IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FARMERS INSURANCE EXCHANGE, a California reciprocal interinsurance exchange, Plaintiff and Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent. JOSE LUIS CERVANTES BAUTISTA, an individual, and SARA BAUTISTA, an individual Real Parties in Interest.	2d Civ. No. B248324 Los Angeles Superior Court, East District Case No. BC 477720 Hon. Salvatore Sirna, Judge Department G Telephone: (909) 620-3071

REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF

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INTRODUCTION

It is undisputed that the sole instrumentality of harm here was an insured's motor vehicle use (tragically running over the insureds' granddaughter who had run out to greet the vehicle). It is also undisputed that such motor vehicle use is covered under the insureds' automobile policy and excluded under their homeowner's policy's exclusion for "bodily injury . . . which results from the ownership, maintenance, use, loading, or unloading of . . . motor vehicles." The case relied on by the insureds, *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94 ("*Partridge*"), involved a loss caused, in whole or in part, by an instrumentality of harm (there a gun) *other than* a motor vehicle. Here, there is no suggestion of an instrumentality of harm other than the insured's motor vehicle.

The issue squarely raised here, thus, is whether the insureds can create coverage that otherwise would not exist under their homeowner's policy solely by way of the claim that the insured spouse's negligent supervision allowed the child to run out to greet the truck and thereby to enter the "zone of danger" created by the truck. The fulcrum question is whether the asserted negligent supervision can be deemed an independent mechanism of harm or instead is intertwined with the excluded motor vehicle cause of harm.

Whether the two ultimate sources of claimed negligent causation (the negligent supervision and the negligent motor vehicle operation) are independent of (or intertwined with) each other isn't established based on one side or the other saying so. There has to be a legal principle involved. The standard should not be a judicial "I know it when I see it." And, it is not. The question is how the two negligent acts are connected and what the physical cause of the injury was.

As demonstrated in the petition, there is a logical, principled approach: If the instrumentality of the harm is a motor vehicle and the alleged "other"

negligence is failing to prevent harm by the motor vehicle, then the negligence is intertwined and the exclusion of injury from motor vehicles applies. This principle underlies and explains the case law – all of the case law. The return's "pick 'em" approach of selectively relying on some cases while dismissing contrary, more applicable cases, does not. More importantly, the petition's approach is consistent with what it means to be an *independent* cause of harm.

There's no doubt that where truly *independent* forces are involved, the fact that one force was a motor vehicle does not mean that a motor vehicle exclusion *necessarily* applies. No one disputes the holding in *Partridge*, *supra*, 10 Cal.3d 94, where a hair-trigger hunting pistol accidentally discharged, causing injury, when a negligently-driven truck hit a bump off-road. But *Partridge* consistently has not applied where the only physical instrumentality of harm has been a motor vehicle. (E.g., *National American Ins. Co. v. Coburn* (1989) 209 Cal.App.3d 914 [insured's negligent supervision of child, allowing him to be run over when another child slipped parked van into gear]; *State Farm Fire and Casualty Co. v. Estate of Evoniuk* (N.D.Cal. 1988) 681 F.Supp. 662 [negligent parental supervision where insured parents knew minors had been drinking; minors thereafter involved in injury-causing motorcycle crash]; *Prince v. United Nat. Ins. Co.* (2006) 142 Cal.App.4th 233 [insured's negligence in leaving children in hot, parked vehicle excluded].) Rather, the *Partridge* paradigm has only applied where the motor vehicle has combined with an independent, non-vehicular instrumentality of harm, such as the gun in *Partridge* and similar cases.

That *Partridge* does not apply is dictated by the facts here. Contrary to the return's assertion, the grandmother's negligent supervision in this tragic case *is* specifically linked to and intertwined with a motor vehicle as the instrumentality of injury. The insureds *admitted as undisputed* that the grandmother's alleged

thereafter involved in injury-causing motorcycle crash]; *Prince v. United Nat. Ins. Co.* (2006) 142 Cal.App.4th 233 [insured's negligence in leaving children in hot, parked vehicle excluded].) Rather, the *Partridge* paradigm has only applied where the motor vehicle has combined with an independent, non-vehicular instrumentality of harm, such as the gun in *Partridge* and similar cases.

