

NO. A06-2445

State of Minnesota
In Court of Appeals

Patricia A. Frey, as Trustee for the heirs and next-of-kin of
Stephen J. Frey, Patricia A. Frey, individually,
and Aven K. Frey, individually,

Respondents,

v.

United Services Automobile Association and Nathan C. Frey,

Appellants.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS **ii**

TABLE OF AUTHORITIES **iii**

ARGUMENT **1**

I. Respondents Concede that Portions of the Trial Court’s Analysis Are Erroneous **1**

II. The Trial Court Erred in Holding that the USAA Policy Was Ambiguous **1**

A. An insured’s purported Reasonable Apprehension of the meaning of an allegedly ambiguous provision in an insurance policy is not relevant under Minnesota law **1**

B. Even If Reasonable Apprehensions Are Considered, the USAA Policy Is Still Not Ambiguous **2**

C. Aven Frey was a Resident Relative at the Time of the Accident **2**

1. The Trial Court’s Determination that Aven Frey Was Not a Resident Relative Is Subject to De Novo Review **2**

2. Aven Frey Was a Resident Relative **3**

III. The Trial Court Further Erred in Applying the Reasonable Expectations Doctrine **5**

CONCLUSION **8**

TABLE OF AUTHORITIES

CASES

<i>Atwater Creamery v. Western Nat'l Mutual Ins. Co.</i> , 366 N.W.2d 271, 278 (Minn. 1985)	6, 7, 8
<i>French v. State Farm Mut. Cas. Co.</i> , 372 N.W.2d 839 (Minn. Ct. App. 1985)	3, 5
<i>Board of Regents v. Royal Ins. Co.</i> , 517 N.W.2d 888 (Minn. 1994)	7, 8
<i>Grinnell Mut. v. Wasmuth</i> , 432 N.W.2d 495 (Minn. Ct. App. 1998)	7
<i>Morgan v. Illinois Farmers Ins. Co.</i> , 392 N.W.2d 37 (Minn. Ct. App. 1986)	3, 4
<i>Skarsten v. Dairyland Ins. Co.</i> , 381 N.W.2d 16 (Minn. Ct. App. 1986)	4, 5
<i>Wood v. Mut. Serv. Cas. Ins. Co.</i> , 415 N.W.2d 748, 750 (Minn. Ct. App. 1987)	5

STATUTES

Minn. Stat. § 65B.15	1
Minn. Stat. § 65B.43, subd. 5 (1982)	4

ARGUMENT

I. Respondents Concede that Portions of the Trial Court's Analysis Are Erroneous.

In its initial brief, USAA emphasized that the trial court erred in holding that the Limited Family Exclusion (LFE) does not apply to the Freys' case because it is not an enumerated ground for cancellation or limit reduction under Minn. Stat. § 65B.15. *Appellants' Brief* at 15. USAA also argued that Aven Frey is not entitled to Underinsured Motorist Coverage under the separate automobile insurance policy issued by USAA in Iowa and naming her as an insured. *Id.* at 28.

Respondents have not challenged these arguments in their brief. USAA's analysis of these issues thus stands unrefuted.

II. The Trial Court Erred in Holding that the USAA Policy Was Ambiguous

A. An insured's purported Reasonable Apprehension of the meaning of an allegedly ambiguous provision in an insurance policy is not relevant under Minnesota law.

Respondents argue that the term "reasonable apprehension" as used in the trial court's analysis of whether the USAA policy was ambiguous was not error. They contend that an insured's "reasonable apprehension" (i.e., a *subjective* understanding) of the meaning of a given word or phrase is the same as an ambiguity for purposes of the interpretation of a contested provision of an insurance policy.

Not so. In Minnesota, the legal concept of one's "reasonable apprehension" of the meaning of the terms in an insurance policy is confined to cases presenting alleged violations of Minnesota's narrow, and seldom invoked, reasonable expectations doctrine. It is not a substitute for, nor a permitted consideration with respect to, the general rules of interpretation of an allegedly ambiguous provision in an insurance policy. Here, the trial court did not attempt to describe, let alone cogently articulate, how the limited family exclusion was ambiguous. Nor did it explain how the Limited Family Exclusion was capable of two reasonable interpretations. Thus, the trial court's reliance upon the inapplicable and unexplained term "reasonable apprehension" and its failure to present a reasoned analysis of the alleged ambiguity constitute reversible error by the trial court.

B. Even If Reasonable Apprehensions Are Considered, the USAA Policy Is Still Not Ambiguous.

The magnitude of the trial court's error makes it unnecessary to delve any further into ambiguity analysis, but it should be noted that even if the trial court had not erred in its analysis, the USAA policy would still not be ambiguous. The reasons for this conclusion are set forth in Appellants' initial brief. *See Appellants' Brief* at 18-20.

