing at the policy are generally enforced, but those that are buried in many pages of fine print are likely to be disregarded. The Delaware Supreme Court has repeatedly held that the insured's reasonable expectations will trump policy terms where "the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print."[2] (See *Hallowell v. State Farm Mutual Automobile Ins. Co.*, 443 A2d 925, 927 (Del. 1982).) In *Hallowell*, the court admitted that the exclusion was relatively unambiguous, but noted the exclusion was buried in a lengthy form contract of twenty-three pages and that the agent failed to mention any exclusions to the insured and so the court read the exclusion out of the policy.

[2] In this case, Bell's name appears on the declarations page which gives the reader the impression he is covered while the ambiguous language is in the fine print of the policy.

The third version adopted by courts is called the whole transaction version. The whole transaction version of the reasonable expectations doctrine enforces expectations created not only "by policy language and structure" but also by insurer's marketing patterns and general practices, the contract's clear language to the contrary notwithstanding. The New Jersey Supreme Court adopted this approach in *Sparks v. St. Paul Ins. Co.*, 100 NJ 325, 495 A2d 406 (1985). In that case the New Jersey Supreme Court found that insurance policies will be enforced "only to the extent that the policy language conforms to public expectations and commercially reasonable standards." Accordingly, the court found that public expectations about insurance coverage could defeat policy language. This view has also been accepted in Iowa. See *Grinnell Mutual Reinsurance C. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988).

It should be noted the New Jersey court added that it had "refused to extend the principle of reasonable expectations if an ordinary person would not misunderstand his or her coverage from a reading of the policy, unless there are other circumstances attributable to the insurer which caused such expectations." 495 A2d at 407.

Petitioner argues the court should adopt the whole transaction approach of the reasonable expectations doctrine.[3] The basis of this request is that this is a contract of adhesion.[4] In this case, Bell paid the insurance premium, lived with his common law wife, was named as a household resident and used the car to go to work to support Severn and

[3] Under any version of the doctrine the Court should find coverage for Bell.

[4] (*Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898, 901 (Ct.App. 1998) (A contract of adhesion is generally thought of as a standard form contract, offered on a take it or leave it basis, containing non-negotiable terms. See also, *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (S.C. 2010) (Adhesion contracts between a consumer and automobile retailer are viewed with "considerable skepticism").

their child. His reasonable expectation by being named on the policy as a household resident was that there would be coverage for him.

II. The Court of Appeals erred in finding that the Doctrine of Reasonable Expectations was not applicable to the facts of this case.

The Court of Appeals and the trial court denied Appellant's request for underinsured motorist's insurance coverage under the Doctrine of Reasonable Expectations. The trial court, which was affirmed by the Court of Appeals, noted: "South Carolina Courts have explicitly rejected this doctrine." *Ex parte United Servs. Auto. Ass'n.*, 365 S.C.50, 54, 614 S.E.2d 652 (S.C. Ct.App. 2005), *citing Allstate Ins. Co. v. Mangum*, 299 S.C. 226, 231-32, 383 S.E.2d 464, 466-67 (Ct.App. 1989).

However, those citations by the Court of Appeals and the trial court are incorrect. A close reading of *Allstate Ins. Co. v. Mangum*, 299 S.C. 226, 231-232, 383 S.E.2d 464, 466-467 (Ct.App. 1989) notes that the Doctrine of Reasonable Expectations was never addressed by the court. In footnote 5 of the *Mangum* case, the Court of Appeals noted:

> ... the appealed order does not address the Doctrine of Reasonable Expectations. This Court has repeatedly held that though an issue is argued before a trial judge, if a trial judge failed to pass on the issue, the party asserting it does not preserve it for appeal unless he moves to amend the judgment by requesting the circuit court to address it pursuant to Rule 59(e) SCRCP. *Palm v. General Painting Co.*, 296 S.C. 41, 370 S.E.2d 463 (Ct.App. 1988). Hamilton failed to so move and therefore failed to preserve for appeal the argument of reasonable expectation. 383 S.E.2d at 465.