That *Partridge* does not apply is dictated by the facts here. Contrary to the return's assertion, the grandmother's negligent supervision in this tragic case *is* specifically linked to and intertwined with a motor vehicle as the instrumentality of injury. The insureds *admitted as undisputed* that the grandmother's alleged supervisorial neglect was allowing the child to run out to meet the grandfather's truck in the driveway. The alleged neglect was allowing the child to enter the "zone of danger" *created by the vehicle*. The neglect here specifically had to do with the dangerous attraction of the *specific vehicle*, the grandfather's truck arriving in the driveway. This was not some inchoate or amorphous danger, but the very vehicular danger that the grandmother specifically anticipated and needed to guard against.

Unable to come within *Partridge*'s ambit, the return seeks to create an issue where there is none by claiming ambiguity in the motor vehicle exclusion. The trial court did not rule on this basis. The exclusion is expansive, not limited. That does not create ambiguity. The return urges that the exclusion does not apply because the insured grandfather, rather than the allegedly concurrently negligent grandmother, was driving the truck. That makes no sense. Nothing in the exclusion limits it to any

particular insured's use of the truck. Read in context, as it must be, the exclusion undoubtedly applies to the circumstance here. In any event, *both* insureds owned the truck and both are liable for each other's use of it; on that basis the exclusion applies even under the insureds' construction.

The trial court had no legally justifiable reason to deny summary adjudication. A writ should issue directing the trial court to reverse its denial and grant Farmers summary adjudication.

ARGUMENT

I. THE WRIT PETITION IS TIMELY AND THE ISSUE IS RIPE.

The return argues that Farmers's writ petition is premature. (Return 10-14.) The simple answer is that this Court has already determined otherwise: "The issuance of [the] order to show cause constituted an effective determination that the [petitioner's] remedy at law was not adequate. [Citations]." (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1056.)

In any event, the argument is baseless. The return argues that the insureds have a pending bad faith claim in connection with payment under the automobile policy. (Return 10-14.) (Farmers paid for the defense under the automobile policy but the insureds unilaterally settled the underlying lawsuit, creating an issue as to liability for the settlement payment. See *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718.)[1]

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[1] The return attempts to kick up distracting and incorrect procedural dust regarding the outstanding claim under the automobile policy, a claim *not* presented in this writ proceeding. The underlying personal injury claim (against the grandparents by the child's parents) was filed in August 2009. The grandparent defendants settled with their son and daughter-in-law in June 2012, less than three years later, not the four years claimed in the return. Farmers filed the present declaratory relief action in January 2012, six months before the case settled, not on the eve of trial. The insureds settled the underlying action with their own family members without the carrier's consent while both insureds were being defended under the automobile policy, which is what has led to the dispute concerning settlement coverage under that policy. None of this, however, is relevant to the issue of homeowners policy coverage that is posed in this writ proceeding.

Because of the outstanding cross-claim, Farmers sought summary adjudication, not summary judgment. (See Petition 8, fn. 4, citing Appendix, Vol. I, Tab 9, pp. 189-194.) In doing so, it sought to fully address any duty under the homeowners policy – the sole question at issue in Farmers's declaratory relief action and in this writ proceeding. Writ relief is appropriate in just this setting. (See Petition 2-3, citing Code Civ. Proc., § 437c, subd. (m), and cases; *Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, 594-595 ["(writ) (i)ntervention (is) particularly appropriate for insurance policy interpretation issues"].)

On close read, the return concedes that the factual issues are not in dispute. (Return 10.) And it admits many of the petition's allegations, including that Farmers's declaratory relief action seeks to adjudicate a legal question – the application of the motor vehicle exclusion in the homeowners policy. (Return 2 [admitting, *inter alia*, paragraphs 3 and 7 (describing declaratory relief action; see Petition 5, 6)].)

There is nothing premature about the petition. It addresses a squarely raised legal issue premised upon undisputed facts that will resolve a substantial portion of the case – asserted coverage under the homeowners policy.

II. *STATE FARM v. PARTRIDGE* DOES NOT APPLY WHERE, AS HERE, THERE IS A SINGLE, EXCLUDED VEHICULAR INSTRUMENTALITY OF HARM.

Partridge, *supra*, 10 Cal.3d 94, undoubtedly recognized that where an instrumentality (there, a gun) independent of an excluded risk (there, as here, a vehicle) causes harm, coverage may, nonetheless, apply. Concomitantly, *Partridge* will not apply just because an insured can conceive of a covered risk that combines with an excluded risk to cause injury. To the contrary, consistent authority (detailed in the Petition at 23-29) holds otherwise. The question is where is the line.