C. Aven Frey was a Resident Relative at the time of the accident.

1. The Trial Court's Determination that Aven Frey Was Not a Resident Relative Is Subject to De Novo Review.

Respondents argue that the issue of Aven Frey's residency is a fact issue which

should be reviewed under a clearly erroneous standard of review. That would be true if the court were the fact finder and had reached a final determination on the issue, but this was a summary judgment motion. Whether the Freys were entitled to summary judgment on the issue of Aven's residency is a question of law that must be reviewed under a de novo standard. *See, e.g., French v. State Farm Mut. Cas. Co.*, 372 N.W.2d 839 (Minn. Ct. App. 1985)(on motions for summary judgment, court could properly decide residency as a matter of law).

2. Aven Frey Was a Resident Relative.

The factors to be considered in a traditional ambiguity analysis are set forth in both Appellant's and Respondents' initial briefs. Despite numerous cases and varied facts, one thing is clear. No Minnesota appellate court has ever held that a traditional college student was not a resident relative of her parents' (or brother's) household. Nor is there any reason for such a conclusion to be reached in this case. That is a correct, worthy, and important body of law. It should remain the governing rule in Minnesota.

Respondents' attempts to distinguish *Morgan v. Illinois Farmers Ins. Co.*, 392 N.W.2d 37 (Minn. Ct. App. 1986), are misplaced. *Morgan* is one of the most factually analogous cases available. As the *Morgan* court held:

[T]he issue is whether a college student who often lived at home, had personal possessions at home, and who was supported by parents could be considered to be a resident relative of the parents' household for the purposes of insurance coverage. In both cases, the intimacy of the family was evident and made it clear that the parties would consider themselves to be covered by the same insurance policy. The evidence of the intimacy of the family relationship in

Skarsten led the court to conclude that the accident victim was a resident relative of the named insured. That same consideration leads to a like result in this case... In each case the intimate relationship enjoyed by the accident victim and the named insured requires a finding that the victim is a resident relative and therefore eligible for insurance benefits.

Respondent contends that another conclusion is dictated by statements of Charlotte Morgan that she no longer lived with her parents, and by written evidence that she designated the shared apartment as her permanent address. We disagree. The case is governed by the statutory definition of residence, not by a layperson's declarations about residence or address.

Morgan at 39-40. All of the *Morgan* factors are found in the instant case. Aven Frey was financially dependent on her parents: they paid for her tuition, lodging, and car insurance. She returned home for holidays and vacations, at times lived with her family in Minnesota, and at other times lived in the family's residence in New Mexico. And while she may have had an intention to return to Minnesota, the record is also clear that, like many college students, she had not formed any other solid post-graduation plans.

Skarsten v. Dairyland Ins. Co., also challenged by Respondents, reinforces this conclusion. The facts in *Skarsten* showed that:

Cheryl Skarsten was living in her own apartment near campus and returning home as often as possible—one or two weekends a month and on holidays. She retained her own room at home and had left some of her belongings there. She was unemployed at the time of the accident and was being supported by her father. Her absence from the family farm was of a temporary nature; she intended to return, if only for weekends and holidays, and considered the farm her permanent residence. Thus, paraphrasing the statute, Cheryl “usually makes her home in the same family unit, even though she temporarily lives elsewhere.” Minn. Stat. § 65B.43, subd. 5 (1982).

Skarsten, 381 N.W.2d 16 (Minn. Ct. App. 1986). Under these facts, the court found that

Skarsten was a resident of her parents' home.

French v. State Farm Mut. Ins. Co., 372 N.W.2d 839 (Minn. Ct. App. 1985), cited by Respondents, is of no assistance to them:

Based upon our reading of the above cases, we agree with the trial court that David was not a resident of his parents' home at the time of the accident. *Fruchtman* and *Van Overbeke* demonstrate that the fact that David retained his parents' mailing address is not decisive, particularly since he was going into the navy. Although David's young age might ordinarily weigh in favor of finding him a resident of his parents' household, it is significant that he had been purposely staying away from his parents' home, living with friends or in his car, and was totally self-supporting. His parents did not provide him with money, food, clothing or any other assistance, and David fully intended to leave for the navy. The record therefore supports the trial court's determination that David did not reside with his parents at the time of the accident.

French at 842. In other words, it took a situation where a child was living with friends or in his car, and received no support from his parents, to lose his status as a resident relative. Similarly, *Wood v. Mut. Serv. Cas. Ins. Co.*, 415 N.W.2d 748, 750 (Minn. Ct. App. 1987), also cited by Respondents, actually found that a soldier enlisted in the Army was still a resident of his parents' home.