Further, the appealed order of the trial court and of the Court of Appeals cites the case of *Ex parte United Servs. Auto. Ass'n.*, 365 S.C.50, 54, 614 S.E.2d 652 (S.C. Ct.App. 2005) for the proposition that the courts of this state have never adopted the Doctrine of Reasonable Expectations in regard to insurance policy construction. The *USAA* case only mentions in passing the *Mangum* case, but never explicitly rules on the Doctrine of

Reasonable Expectations. Accordingly, the cases cited by the Court of Appeals and the trial court do not stand for the proposition that this Court has never recognized the Doctrine of Reasonable Expectations. Indeed, this is the only case of which Appellant is aware that this Court has ever been squarely asked to consider the doctrine.

The question in this case is whether or not the term "household resident" qualifies Bell for underinsured motorist coverage. "Household resident" is not defined in the policy of Progressive Direct Insurance Company and because Bell is named as a "household resident" and "driver", this ambiguity should provide him coverage based on his reasonable expectation that he was covered at the time of the accident. The facts of this case clearly cry out for the Court to apply the Doctrine of Reasonable Expectations to this insurance policy. Bell lived with his common law wife, had a son, paid all the household bills including the insurance premium, and was named as a "household resident" on the declarations page. (R. p. 52). If anyone had a reasonable expectation of coverage, it was Bell who was the father of the insured's baby and had a well-founded belief the policy would cover him. The Progressive declaration page (R. p. 52) is as follows:

Drivers and household residents	Additional information
SARAH K. SEVERN	Named insured
JOSHUA D. BELL	

The Doctrine of Reasonable Expectations requires a court to consider the expectations of the parties to an insurance contract. As one court noted: "The gist of the doctrine is that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of a company's intent to exclude coverage will defeat that expectation." See *Woodson v. Manhattan Life Insurance Co. of N.Y.*, 743 S.W.2d 835 (1987). Here, the term

"household resident" is not conspicuously defined (or defined at all), making it ambiguous, which allows the Court to apply the doctrine based on the unique facts present here.

The majority of courts have held that the concept of reasonable expectations should be applied to the construction of all insurance policies. One should look to the reasonable expectation of the applicant and intended beneficiaries regarding the terms of the insurance contract and those will be honored even though painstaking study of the policy provisions would have negated those expectations. *See Grinnell Mutual Reinsurance Co. v. Voeltz*, 431 N.W.2d 783 (1988).[5]

Indeed, most courts have held the rule regarding insurance coverage is to protect what a person may reasonably expect from the terms of the policy he purchases. *See Travelers Insurance Co., Inc. v. Jones*, 529 So.2d 234 (1988).

In sum, it is well established throughout the country that if there is an ambiguity, an insurance contract should be read in accord with the reasonable expectation of a purchaser so far as the language will permit. *Steigler v. Insurance Co. of North America*, 384 A.2d 398 (1978) (doctrine allows innocent spouse to recover on a fire policy when other spouse burned their house); *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663 (1977) (our guide is, as it must be, the reasonable expectation of the purchaser when he purchased the policy) (allowing coverage for crops under the doctrine despite policy language); *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (1981) (use of the reasonable expectation test by these courts reflects the inapplicability of traditional contract theory to this type of

[5] It should be noted there are no policy provisions here which define household resident. The Progressive policy is silent, making it clear the doctrine should be applied in this case and that the case be submitted to a jury.

insurance marketing) (allowing coverage for asbestos claims); *Fritz v. Old American Ins. Co.*, 354 F.Supp. 514 (S.D.Tex. 1973) (The objectively reasonable expectations of the insured will be honored even though painstaking study of the policy provisions would have negated those expectations) (allowing coverage for death claim in accident insurance policy); *Commercial Union Assurance Co. v. Aetna Casualty and Surety Co.*, 455 F.Supp. 1190 (D.N.H.1978) (An insurance contract should be given a construction which a reasonable person standing in the shoes of the insured would expect the language to mean.) (The majority rule is that the insured is not presumed to know the contents of an adhesion type insurance contract delivered to him and allowing coverage regarding motor vehicle accident); *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987) (reversing trial court and adopting the doctrine when policy is ambiguous). See also 2 Couch on Insurance 2d § 15.16, P174 (1984) (test is what a reasonable person in position would have understood the language to mean).