Partridge and most of the later cases applying it involve a gun as the instrumentality of harm, an instrumentality entirely independent from the excluded motor vehicle ownership or use. (See Petition 20-23.) The one "exception" is *State Farm Fire & Cas. Co. v. Kohl* (1982) 131 Cal.App.3d 1031. (Return 34-37.)[2] But, as the petition addresses in some detail (Petition 21-22), *Kohl* conceptually is not an exception. It involved a separate, non-vehicle instrumentality of harm.

In *Kohl*, that instrumentality happened to be a human actor, rather than the guns in the other cases applying *Partridge*. In *Kohl*, the insured driver hit a motorcyclist, causing injury. If nothing else had happened, that

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[2] One outlier not relied upon by the insureds here is *Gonzalez v. St. Paul Mercury Ins. Co.* (1976) 60 Cal.App.3d 675, which held that the insured's negligent repair of a vehicle's brakes was somehow independent of the insured's later driving of the vehicle. But "*Gonzalez* has been repeatedly disapproved." (*Prince v. United Nat. Ins. Co.*, *supra*, 142 Cal.App.4th at p. 241, fn. 3.)

would have been an excluded motor vehicle risk. But the insured then negligently dragged the injured motorcyclist from the roadway, causing additional injury. The dragging caused injuries independent of those caused by the collision. (*Id.* at p. 1039.) The insured was an additional, separate instrumentality of harm in *Kohl*. (See *Hartford Fire Ins. Co. v. Superior Court* (1983) 142 Cal.App.3d 406, 416 [distinguishing *Kohl* on this basis].) There's no such second instrumentality of harm here.

Partridge and its progeny, thus, hold that a homeowners policy containing a motor vehicle exclusion might nevertheless provide coverage where an instrumentality *independent* of a motor vehicle causes the harm even though negligence may be attributed to both excluded motor vehicle use (there, negligent driving) and to the more direct instrument of harm (there, a negligently filed hair-trigger pistol, or in *Kohl*, negligent dragging). The key is that the potentially covered risk must *independently* cause harm. (See cases discussed at Petition 19-20.)

This rule has been applied in a number of factual settings, but the most cogent example is *National American Ins. Co. v. Coburn*, *supra*, 209 Cal.App.3d 914. *Coburn* is on point. It is a case about an injury to a child, run over by a motor vehicle, where the allegations included that the insureds failed to adequately supervise *the child who was injured*, allowing him to be in vehicle's zone of danger when the vehicle started to roll.

The return highlights *Coburn*'s conclusion that "'[n]one of the alleged negligence, including the negligent supervision of the children, exists independently of Usher's use and loading of the vehicle.'" (Return

32, quoting *Coburn*, 209 Cal.App.3d at pp. 919-920.) From this, it argues that only negligence in how the vehicle was being used (or loaded) was at issue in *Coburn*. Not so.

The return is selective – significantly so – in parsing the quotation; it omits earlier language in the paragraph that makes clear that the negligent supervision included permitting the children to play around the hazardous vehicle: "Here, *the alleged negligence consisting of the Ushers' failure to properly supervise the children,* exposing them to the hazard of a vehicle parked on an incline with its doors open and without its parking brake set. . . ." (*Id.* at p. 919, emphasis added.) That negligence, though, was only connected to liability through the vehicle as the actual instrument of harm: It "could not render the Ushers liable for Graham Coburn's death independently of Usher's use and loading of the vehicle." (*Ibid.*)[3] Analogously, the grandmother's negligent supervision lay in letting the children get out of the house to greet the grandfather in the driveway where she knew the vehicle hazard would be present. *Coburn* governs this case.