In short, all of the cases cited by the parties strongly favor the conclusion that Aven Frey was a resident of the Frey family home.

III. The Trial Court Erred in Applying the Reasonable Expectations Doctrine.

Respondents also attempt to bolster the trial court's erroneous conclusion that the reasonable expectations doctrine is applicable to this case. As discussed in USAA's initial brief, however, the doctrine is inapplicable to this case because the limited household

exclusion is plainly designated (it is placed where one would expect to find it – in the exclusions section of the policy) and is unambiguous.

In *Atwater Creamery v. Western Nat'l Mutual Ins. Co.*, the court held that “where major exclusions are hidden in the definitions section, the insured should be held only to reasonable knowledge of the literal terms and conditions” of the insurance policy. *Atwater Creamery*, 366 N.W.2d 271, 278 (Minn. 1985). *Atwater Creamery* dealt with the application of the burglary definition in a commercial policy that required “evidence of forcible entry.” *Id.* The definition’s purpose is to discourage fraud (“inside jobs”) and to encourage the insured to secure the premises. *Id.* On two occasions the insured’s facility was burglarized and the insurer paid for the resulting loss. *Id.* On a third occasion the facility was burglarized and the insurer denied coverage because an insured burglary required visible marks of forcible entry. *Id.* at 276. During the third burglary there were no marks or other signs of forcible entry, however the local sheriff’s department cleared all Atwater employee’s of wrongdoing and ruled out an “inside job.” *Id.* Therefore, literal enforcement of the exclusion did not effectuate its purpose. *Id.* In addition, the court concluded that the burglary definition operated as a “hidden exclusion” and that it was surprisingly restrictive because literal application operated to make the insurer’s obligation to pay turn on the skill of the burglar. *Id.* For these reasons the court held that when the technical definition of burglary in an insurance policy operates as an exclusion from coverage it will “not be read to defeat the reasonable expectations of the purchaser

of the policy.” *Id.* at 279.

Nine years later, the Minnesota Supreme Court revisited *Atwater* and made clear that it does not authorize re-writing of a plainly designated exclusion. *Board of Regents v. Royal Ins. Co.*, 517 N.W.2d 888 (Minn. 1994). In *Board of Regents*, while analyzing a pollution exclusion in a CGL policy, the court rejected the insured’s argument and reliance on a prior, though unrelated, Minnesota Court of Appeals decision that applied the reasonable expectations doctrine to a pollution exclusion. *Id.* at 891 (*citing and overruling Grinnell Mut. v. Wasmuth*, 432 N.W.2d 495 (Minn. Ct. App. 1998)). The doctrine simply “has no place” in these cases. *Id.* In so doing, the court stated that “the reasonable expectation test is not a license to ignore the . . . exclusion. . . nor to rewrite the exclusion solely to conform to a result the insured might prefer.” *Id.*

Board of Regents is directly on point. In this case USAA’s limited household exclusion is plainly set out in the exclusions section of the policy. It is clearly worded and unambiguous. Thus, like in *Board of Regents*, there is no reason to apply the reasonable expectations doctrine to this plainly designated unambiguous exclusion. Unlike *Atwater*, in this case there is no “hidden exclusion” within a definition. Furthermore, there is no conflict between the application of the exclusion and its purpose as there was in *Atwater*. The reasonable expectations doctrine is not a license to ignore this plainly worded, unambiguous, and clearly placed limited household exclusion. It is enforceable as written.

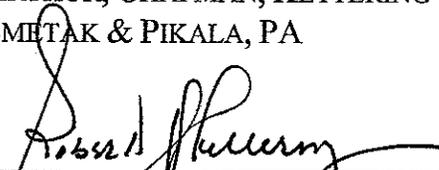
CONCLUSION

The trial court's grant of summary judgment to Respondents was error. It erred when it employed the concept of "reasonable apprehension" as if it were a cognate for an ambiguity analysis. It erred when it failed to apply the settled body of Minnesota law holding that college students, financially supported by their parents, but living away from home during college, remain "resident relatives" for purposes automobile insurance coverage. It erred when it applied Minnesota's reasonable expectations doctrine to a clearly written exclusion, set out in the exclusion section of the policy, as opposed to an exclusion hidden within a definition as was the case in *Atwater* and re-emphasized in *Board of Regents*. For these reasons, the trial court's decision should be reversed with instructions that judgment of dismissal be entered in favor of Appellant USAA.

Respectfully submitted,

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