

STATE OF MINNESOTA

IN SUPREME COURT

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Aaron R. Carlson and  
Robert S. Carlson,  
Appellants,

-vs-

Allstate Insurance Company and  
Midwest Family Mutual Insurance  
Company,  
Respondents,  
and  
Allstate Insurance Company,  
Respondent

File Number: A06-1664

-vs-

Michael J. Fay, Individually, and  
Mike Fay Insurance Agency,  
Respondent.

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REPLY BRIEF OF APPELLANTS AARON AND ROBERT CARLSON

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## STATEMENT OF FACTS

In keeping with Minnesota Rules of Appellate Procedure §128.02 Subd. 3, Appellants in this reply are going to concentrate solely on those portions of Respondent's Statement of Facts which Appellants believe are erroneous or taken out of context.

In its Brief, Respondent implies that Robert Carlson placed the Ford Focus lease in his name specifically because his son Aaron was not able to make the payments. However, it is clear from the full context of Robert Carlson's deposition testimony, he did not initially understand the lawyer was asking him the reason he used his name rather than Aaron's on the lease. What Robert Carlson was actually saying was that he took out the lease for his son because his son could not afford the lease payments or insurance on his own. In follow up, when asked the specific question of why he put his name on the lease rather than Aaron's name or both their names, Robert Carlson's answer was, "nothing logical." (Robert Carlson Dep. 5-6 /A-41). In other words, Robert Carlson had never given the issue any thought because the significance of such a choice had never occurred nor been explained to him.

Respondent states that Robert Carlson knew that Aaron was designated as a "driver" and not as a "named insured," a highly misleading statement. Following

the collision, after the alleged distinction between the two terms was pointed out to him, Robert Carlson naturally said he could see that he and his wife were listed in the “named insured” box and his son was listed in the “designated driver” box. (Robert Carlson Dep. 13/A 43 and Robert Carlson Dep. 9/A 42). But, Robert Carlson testified that he never discussed with Fay who the specific “named insureds” were going to be. (Robert Carlson Dep. 20/A 44). Michael Fay verified that they never discussed designating Aaron as a driver as opposed to a named insured. (Fay Dep. 36-37/A 80-81). Although Fay was unclear and inconsistent regarding whether or not he recognized that listing Aaron Carlson as a “driver” rather than a “named insured” could create a potential coverage problem, it is undisputed that he never communicated the difference or its potential ramifications to the Carlsons. (Fay Dep. 57-60/A 86). Fay further stated that when he turned in Aaron’s no-fault claim, he had no reason to think that the claim would not be covered. (Fay Dep. 52/A 84). In fact, some medical bills were initially paid by the Allstate adjuster handling the claim, but Allstate was later able to get the medical providers to refund the money. (Fay Dep. 19/A 76).

Respondent notes in its Statement of Facts, “Fay testified that he had no option other than to list Aaron as a driver” - a statement which is contradicted by Fay’s later testimony that all Robert Carlson would have had to do was make Aaron

a co-lessee to make Aaron eligible for listing as a “named insured.” (Fay Dep. 24 and 48- 49/A 77, 83-84). Since Robert Carlson went to Fay prior to leasing the vehicle, listing Aaron as a co-lessee would have presented no problem for him. Again, the undisputed fact is that Robert Carlson never asked that Aaron be named a “driver” rather than a “name insured” and the subject was never discussed with him. (Robert Carlson Dep. 20/A 44 and Fay Dep. 36-37/A 80-81). The choice of categorizing was something Fay and Allstate unilaterally chose to do according to what they claim was an undisclosed unwritten policy.

Respondent further takes testimony out of context when it claims that Fay and Robert Carlson discussed on numerous prior occasions what it would take for both of Robert Carlson’s sons to be removed from his policy and to be separately insured. The issue was not separate insurance policies which, according to Allstate’s claimed underwriting procedure, was impossible because Aaron’s name was not on the title. Rather, the issue was ownership of the cars solely by either Aaron or his brother Christopher to remove the potential of vicarious liability on Robert Carlson’s part. (Fay Dep. 15, 47/A 75, 83). In the event the sons owned their own vehicles, they naturally would have had to obtain their own insurance. However, Aaron and Christopher did not purchase their own vehicles because they were not in the financial position to buy their own vehicle; and Robert Carlson chose to retain

an ownership interest in the vehicles rather than give them to his sons outright.