And *Coburn* is not alone. Here is the rule: Where the claim is that negligent supervision leads to vehicle-inflicted harm and there is a motor-vehicle exclusion, *Partridge* does not apply. For example, *State Farm Fire and Casualty Co. v. Estate of Evoniuk*, *supra*, 681 F.Supp. 662, involved a negligent supervision scenario where the insured parents knew that their

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[3] To parse further, *Coburn* notes that the *Ushers'* (plural) negligence included failing to supervise the children while only *Usher's* (singular – i.e., one spouse's) loading involved the vehicle.

minor son and a friend had been drinking. The minors then went motorcycle riding with disastrous results. The minors' drinking in and of itself would not have caused harm until the minor son went ahead and drove. There was no claim that the parents might be covered for negligently entrusting the motorcycle, just that their negligence in supervising the son in the first place in allowing him to drink and then drive was a cause of the vehicular harm once he did drive. (*Id.* at p. 663 [only issue presented was whether the parents' negligent supervision was covered; unavailability of coverage for negligent entrustment was conceded].) But because the motor vehicle was the sole instrument of harm, the exclusion applied. (*Id.* at pp. 664-665 ["The Evoniuks' alleged negligent supervision of Sean cannot be separated from his alleged negligent use of the motorcycle"].)

Likewise here, the grandmother's negligent supervision in letting the child go into the specifically anticipated zone of danger created by the grandfather's returning truck (itself known to draw the children to it) to greet the truck cannot be separated from the truck itself; the two are plainly intertwined. (Accord, *Prince v. United Nat. Ins. Co.*, *supra*, 142 Cal.App.4th at p. 245 [negligently supervising children by "leaving the children in (a) hot vehicle 'simply cannot be dissociated from the use of the vehicle'"].) It is *because* the truck is both attractive and dangerous that the grandmother was negligent in her supervision.

We need not re-survey the cases set out in the Petition. Suffice it to say that they uniformly support the principles that if a vehicle is the

instrumentality of harm, the motor vehicle exclusion applies, and that that is true even where negligence other than in vehicle operation is claimed. (Petition at 26-28.)[4]

This case fits squarely within the cases regarding supervision of minors in relation to motor vehicles. Negligent supervision when minors alight from a vehicle and cross the street (*National Indemnity Co. v. Farmers Home Mutual Ins. Co.* (1979) 95 Cal.App.3d 102), are left in a vehicle (*Prince v. United Nat. Ins. Co., supra*, 142 Cal.App.4th 233), are allowed to play around a precariously parked vehicle (*National American Ins. Co. v. Coburn, supra*, 209 Cal.App.3d 914), are allowed access to keys (*Belmonte v. Employers Ins. Co.* (2000) 83 Cal.App.4th 430), are allowed to drink before operating a vehicle (*State Farm Fire and Casualty Co. v. Estate of Evoniuk, supra*, 681 F.Supp. 662) and go out to meet and greet a vehicle (this case) are all excluded.

And so it is across the country. The majority of jurisdictions endorse the analysis that a negligent supervision claim does not create coverage where a vehicle is the instrument of harm. As the Utah Court of Appeals explained, "[t]hese cases reason that where the negligent supervision is so inextricably intertwined with the motor vehicle, there is no independent nonauto-related act which would take the claim outside the scope of the motor vehicle exclusionary clause. Thus, negligent supervision claims are

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[4] A vehicle that is the instrumentality of harm is necessarily much more than just the situs of otherwise covered risk. It is the risk itself, a risk that has been excluded.

excluded from coverage where the acts complained of could not have resulted in injury but for the use of the automobile." (*Taylor v. American Fire and Casualty Co.* (Utah Ct. App. 1996) 925 P.2d 1279, 1282-1283 [no homeowners coverage for injuries caused by insureds' negligent supervision of their minor child, who took their unlicensed, uninsured car to a party where she became drunk and thereafter was involved in an automobile accident; citing decisions from Alabama, Florida, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, Oklahoma, Oregon, South Dakota and Wisconsin].)

The return takes issue with the petition's discussion showing that *Partridge* doesn't apply where the motor vehicle is the sole injury-causing instrumentality of harm. (E.g., Return 3, 15, 21.) That, however, is the only framework consistent with the decisional law. The return has offered no alternative analysis consistent with precedent. More important, the injury-causing instrumentality approach is consistent with *Partridge*. *Partridge* is premised on "liability of the insured aris[ing] from his non-auto-related conduct [that] exists *independently of* any 'use' of his car . . . ." (10 Cal.3d at p. 103, emphasis added.) Where the harm is inflicted solely by a motor vehicle (here, the insured's motor vehicle), it cannot be said to exist independently of any "use" of that vehicle. Farmers stands by the petition's explanation and analysis of *Partridge*, *Coburn* and the other relevant cases discussed. (See Petition 19-29.)

III. AS THE INSUREDS HAVE ADMITTED, THE GRANDMOTHER'S ALLEGED NEGLIGENCE WAS SPECIFICALLY TIED TO THE "ZONE OF DANGER" CREATED BY THIS VEHICLE.