Over thirty-six jurisdictions have recognized this doctrine. Most states have also recognized this doctrine as a matter of law in construction of all insurance policies: *Eli Lilly &. Co. v. Home Ins. Co.*, 794 F.2d 710, 715 (D.C.Cir. 1986), *cert. denied*, 479 U.S. 1060, 107 S.Ct. 940, 93 L.Ed.2d 991 (1987) (Applying Indiana law.); *Keene Corp. v. Insurance Co. of North America*, 215 U.S.App.D.C. 156, 667 F.2d 1034, 1041 (1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 LEd.2d 875 (1982), reh'g denied, 456 U.S. 951, 102 S.Ct. 2023, 72 L.Ed.2d 476 (1982); *Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1251 (9th Cir. 1981) (Applying Hawaii law.); *Macon Light House Revival Center, Inc. v. Continental Ins. Co.*, 651 F.Supp. 417-18 (M.D.Ga. 1987) (Applying Georgia law.); *Commercial Union Assurance Co. v. Aetna Casualty &. Surety Co.*, 455 F.Supp. 1190, 1193 (D.N.H. 1978)

(Applying New Hampshire law.); *Gleason v. Merchants Mut. Ins. Co.*, 589 F.Supp. 1474, 1480 (D.R.I. 1984) (Applying Rhode Island law.); *Dronge v. Monarch Ins. Co.*, 511 F.Supp. 1, 4 (D.Kan. 1979) (Applying Kansas law.); *Fritz v. Old American Ins. Co.*, 354 F.Supp. 514, 516 (S.D.Tex. 1973) (Applying Texas law.); *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 386 (Me. 1989); *Grinnell Mutual Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785-86 (Iowa 1988); *Travelers Insurance Co., Inc. v. Jones*, 529 So.2d 234, 239 (Ala. 1988); *Woodson v. Manhattan Life Insurance Co. of N.Y.*, 743 S.W.2d 835, 839 (Ky. 1987); *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 739, 356 S.E.2d 488, 495 (1987); *Steigler v. Insurance Co. of North America*, 384 A.2d 398, 400 (Del.Supr. 1978); *Davis v. M.L.G. Corp.*, 712 P.2d 985, 989 (Colo. 1986); *Meier v. New Jersey Life Ins. Co.*, 101 N.J. 597, 503 A.2d 862, 869 (1986); *Home Indem. Ins. Co. v. Merchants Distributors, Inc.*, 396 Mass. 103, 483 N.E.2d 1099, 1101 (1985); *Atwater Creamery Co. v. Western Nat'l Ins. Co.*, 366 N.W.2d 271, 278-79 (Minn. 1985); *Kracl v. Aetna Casualty & Sur. Co.*, 220 Neb. 869, 374 N.W.2d 40, 44 (1985); *National Union Fire Ins. Co. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 682 P.2d 1380, 1383-84 (1984); *Gross v. Lloyds of London Ins. Co.*, 121 Wis.2d 78, 358 N.W.2d 266, 270 (1984); *Darner Motor Sales v. Universal Underwriters*, 140 Ariz. 383, 389, 682 P.2d 388, 394 (1984); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173,656 P.2d 820, 824 (1983); *Great American Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 279 S.E.2d 769, 774 (1981); *United States Fire Ins. Co. v. Colver*, 600 P.2d 1, 3-4 (Alaska 1979); *Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346, 1354 (1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 871, 59 L.Ed.2d 55 (1979); *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 673 (N.D. 1977); *Crowell v. Federal Life &. Casualty Co.*, 397 Mich. 614, 247 N.W.2d 503, 506 (1976); *Gyler v.*

Mission Ins. Co., 10 Cal.3d 216, 110 Cal. Rptr. 139, 514 P.2d 1219, 1221 (1973); *Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 501 P.2d 255, 260 (1972); *Katz Drug Co. v. Commercial Standard Ins. Co.*, 647 S.W.2d 831, 835 (Mo.App. 1983); *Atlantic Cement Co., Inc. v. Fidelity & Casualty Co. of New York*, 91 A.D.2d 412, 459 N.Y.S.2d 425, 429 (1983), aff'd, 63 N.Y.2d 798,481 N.Y.S.2d 329, 471 N.E.2d 142 (1984); *Costello v. Costello*, 465 S.E.2d 620 (1998) (applying West Virginia law). See also *Max True Plastering Co. v. U.S. Fidelity and Guar. Co.*, 912 P.2d 861 (1996) in which Oklahoma recognized the doctrine.[6]