Under those circumstances, there was no point in obtaining separate policies on each vehicle, as Respondent pointed out, because that would have eliminated the multi-vehicle discount for Robert Carlson.

More importantly, there is no dispute that it would not have cost one penny extra to add Aaron Carlson to the lease and make him a “named insured” under the Focus policy. Robert Carlson paid \$996.60 every six months for the Ford Focus policy, an amount \$459.00 more than what he paid for coverage on his 2001 Ford truck because the Focus was being operated by Aaron in Minneapolis, and he would not have incurred any more expense were Aaron listed as a “named insured.” (A 21-22).

Even more misleading is Respondent’s statement that Fay testified that he had discussions with Robert Carlson on numerous occasions over the course of their insurance relationship about the difference between the “named insured” and “driver” designations. As previously stated, both Fay and Carlson testified when asked that specific question that they never discussed the distinction between “named insured” and “driver” and the subject had never come up. (Robert Carlson Dep. 20/A 44 and Fay Dep. 36-37/A 80-81). The Fay quotation Respondent uses to support its contention that Fay and Carlson discussed the “named insured” issue is

found in a long rambling answer Fay gave in response to the question of whether, prior to the collision, he was even aware of the distinction between a designated “driver” and a “named insured” and the possible effect it would have on coverage.

Fay attempted to answer the question by going back to his discussion about potential vicarious liability and stated that he did know that putting a younger driver on the declarations page would raise the premium rate. (Fay Dep. 57-60/A 86). Fay further added that he at times avoided such a listing to keep costs down since resident relatives and students were covered anyway. (Id.). Fay acknowledged in a follow up question that the latter course could lead to coverage problems due to having an undisclosed driver. (Id.). However, in the present case, it is undisputed that Robert Carlson specifically identified Aaron as the primary driver and that Aaron’s name was placed on the declarations page, resulting in a significantly higher premium. To the extent that a discussion between Fay and Robert Carlson took place regarding placing Aaron’s name on the declarations page, such a discussion would have reinforced Robert Carlson’s belief that Aaron was fully covered since the term “named insured” was never brought up – only placing the name on the declaration page. Fay also specifically stated that he did not discuss any coverage distinctions with regard to the issues of no-fault, UM, and UIM coverage. (Id.).

Respondent states that Fay denied that Robert Carlson prior to the subject collision, asked Fay, "Are the two boys covered the same as I am and my wife?" and that Fay responded, "Yes". Respondent then acknowledges that Fay testified he told Robert Carlson that, "The cars are covered." First, it is important to note that in context of a motion for summary judgment, the Court would have to presume that Robert Carlson's testimony was accurate. Moreover, Michael Fay actually stated he did not recall what was said but thought the question was unusually phrased and probably was not asked that way:

Q. Do you remember that conversation?

A. No. That question was never phrased. Was the question ever asked, are we covered, are the cars covered? Of course, and we say yes, but not to that detail."

(Fay Dep. 38 / A 81). (*Emphasis added.*)

Later in his deposition Fay was again asked that question:

Q. Mr. Barnes asked you a question, he read to you what Bob Carlson had said, and you thought it was an unusual question, when Bob claims to have asked you, are my wife and I covered the same as the boys; do you recall that question?

A. Right.

Q. And you said that you didn't have a recollection as to that conversation.

A. No.

Mr. Sonnesyn: Incidentally, Mr. Persson asked you a negative and you responded in a negative. Just so that the record is clear, you're agreeing with Mr. Persson, right?

The Witness: Yes.

Q. Okay. You don't recall that conversation?

A. We did not have that specific question asked, no, that's correct.

Q. Do you remember the conversation at all or anything in regard to that?

A. You know, I don't think he was referencing, at least in that, any specific date on those conversations?

Q. Right

A. I think he just said in general did we ever – we had conversation to that effect. I do not remember any time in all the years we had insurance with them that that specific question was addressed.,

Q. Do you have any recollection as to whether or not Bob Carlson asked you simply, "Are the boys covered?"

A. Yes.

Q. And what is your recollection of that?

A. You know, I think that's a pretty common parting question, if you will, so we're covered, or are we covered, are they covered. You know, I think we probably said yes, in the affirmative.

(Fay Dep. 55-56/A 85).

Finally, while Robert Carlson may very well have been insured by Allstate for

approximately 25 years and may well have known Fay prior to their business relationship, he was not assigned to Fay's agency until 1991. (Fay Dep. 7/A 73).