The return urges that the grandmother's (Sara's) negligence had nothing to do with a motor vehicle. The record is otherwise.

- In response to the summary adjudication motion, the insureds *admitted* as undisputed that "Sara testified that her grandchildren would routinely go out to greet Jose at his truck when he came home. She further testified that as a result, she needed to take extra precautions for the younger grandchildren, including Valerie. *'It was kind of normal to be on the lookout for grandpa coming home to ensure that the younger ones would be safe.'* Thus Sara's alleged negligence is in allowing Valerie to be out of the house in the *zone of danger*: 'little Valerie should have never been out of the house without adult supervision and therefore she would not have been within *the zone of danger* without some negligence of mine in supervising the child; the fact is that Valerie was under my supervision and she got out of the house without me knowing it." (Vol. II, Tab12, p. 435 [Response to Separate Statement of Undisputed Facts, showing this fact as "Undisputed" (emphasis added)].) The referenced "zone of danger" can only be that created in the driveway by the returning truck.

- The return *admits* paragraph 12 of the Petition. (Return 2.) That paragraph alleges that "[i]n particular, Sara admitted that the children (including Valerie) would routinely run out to greet Jose *at his truck* when he arrived home and that she needed to take precautions to ensure that Valerie did not go out unsupervised *so as to be in the vehicle's 'zone of danger.'*" (Emphasis added, Petition 7-8; see also Return 2 [admitting Petition paragraph 10 [child died because she was run over by the grandfather's truck in the driveway of the insureds' residence], 11 [wrongful death plaintiffs alleged that the grandmother negligently supervised child in allowing her to be run over and killed in the property's driveway by the grandfather's truck].)[5]

The insureds' own admissions here are that the grandmother's negligence was *vehicle-related.* It was in failing to supervise the young child to keep her out of the *vehicle-related* zone of danger that the grandmother was negligent. The negligence was in allowing the children to go unsupervised to greet the truck. The grandfather coming home in his truck is what created the anticipated danger to be protected against. The danger was specific and it was vehicle-related. The danger was from the truck that the grandfather drove up the driveway when he returned from

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[5] The return claims that the petition miscites the record. We have quoted it in the text here. We invite the Court to read the record portions cited.

work. And, the danger was specific to the children's attraction to *this* particular vehicle. (Vol. II, Tab 9, pp. 298 [The grandchildren love their grandfather, would wait in anticipation for him to get home, and would go out and greet him *at his truck*], 299 [they did so several times a week; she tried to put the little ones to bed before he drove up], 301 [the grandmother agreed it was a dangerous situation *when a vehicle was pulling up the driveway*, and she thought that her older granddaughter would close the door behind her if she went out].) The admitted allegations here are that the vehicle coming into the driveway is what created the danger that needed to be protected against. And, it was not any vehicle that created the duty, it was the grandfather's vehicle which naturally attracted the children.

IV. THE MOTOR VEHICLE EXCLUSION IS NOT AMBIGUOUS, EITHER ON ITS FACE OR WHEN READ IN CONTEXT, AND CLEARLY APPLIES UNDER THE FACTS PRESENTED.

In an argument not relied upon by the trial court, the return asserts that the motor vehicle exclusion is ambiguous and could be construed to apply only if the allegedly negligent insured (here, the grandmother) was driving the truck. (E.g., Return 2, 9, 10, 14, 22, 24, 27, 30-31, 36.) Not so.

A. The Unqualified Exclusion, Especially When Read In Context, Applies Generally To Injury Caused By A Motor Vehicle And Certainly To A Motor Vehicle Driven, As Here, By An Insured.

The motor vehicle exclusion isn't couched in terms of any particular person's use, ownership, etc. Rather, *injury* resulting from ownership or use of a motor vehicle is generally excluded: "We do not cover **bodily injury** or **property damage** which: . . . results from the ownership, maintenance, use, loading or unloading of: . . . **motor vehicles**." (Vol. I, Tab. 9, p. 213, bold in original.)

"The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) Where, as here, there is no evidence the parties intended for words in the policy to have any special or technical meaning, the plain, common-sense meaning of the words—viewed in the context of the policy as a whole—controls the interpretation. (E.g., *ibid.*; *Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1378; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867-868; *Garamendi v. Mission Ins. Co.* (2005) 131 Cal.App.4th 30, 42; Civ. Code, §§ 1635, 1638, 1639, 1641, 1644.)