This Court has never addressed the Doctrine of Reasonable Expectations in an insurance policy. Neither *Mangum* nor *USAA* provides guidance as to whether this is the law. The *USAA* case merely cites the *Mangum* case and *Mangum* holds the Doctrine of Reasonable Expectations was not decided by the trial court. Further, *Gambrell v. Travelers Ins.* 280 S.C. 69, 310 S.E.2d 814 (1983) did not address the Doctrine of Reasonable Expectations nor has any other case from this Court.[7] Finally use of the doctrine would not torture the meaning of the insurance policy language in this case because "household resident" is not defined and is ambiguous.

III. The Court of Appeals erred in failing to find the policy was ambiguous and thus Bell was entitled to underinsured motorist coverage as a matter of law.

The Progressive policy does not define the term "household resident" although that term appears prominently on the declaration page. (R. p. 52) The declaration page states:

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[6] The Kentucky Supreme Court on June 21, 2012 handed down an opinion reversing both the trial court and the Court of Appeals based on the doctrine of reasonable expectations. (See *Bidwell v. Shelter Mutual Ins. Co.*, Opinion No. 2010-SC000560-DG Kentucky Supreme Court; (an essential tool in deciding whether an insurance policy is ambiguous and consequently should be interpreted in favor of the insured, is the so-called doctrine of reasonable expectations. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.)

[7] Two United States District Court cases state that South Carolina rejects the doctrine, however, those cases cite *United Servs.*, 365 SC at 4; 614 S.E.2d at 654. However, the doctrine is only cited as dicta and has never been addressed by this Court. See *Bankers Ins. Co. v. Prezzy*, 2009 W.L. 3459189 (D.S.C.) and *NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC* (2010 W.L. 146482).

Drivers and household residents	Additional information
SARAH K. SEVERN	Named insured
JOSHUA D. BELL	

Further, the General Definitions section of the policy (R. p. 25-26) and the Additional Definitions section (R. p. 27) do not define the term "household resident". Also, the policy, by naming Bell as a "household resident", shows that he was being recognized as more than just a "driver". [8] Because "household resident" is not defined and all ambiguities are to be construed against the insurer, this Court should hold that a "household resident" is entitled to underinsured motorist coverage. Finally, Bell was not only a "household resident", but the father of Severn's baby, thus, he was a relative as that term is defined in the policy.[9] (See **Insured person** means: **you** or a **relative** with respect to an **accident** arising out of the ownership, maintenance or use of a **covered vehicle**.) (R. p. 27). Thus, by listing Bell as a "household resident" on the declaration page, insurance coverage was clearly contemplated by Progressive.[10] (It is without dispute that Bell was more than just a mere "driver" -- he was a "household resident", a common law husband and the father of the named insured's baby). Accordingly, *Ex parte United Servs. Auto. Ass'n.*, 365 S.C.50, 54, 614 S.E.2d 652 (S.C. Ct.App. 2005) is not applicable. Indeed, by using the term "household resident" in the policy Progressive admits Bell was living with Severn and was not just a "driver" which the Court of Appeals in *USAA* found to mean only mere use of the vehicle. (614 S.E.2d at 652). The use of "household resident" in the policy contemplates a more

[8] Indeed, Sarah Severn is also listed as a household resident.
[9] He was also a common law husband under South Carolina law.
[10] Petitioner bets the insurer charged an extra premium for the insurance from Bell.

lasting relationship akin to that of a named insured and thus coverage should be extended. (At the very least Bell had a reasonable expectation he was covered based on the declaration page.).

Since the Briefs were filed in the Court of Appeals, the Plaintiff has learned of a new case which interpreted Progressive Insurance Company's policy. In *Moniz v. Daverede*, 40 So.3d 1027 (La.App. 4 Cir. 2010), the Louisiana Court of Appeals had an opportunity to consider what the term "driver" and "household resident" meant in a policy exactly like the policy in this case. In *Moniz*, the facts were similar to the facts in this case. The declarations page of the policy contained a section entitled in boldface: "Drivers and household residents." Kelly Falgout III is listed as the "Named insured" on the first line under that heading. The name of the plaintiff (Kelly Pepperman) appears on the next line, or as the plaintiff states in her brief "Falgout is the only "named insured" on the policy.