### ARGUMENT

Concerning both the issue of whether or not the policy language provides coverage and the issue of whether or not the doctrine of reasonable expectations requires coverage, Respondent in its Brief states the salient question is whether or not a reasonable person in Robert Carlson's position would believe that his son Aaron would be covered by the Ford Focus policy. Respondent further states that this analysis must be done in light of all the relevant factual circumstances.

Appellant agrees but would rephrase the question to state whether a reasonable person in Robert Carlson's position would believe he had done what was necessary to add his sons to the policy.

Respondent contends that Robert Carlson should have recalled reading in the full policy, which was probably last sent to him 20 years earlier when his sons were non-drivers, that strangers to the policy would not be covered unless they were occupying the vehicle, a resident relative, or a student child of the policy holders. I doubt Robert Carlson or any other reasonable person would have a problem with that concept. That is, in fact, the main reason why Robert Carlson disclosed to Fay and Allstate that Aaron Carlson, who was an adult living away

from home, was going to be driving the car and asked that Aaron's name be added to the policy.

What did Robert Carlson receive after asking that his son Aaron be listed under the policy? Three things – First, he received an Amended Auto Policy Declarations page (A 109-110) that listed his sons Aaron and Christopher as drivers under the policy. Second, Robert Carlson received a cover letter from Michael Fay (A 108) which contained a box entitled “Your Quick Insurance Check” telling him to “Verify vehicles and drivers listed on the Policy Declarations and the ID cards.” The instructions did not tell him to verify “named insureds.” The instructions merely told him to verify “designated drivers.” Robert Carlson did so. The Declarations page listed his sons along with him and his wife as drivers. Third, Robert Carlson received ID cards - including a card for Aaron. At that point Robert Carlson reasonably concluded that he had accomplished his stated purpose, as would any parent, of insuring Aaron under the terms of the policy.

Respondent argues to this Court that a layperson, as opposed to a trained lawyer, would readily understand that a policy exclusion existed which applied to Aaron in the event he was pedestrian because he was listed as a “driver” rather than a “named insured.”

In Appellants' main Brief, we challenged Respondent to find a single layperson who would understand the ramifications of listing a person as a "driver" rather than a "named insured" on the declarations page, a challenge Respondent has not met. Appellants now ask Respondent to show the clear and unambiguous exclusion which would have caused a reasonable person to understand that the insurance Robert Carlson was buying for his son would not fully apply because the son was designated simply as a "driver." No such exclusion manifests itself. As Michael Fay in his unsuccessful attempt to clarify the difference between a listed "driver" and a "named insured" lamely states, "But by definition, I don't believe there is a definition in the policy that specifically names what benefits are available to a so-called driver." (Fay Dep. 35/A 80).

The evidence in the record shows that Robert Carlson, prior to leasing the Ford Focus insured at the time of the collision, went to his Allstate agent Michael Fay and told him of his intent to lease the car for Aaron and of his desire to provide insurance coverage for Aaron. It is undisputed that Robert Carlson approached Respondent Allstate Insurance Company and completely and honestly explained the circumstances concerning the use of this vehicle. He asked the insurance agent to obtain coverage for him and his sons. In Robert Carlson's own words, he asked, "Are the two boys covered the same as I and my wife?" The

agent's response was, "Yes."

All the parties understood that the Ford Focus was going to be used exclusively by Aaron Carlson in Minneapolis and that consequently the premium would be increased by \$459.00 to reflect that fact. Since the vehicle was going to be operated solely by Aaron and since Robert Carlson had coverage in the same amount for the other vehicles which he and his wife operated, under no conceivable circumstances would either Robert Carlson or his wife benefit from the no-fault, UIM, and UM coverage under the Ford Focus policy for which he paid the full price. This coverage was for Aaron and the UM, UIM, and no-fault premium's were based on his use with no deduction for the alleged "driver – pedestrian" exclusion.