On its face, this plain language applies to motor vehicles generally. The language is not qualified or limited. On its face, being unqualified, it is

general and broad. (See *Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 173 [unqualified nature of exclusion's language meant that it applied generally to all claims, not just to one category of claims, e.g., consumer versus competitor claims]; cf. *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 233 ["we must infer that their decision to use *the unqualified and therefore broader term* 'district' was deliberate," emphasis added].) If anything, the breadth of the unqualified exclusion suggests that it might apply regardless whether the motor vehicle causing the bodily injury was owned or operated by an insured. If so, that is because the language, on its face, is straightforward and clear. "If contractual language is clear and explicit, it governs." (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.) Unqualified language is clear and explicit.

Not surprisingly, a comparable motor vehicle exclusion has been held clear on its face and not limited to any particular insured's (or even any insured's) use of the vehicle. *Belmonte v. Employers Ins. Co., supra*, 83 Cal.App.4th 430, is on point. There, the exclusion barred coverage "for bodily injury 'arising out of the ownership, maintenance, use or entrustment to others of any . . . "auto" . . . owned or operated by or rented or loaned to any insured.'" (*Id.* at p. 432.) The insured's niece took the vehicle's keys without the insured's knowledge and drove the vehicle. Just as here, "[w]ithout citing any authority other than the general proposition that coverage exclusions are construed strictly against the insurer, [the insured] argue[d] that the exclusion for use of the vehicle is limited to use by the

named insured. Because [the insured] was not operating the vehicle himself, he argue[d], the exclusion does not apply." (*Id.* at p. 434.) Agreeing that exclusions are construed against an insurer, but also noting that plain, explicit language is to be enforced, *Belmonte* held that the exclusion unambiguously applied without any limitation on who was driving the vehicle. (*Id.* at p. 435.)[6]

Belmonte aside, the exclusion's broad meaning is *still* unambiguous. The motor vehicle exclusion needs to be read in context. Courts "do not declare ambiguities by isolating phrases and considering them in the abstract . . . ." (*Fibreboard Corp. v. Hartford Aceident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 509.) "[T]he meaning of words . . . is always subordinate to the meaning derived from the context, or from the circumstances under which the word is used." (*Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800, 807.)

Here, "motor vehicles" are part of a list of generally excluded risks, including "aircraft" and "any other watercraft owned or rented to *an* insured." (Vol I, Tab 9, p. 213, emphasis added; see *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 322-323 ["a clause excluding coverage for particular conduct by 'an' or 'any' insured, as opposed to 'the'

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[6] In *Belmonte*, the exclusion had the additional requirement that *the vehicle* had to be owned, etc., by the insured. That overt requirement is absent here. Nonetheless, the argument in *Belmonte* did not turn on that difference. It was that the absence of any qualifier *as to "use,"* meant that the use had to be by the named insured. That is the same argument here. *Belmonte* rejected it relying on an Illinois case reaching the same conclusion where the "use" was by a thief – a stranger – who had stolen the car. (*Id.* at p. 435.)

insured, means that such conduct by one insured will bar coverage for all other insureds under the same policy on claims arising from the same occurrence. This rule applies even when the insureds seeking coverage did not themselves participate in the act for which coverage is excluded, and even when their liability is premised on their own independent acts or omissions that would otherwise be covered"]; *Hartford Fire Ins. Co. v. Superior Court*, *supra*, 142 Cal.App.3d 406 [broadly reading comparable "aircraft" exclusion].)

And, these are part of an even longer list that likewise is general and all inclusive, e.g., "an insured transmitting a communicable . . . disease," "results from the legal liability of any insured because of home care services," "results from the rendering or failure to render business or professional services," "is caused directly or indirectly by war, including undeclared war, civil war, insurrection, rebellion, revolution, or warlike act by military personnel. Discharge of a nuclear weapon, whether or not accidental, is deemed a warlike act." (Vol. 1, Tab 9, p. 213.) Not one of the long list of exclusions, of which the motor vehicle exclusion is a part, suggests that *the* allegedly negligent insured had to *also* be involved in the excluded conduct. (See *Minkler*, *supra*, 49 Cal.4th at pp. 322-323.) For example, there is no suggestion that the allegedly negligent insured had to be a participant in a war for that exclusion to apply. Excluded war and motor vehicle use should be treated the same.