Just like in this case, the plaintiff and the named insured share a common residence. Further, the Plaintiff is related to the insured—he is the father of their child. In *Moniz*, the plaintiff contended that because her name appeared on the declaration page of the policy under the category of "Drivers and household residents" she was reasonably led to believe that she was covered. The Louisiana Court of Appeals in finding an ambiguity asked the following question: "Why is the plaintiff's name shown on the declarations page of the policy if she is to be treated as a third party stranger to the policy?" The Court noted: "We have reviewed the policy in depth and can find nothing that would explain why the plaintiff's name would appear on declarations page if she was not intended to be an insured." Accordingly, the Court reversed the grant of summary judgment finding that the

plaintiff's name on the declaration page in the absence of any countervailing explanation from Progressive created an ambiguity which warranted reversal of summary judgment.

It should also be noted that the term "household" is generally synonymous with family for insurance purposes and includes those who dwell together as a family under the same roof. See *Vanoverbeke v. State Farm Mut. Auto. Ins. Co.*, 303 Minn. 387, 227 N.W.2d 807, 810 (1975). Generally, the term "household" as used in automobile policies is synonymous with home and family. *Bartholet v. Berkness*, 291 Minn. 123, 189 N.W.2d 410, 412 (1971). See also, *Cicciarella v. Amica Mut. Ins. Co.*, 66 F.3d 764 (5th Cir. 1995) (as both resident and household are ambiguous, it follows that the key phrase "resident of the insured's household" is ambiguous and thus a question of fact. Accordingly, the district court erred in not allowing the jury to determine the parties intended meaning of household, resident and resident of the insured's household.) See also *Farmers Mut. Ins. Co. v. Tucker,* 213 WV 16, 576 S.E.2d 261, 270 (2002) (finding the phrase resident of your household in a property insurance policy ambiguous). *Risk Management Div. v. General Services Dept. of State ex rel. Apodaca v. Farmers Ins. Co. of Arizona*, 134 N.M. 188, 75 P3d 404 (N.M. App. 2003) (When construing ambiguous contract language the district court must adopt the interpretation that is most in accord with reason and the probable expectation of the parties. We agree with other jurisdictions that have concluded the undefined term resident or residence may be subject to various interpretations depending on the context of the case."

IV. The Court of Appeals erred in ruling that there was no genuine issue of material fact regarding the common law marriage of Bell.

The Court of Appeals affirmed the trial court's grant of summary judgment on the Plaintiff's common law marriage claim despite the evidence in the record that was offered only by the Plaintiff.

In this case, the evidence presented offers numerous inferences on common law marriage and the trial court erred in granting summary judgment. Here, the record establishes that Bell was a "driver" and "household resident" of a policy from his common law wife, Sarah Severn (Deposition, R. p. 97, lines 16-17); that they lived together in South Carolina (Deposition, R. p. 97, lines 16-17, R. p. 98, line 3); that both names were on the lease (Deposition, R. p. 99, lines 23-24); that they had a child (Deposition, R. p. 100, lines 9-14); that Bell paid all of the bills, including the car insurance premium (Deposition, R. p. 106, lines 20-25); that the term "household resident" is not defined in the policy (R. p. 52); that Bell had given Severn a diamond ring (Deposition, R. p. 103, lines 11-13); that they had lived together in two different apartment complexes (Deposition, R. p. 100, lines 1-25); that they moved to another apartment complex because they needed a baby room (Deposition, R. p. 100, lines 22-24) ; that Bell, his common law wife and their baby lived together eleven months (Deposition, R. p. 101, line 10). The record establishes that Bell paid all the bills including car insurance, rent, water, sewer, electric, internet, clothing and food (Deposition, R. p. 106, lines 20-25); that Bell asked Severn to marry him after she got pregnant (Deposition, R. p. 108, lines 4-7); that Bell paid the insurance on the only vehicle in the household (Deposition, R. p. 109, lines 1-3); and that Bell and Severn shared the car (Deposition, R. p. 125, lines 15-22) .