It is important to note that Robert Carlson never asked that Aaron be listed in the "driver" box rather than the "named insured" box. That subject never came up, nor did anyone even attempt to explain the distinction to the Carlsons. What Robert Carlson asked for was simply that his son be covered by the policy which he was procuring for his son's benefit and he left Michael Fay's insurance office with the reasonable impression that such coverage had been obtained. Had Allstate or its agent told Mr. Carlson about their alleged underwriting policy, all Robert Carlson had to do was add Aaron's name to the lease, which had not yet

been signed when Robert Carlson approached Allstate about insuring the new car. This would have eliminated the problem with no extra cost whatsoever to anyone. Aaron was not added to the lease because no one realized the problem, not even Michael Fay, a trained insurance agent, and Allstate never raised the issue with the Carlsons. Were the distinction in terms as clear as Allstate claims, would not Allstate's own sophisticated and trained agent have recognized and explained the distinction to the Carlsons? Any reasonable parent or insured would certainly have opted for full coverage if the distinction in terms been explained to him.

The simple upshot of all of this was that Allstate denied coverage to Aaron Carlson when he was injured due to Aaron's status as a "pedestrian," despite the fact that Robert Carlson was completely forthright and paid all premiums asked for and expected by Allstate. Neither Aaron nor Robert Carlson (nor Allstate for that matter) could have "reasonably expected" that Aaron Carlson should be given the coverage which his father fully paid for, expected, and had been promised.

Lastly, in regard to mandated coverage under Minnesota Statutes §65B.49 Subd. 3 a (5), if Respondent is correct in asserting that the term "is insured by" merely means has insurance coverage under the policy under the specific circumstances – i.e. as a pedestrian – the second paragraph to that subdivision is

completely superfluous since the person would have coverage anyway. The legislature obviously expressed a clear intent to cover pedestrians. Concerning no-fault, the legislature chose to set up the Assigned Claims Plan to cover individuals not otherwise covered and consequently used the term “an insured” which is defined as a “named insured” since coverage was automatically provided under the Assigned Claims Plan.

Concerning UM / UIM coverage, which is fault driven, the legislature chose to pursue a different approach. The sole purpose of the second paragraph of Minnesota Statutes §65B 49 3 a (5) was to cover the situation whereby a person would by definition not be occupying his or her normal motor vehicle, or for that matter, any motor vehicle. The legislature by deliberately choosing to use the broader term “is insured” as opposed to “an insured” clearly expressed an intent in regard to UM /UIM coverage to allow the person to go to the policy that normally provided UM / UIM coverage to that person – in this case, the Ford Focus which was Aaron’s only vehicle.

#### CONCLUSION

The Court of Appeals found as a matter of law that Allstate is not required to pay uninsured motorist benefits and no-fault benefits under the policy that Appellant Robert Carlson procured for his son Appellant Aaron Carlson. This

ruling was made despite the fact that the insurance was procured for Aaron; Aaron was listed on the policy as the sole driver of the vehicle; the premium charged was based on Aaron's age, his driving record, and his location in Minneapolis; and that Allstate in the declarations page placed Aaron Carlson's name in the "listed driver" box rather than the "named insured" box. Allstate did this despite the fact that the premium it charged would have been the same regardless of what box Allstate placed Aaron's name in and despite the fact that had Robert Carlson known about the potential significance of Allstate's labeling of Aaron, Robert would have taken the simple steps needed to procure full coverage for his son, coverage which he had asked for and which would have provided the bargained and paid for uninsured and no-fault coverage. Simply put, Allstate readily reaped the monetary benefits of selling an insurance policy to the Carlsons without consideration or explanation of its policy of excluding "drivers" from the full coverage afforded by the policy. Respondents' assertion that the policy is clear on its face as far as the distinction between "driver" and "named insured" is incredulous. Neither Allstate's own agent, Michael Fay nor the adjuster that initially handled the no-fault claim recognized its existence. Allstate in relying on an artifice which it created when it chose to list Aaron as a "driver" rather than a "named insured" is denying a benefit clearly mandated by Minnesota's no-fault

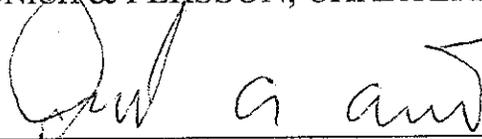
law.

This is precisely the situation for which the Doctrine of Reasonable Expectations was established. Appellants should be given the coverage they asked for, paid for, and reasonably expected to receive! What reasonable and rational person would opt to deny himself or his child coverage as a pedestrian. All the Appellants want is what they paid for. The Carlson family simply did not get the coverage they paid for.

This Court should reverse the Court of Appeal's and the District Court's granting of Summary Judgment for Allstate and enter Summary Judgment on behalf of Aaron Carlson against Allstate Insurance Company.

Respectfully Submitted:

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