Words and phrases "take[] meaning from the company [they] keep[]." (*People v. Drennan* (2000) 84 Cal.App.4th 1349, 1355; see *Credit*

Suisse First Boston Mortgage Capital, LLC v. Danning, Gill, Diamond & Kollitz (2009) 178 Cal.App.4th 1290, 1298, fn. 6.) They are "known by [their] associates," such that "the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used." (*Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460, 471, fn. 3, citations and internal quotation marks omitted.)[7] This principle applies as much to insurance policies as to any other contract. (*Housh v. Pacific States Life Ins. Co.* (1934) 2 Cal.App.2d 14, 19.)

Given its context, at a minimum, the motor-vehicle exclusion applies to *any* insured's motor vehicle use or ownership. The grandfather indisputably was an insured. He was using the vehicle. The exclusion applies.

B. The Exclusion Is Not Ambiguous Here For Being Broad, Unqualified, And General.

The return argues that the motor vehicle exclusion must be narrowly read because it does *not* have limiting language. The argument is nonsensical, asserting that because the exclusion's language is broad, it must be read narrowly.

The return contrasts the exclusion's language with that at issue in *National American Ins. Co. v. Coburn*, *supra*, 209 Cal.App.3d at pp. 916-

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[7] This is sometimes known as the *noscitur a sociis* doctrine or, literally, "it is known by its associates." (See *Seid Pak Sing v. Barker* (1925) 197 Cal. 321, 341 [applying doctrine to contract interpretation].)

917. In *Coburn*, the comparable exclusion precluded coverage for injury arising out of the ownership, use, etc., of a motor vehicle owned or operated by any insured; the exclusion here voices no such "any insured" limitation. (Return 30-31.) From this, the return argues that the lack of a limiting clause means that the unqualified language in the Farmers policy must be more qualified than the language at issue in *Coburn*. That makes no sense. As discussed above, unqualified language is more general and broader than qualified, limited language, not less so.

The return hypothesizes that an exclusion precluding coverage if the motor vehicle inflicting injury is owned and driven by a stranger would run counter to an insured's expectations. (Return 23, 35.) But that's not the situation here. Hypothesizing about a different context is irrelevant to the determination of whether the exclusion applies *here*. The rule is well-settled that "an ambiguity cannot be created by parsing words outside their context. (Citation.) '"[L]anguage in a contract must be construed in the context of that instrument as a whole, *and in the circumstances of that case*, and cannot be found to be ambiguous in the abstract."' (Citation.) 'Multiple or broad meanings do not necessarily create ambiguity. . . . [¶] The proper question is whether the word is ambiguous *in the . . . circumstances of this case*.' (Citation.) Nor does the fact that language could be clearer make it ambiguous. (Citations.)"'" (*Alameda County Flood Control & Water Conservation Dist. v. Department of Water Resources* (2013) 213 Cal.App.4th 1163, 1179, emphasis added, citing and quoting *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18

Cal.4th 857, 868; see *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co., supra*, 5 Cal.4th at pp. 867, 868; *Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 914; *Suarez v. Life Ins. Co. of North America* (1988) 206 Cal.App.3d 1396, 1406.) "The proper question is whether the particular phrase is ambiguous in 'the context of *this* policy and the circumstance of *this* case.'" (*St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Line Ins. Co.* (2002) 101 Cal.App.4th 1038, 1056, original emphasis.)

Whatever the insureds might argue as to their expectations for coverage hypothetically afforded under their homeowners policy as to a motor vehicle accident caused by a different vehicle, or a different driver, or away from their premises, or any combination of these, they could not reasonably have expected motor-vehicle excluded, homeowners-policy coverage for a motor vehicle accident caused by their family truck, driven by one of them, on their insured premises. If the exclusion applies to anything, it applies to that.

C. In Any Event, The Exclusion Applies Even Under The Insureds' Interpretation, As Under Community Property Law The Grandmother Jointly Owned The Motor Vehicle And Was Jointly Liable For Her Husband's Use.

Even if, despite its context, the motor vehicle exclusion were nonsensically restricted to "the" particular, negligent insured, it would apply here. That is because the grandmother *owned* the truck as much as the

grandfather did. The exclusion applies as much to owned as to operated vehicles. Both the insured grandfather, who was driving, and the grandmother own the truck. All property acquired by a married person during the marriage while domiciled in California is, and is presumed to be, community property. (Fam. Code, § 760; see, e.g., *In re Marriage of Mix* (1975) 14 Cal.3d 604, 610-611; *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 349-350.)