Further, the case cited by the trial court, *Callen v. Callen*, 365 S.C. 618, 624 S.E.2d 59 (2005), actually involved a trial by the family court and an order of the court on whether a common law marriage existed. Here, the trial court made legal conclusions based solely on oral argument at a motion for summary judgment. The court in this case violated the *Callen* case by use of this procedure. (In *Callen*, the parties participated in an apparently

matrimonial cohabitation and while cohabitating the parties had a reputation in the community as being married, a rebuttable presumption arises that a common law marriage was created") *Callen*, 624 S.E.2d at 60. The evidence presented by Bell showed matrimonial cohabitation with Severn and created an inference of marriage. Accordingly, the Court of Appeals decision and the trial court must be reversed.

It is puzzling based on the *Callen* case and on the strict requirements of SCRCP 56 that the Court of Appeals affirmed summary judgment. As has been stated above in other portions of the brief, it is only necessary for the non-moving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. *Hill v. York Co. Sheriff's Dept.*, 313 S.C. 303, 437 S.E.2d 179 (every benefit of the doubt to the non-moving party under the summary judgment standard) See *Watters v. Terminix Serv. Inc.*, 376 S.C. 632, 658 S.E.2d 110 (Ct.App. 2008).

Here, the Court of Appeals affirmed the trial court without a trial when the defendants offered no evidence and Plaintiffs offered the sworn testimony of Bell that he lived with, Severn, that they had a child together, that he paid the automobile insurance, that he was the father of Severn's child, that they shared one car, that they had lived in two different apartment complexes in South Carolina, that they moved into the apartment where they lived when the accident happened because they needed a baby room, that Bell had given Severn a diamond ring, and that he paid all of the household bills while she stayed home with the child. These facts are more than a scintilla of evidence under the South Carolina summary judgment rule (SCRCP 56) and show that the parties were cohabitating and presenting themselves to the community as if being married. Thus, summary judgment

was inappropriate in this case. Accordingly, Appellant requests that this case be reversed and returned to the trial court.

V. The Court of Appeals erred in citing *Gambrell* for the proposition that the Doctrine of Reasonable Expectations would be rejected by the South Carolina Supreme Court.

The Court of Appeals held that the Doctrine of Reasonable Expectations would clash with the *Gambrell* case and thus would not be accepted in this state. In *Gambrell*, the Supreme Court was faced with an interpretation of an automobile insurance policy and an underinsured motorist statute. The Court in *Gambrell,* in interpreting underinsured motorist coverage, held that a motorist may recover underinsured motorist coverage when his damages exceed the at-fault motorist's liability coverage. The question presented here is: What is the reasonable expectation of the purchaser of such a policy when his name appears as a household resident on that policy? As has been stated previously, at least 36 states have relaxed the strict construction rule of insurance policy interpretation in these types of circumstances.

The Court of Appeals thus erred in citing *Gambrell* for the proposition that the Doctrine of Reasonable Expectations would be rejected by this Court. This ruling is erroneous for the following reasons:

1. *Gambrell* only held that S.C. Code Ann. § 56-9-831 allows the insured to recover those damages exceeding the at-fault motorist's liability coverage to the extent of her underinsured motorist coverage.

2. This Court has never considered the doctrine of reasonable expectations in regard to insurance policies and should do so now.

3. No South Carolina court other than a United States District Court case has discussed the doctrine of reasonable expectations except *in dicta*.

4. *Gambrell* and the doctrine of reasonable expectations can be reconciled when there are ambiguous terms in an insurance policy such as household resident. Indeed, *Gambrell* reconciled an underinsured motorist insurance policy with a South Carolina statute. The same can be easily done here using the Doctrine of Reasonable Expectations.

5. *Gambrell* was decided 28 years ago prior to the doctrine of reasonable expectations being adopted in 36 states across the United States.

6. Society has changed and the law should change. Currently almost 12,000,000 Americans live together without being officially married. (See U.S. Census Bureau 2005-2007). Many people live together and insurers understand this phenomenon by naming people as household residents but not defining that term.

7. The doctrine of reasonable expectations is a logical extension of how to interpret an insurance policy in circumstances such as these when someone such as the Appellant is named on the declaration page of an insurance policy.