Likewise, the grandmother is jointly liable as part of the community for the grandfather's negligent driving. (Fam. Code, § 910; see *Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 195-196 [insurer could seek reimbursement for full amount of uncovered settlement made on behalf of insured spouses from either because both are joint and severally liable for the other's conduct].) There is no showing or suggestion that the truck was anything other than community property or that the grandmother would not be equally liable for the grandfather's use of the truck. (See *Hartford Fire Ins. Co. v. Superior Court, supra,* 142 Cal.App.3d at p. 416 [aircraft exclusion applied to wife's community liability for husband's use of aircraft].)

Indeed, although the automobile policy excluded the grandmother *as a driver* (Vol. I, Tab 9, p. 277), that policy fully covered her in every other respect, including as an owner and spouse. (See Vol. I, Tab 9, pp. 257 ["Throughout this policy 'you' and 'your' mean 'the named insured' shown in the Declarations *and spouse if a resident of the same household*," emphasis added], 258 ["We will pay damages for which *any* insured person

is legally liable because of bodily injury to any person and property damage arising out of the *ownership*, maintenance or use of a private passenger car, a utility car, or a utility trailer," emphasis added]; compare Vol. I, Tab 9, p. 277 ["It is agreed that all coverage afforded by this policy shall not . . . apply to the *operation* of any automobile by the person(s) named above (naming Sara Bautista). This policy will not provide coverage for any person who entrusts a vehicle to the person(s) named above"].)[8]

The risk of injury from a vehicle that the grandmother owned was specifically excluded. So, too, was the risk of injury for community use of a vehicle. That is the risk that came about. Even under the insureds' construction, the motor vehicle exclusion applies.

D. The Insureds Could Not Have Reasonably Expected Duplicative Coverage For The Same Injurious Event Under Multiple Policies.

As the return notes, the insureds bought a package of insurance. (Return 44.) In purchasing such a package, they had no reasonable expectation of *duplicative* coverage under the automobile and homeowners policies for the same event and injury. The coverage under the two policies has to be read together. (*Palacin v. Allstate Ins. Co.* (2004) 119

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[8] The return's assertion that the automobile policy provided no coverage to the grandmother misreads the policy. (Return 15, fn. 13; Return 40, fn. 19; see Vol. II, Tab 15, pp. 468-469 [colloquy at 3/6/13 hearing regarding exclusion of the grandmother as a driver under the automobile policy].)

Cal.App.4th 855, 868-869 [that homeowner association's property insurance excluded coverage for tenant improvements indicated the condominium owner purchased property insurance to cover damage to tenant improvements]; *Fibreboard Corp. v. Hartford Accident & Indemnity Co.*, *supra*, 16 Cal.App.4th at p. 509 [interpreting premises liability coverage in light of the insured's purchase of separate products-liability coverage].)

This reinforces the conclusion that the homeowners policy's motor vehicle exclusion applies. The obvious intent of the two policies was to be mutually exclusive. While both insureds might assert a reasonable expectation of coverage for the incident under the *automobile* policy, neither of them could reasonably expect it under the *homeowners* policy. (See Petition 18.)

CONCLUSION

The homeowners policy's unqualified motor vehicle exclusion precludes coverage here. There is no reason why that exclusion should not apply by its plain language to the circumstance presented: injury inflicted by a motor vehicle owned by both insured spouses while being driven by one insured spouse.

For all the reasons addressed in this reply and in the petition and points and authorities previously filed, the Court should grant Farmers's petition and direct the trial court to vacate its order denying summary adjudication and to instead issue a new order granting summary adjudication that no coverage exists for the underlying matter under the insureds' homeowners policy.

DATED: June 12, 2013 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that this **REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF** contains **6,164** words, not including the cover, the certification of interested parties, the tables of contents and authorities, the caption page, the signature blocks, or this Certification page.

DATED: June 12, 2013

Robert A. Olson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On June 12, 2013, I served the foregoing document described as: **REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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(X) BY FED EX: I caused such envelope to be delivered by the Federal Express delivery service to the offices of the addressees.

Executed on June 12, 2013, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Anita F. Cole