8. Because an automobile insurance policy is required in South Carolina, this is not the normal contractual relationship where both parties have equal bargaining power. People buy insurance because the law requires them to do so and thus should get the benefit of their reasonable expectation in the purchase of such policy.

VI. The Court of Appeals erred in failing to hold all ambiguities must be construed against the insurer.

The Court of Appeals erred when it found that a party's status is not dispositive when listed on the declarations page.[11] In fact, the insurer can choose to insure whoever it

[11] It should be noted Bell's status as household resident is not defined in the policy—a patent ambiguity.

wants to and can so state on the declarations page. Here, Bell was not just a mere operator; he was a household resident and the father of the insured's child. They lived together, Bell paid the bills (including the insurance premiums) and they shared a car -- all of which Progressive recognized when it listed Bell as a household resident on the policy. If anything, the policy was ambiguous about Bell's status and thus coverage was mandated. See *Super Duper, Inc. v. Pennsylvania National Mutual Cas: Ins. Co.*, 385 S.C. 201, 683 S.E.2d 792 (SC 2009), ("Ambiguous terms must be construed in favor of the insured.").

Indeed, the Court of Appeals' initial Opinion in this case admits that the term household resident is not defined. (See withdrawn Opinion, May 23, 2011). Thus, this ambiguity and subsequent opinions of this Court require coverage. Since Progressive decided to expand its policy to include household residents such as Bell and knew about the ambiguity when it did so, the policy must be construed against it.

CONCLUSION

In conclusion, Appellant requests this Court reverse the Court of Appeals and remand this case to the circuit court. There is manifest injustice to Bell in this case. He lived with Severn as if he were her husband, had a son with her, supported her, moved with her twice to apartments in Horry County, and was even named as a "household resident" on the Progressive policy that he paid for. The term "household resident" is not defined in the policy. Bell had a reasonable expectation that the policy on the car which he drove and on which he paid the insurance premiums would cover him for underinsured motorist's coverage. Bell requests that the Court adopt the Doctrine of Reasonable Expectations formulated by Professor Robert Keeton which states:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even

though painstaking study of the policy provisions would have not negated those expectations.

The reasons for adopting this doctrine are well known policy considerations including the following: the standard form insurance policy is an adhesion contract; the term household resident is not defined and thus ambiguous; Bell had inequality of bargaining power and the standard insurance policies are complex; Bell paid for the coverage; South Carolina law requires automobile insurance; and, finally, the standard insurance policy is full of technical language and fine print which is difficult to understand.

In sum, the Petitioner requests the court adopt the doctrine of reasonable expectations as the law of South Carolina.

Respectfully submitted,

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August 7, 2012
Surfside Beach, South Carolina.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Presiding Judge

Opinion No. 2011-UP-242 Filed May 24, 2011
Withdrawn, Substituted and Refiled June 23, 2011

JOSHUA BELL ..... Petitioner

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY..... Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served the **Brief of Petitioner** on the Respondent, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

J.R. Murphy, Esquire
Murphy & Grantland, PA
P. O. Box 6648
Columbia, SC 29260

DATE OF MAILING: August 1, 2012

Shelia Y. McCumbee

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 7th day of August, 2012

Notary Public for South Carolina
My Commission Expires: 2-25-19

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August 7, 2012

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: *Joshua Bell v. Progressive Direct Insurance Company*
Appellate Case No. 2011-195286
Civil Action No. 2007-CP-26-5890
Our File No. 2006-0212C

Dear Mr. Shearouse:

Enclosed please find the following documents for filing in the above-captioned case pursuant to Rule 242(i), SCACR:

(1) Original (unbound) and fourteen (14) copies of the **Brief of Petitioner** and **Proof of Service**. (One additional copy of the Proof of Service is provided for return to us).

(2) Fourteen (14) copies of the **Appendix** (one of which is unbound pursuant to conversation with Linda Allen).

(3) Original and copy of **Proof of Service** of the **Appendix**.

I also enclose a self-addressed, stamped envelope for your convenience in returning filed copies of the Proof of Service of the Brief and Proof of Service of the Appendix.

By copy of this letter, I hereby serve attorney for Respondent with the Brief of Petitioner and Appendix.

Sincerely yours,

Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures
cc w/enc.: J.R. Murphy, Esquire