IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1206

HUMANA WORKERS COMPENSATION SERVICES, ET AL.,

Petitioners,

v.

HOME EMERGENCY SERVICES, INC.,

Respondent.

Review From Third District Court of Appeal
Case Number: 3D00-2643

REVISION I

BRIEF ON THE MERITS OF RESPONDENT, HOME EMERGENCY SERVICES, INC.

LANGBEIN & LANGBEIN, P.A.
Co-Counsel for Petitioners
20801 Biscayne Boulevard
Suite 506
Aventura, FL 33180
(305) 936-8844
By: Evan J. Langbein
Fla. Bar No. 163183

RICHARD A. FRIEND, ESQ.
Co-Counsel for Petitioners
9155 South Dadeland Boulevard
Suite 1012
Miami, FL 33156
(305) 667-5777
By: Richard A. Friend
Fla. Bar No. 199087

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130-1720
(305) 358-2800

By: Joel S. Perwin
Fla. Bar No. 316814

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STATEMENT OF THE CASE AND FACTS

Petitioners, HUMANA WORKER'S COMPENSATION SERVICES, INC. ("HUMANA") and FLORIDA BUILDERS AND EMPLOYERS MUTUAL INSURANCE

CO.(B & E)[1] fail to set forth *the entirety* of pertinent policy language addressed by the district court. *The entirety* of pertinent policy language reads [emphasis added]:

> **" A. How This Insurance Applies**
>
> This employers liability insurance ***applies to bodily injury by accident*** or bodily injury by disease. Bodily injury includes resulting death.
>
> 1. The bodily injury must ***arise out of*** and in the course of the injured employee's employment by you.
>
> * * *
>
> **B. We Will Pay**
>
> We will pay all sums you legally must pay ***as damages because of*** bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.
>
> The damages we will pay, where recovery is permitted by law, ***include damages:***
>
> * * *
>
> 4. ***because of*** bodily injury to your employee that arises out of and in the course of employment, ***claimed against you in a capacity***

[1] Petitioner, HUMANA, is the reinsurer of Petitioner, B & E, under an order of supervision issued by the Florida Department of Insurance. (R. 3) Petitioners usually will be referred to as HUMANA. At times, Petitioner, B & E may be referred to, since it issued the subject policy. The record on appeal is a single volume and will be referred to as "R._____". The initial brief of Petitioner will be "IP.____". All emphasis is supplied unless indicated otherwise.

other than as employer." (R. 21-22)

Petitioners also mistakenly state twice that ***this appeal*** was decided *en banc* by the District Court of Appeal, Third District. (IP. 1-2 & 5). It was in this Court's Case No. SC02-1137, in which Respondent is Petitioner and another insurer, Lincoln Insurance Company, is Respondent in which the district court ruled *en banc.* Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So.2d 433, 437-442 (Fla. 3d DCA 2001).

The 2-1 panel decision in Lincoln had agreed with the interpretation of a commercial general liability (CGL) policy made in Norris v. Colony Ins. Co., 760 So.2d 1010 (Fla. 4th DCA 2000). On *en banc* rehearing, however, eight judges of the district court disagreed with Norris' tort law analysis of the primary insurance coverage. The district court in Lincoln, however, applied an ***exclusion*** containing language similar to PART TWO B of Respondent's Employer's Liability policy, which in the instant case is a ***coverage*** declaration. Lincoln, supra, 812 So.2d at 439.[2] ***This*** appeal was decided by a three-judge panel, in

[2] The applicable ***exclusion*** [2(e)(1) to Lincoln's CGL] was quoted in Chief Judge Schwartz's special *en banc* concurring opinion: "'Bodily injury' to: (1) An employee of the insured arising out of and in the course of employment by the insured;... This exclusion applies: (1) Whether the insured may be liable as an employer or in any other capacity."

reliance upon the *en banc* holding in LINCOLN's appeal. (R. 195-196) *En banc* rehearing was denied by the district court. (R. 197)[3]

HUMANA unfairly categorizes one of the two spoliation-of-evidence counts (Count VII) the MILIANs alleged against HES. The MILIANs alleged not a "violation" of a "contractual agreement to maintain the ladder" (IP. 9), but that HES had "negligently" lost the ladder in violation of a common law duty to preserve evidence, following the MILIANs' notice to safeguard it. (R. 10-12).

HUMANA filed this suit for declaratory relief against its insured, Respondent, HES, and others. (R. 1-42) Petitioner attached the same exhibits to the complaint that it attached to its brief on the merits in this Court: (a) the policy and (b) the underlying lawsuit. (R. 8-40).

HUMANA alleged no duty to defend or indemnify. (R. 5) HUMANA joined "interested parties": (1) KELLER LADDERS, INC. ("KELLER"); (2) HOME DEPOT USA, INC. ("HOME DEPOT"); (3) PCA SOLUTIONS, INC. ("PCA"); (4) ALBERT MILIAN and ROSE MILIAN; and (5) LINCOLN,

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[3] This Court may also note that unlike the Lincoln case, the Florida Defense Lawyers Association, which represents the insurance industry, has elected ***not*** to make an amicus curiae appearance in this appeal. Lincoln, supra, 812 So.2d at 437, fn. 1.

HES's CGL carrier. (R. 1-5)

KELLER is a Defendant in the MILIANs' underlying action. It allegedly manufactured a six (6) foot aluminum step ladder Type II, Model 926. (R. 27) ALBERT MILIAN allegedly suffered a fall from the ladder, defectively manufactured, sustaining "serious and permanent injury", including "removal of Plaintiff's elbow joint, necessitating fusion of his arm in an 'L' shape position, resulting in complete lack of mobility in the joint." (R. 28).

HOME DEPOT allegedly sold the defective ladder to HES. (R. 28) PCA was HES's worker's compensation insurer. (R. 36) PCA was sued for negligence because it allegedly "...told [HES] to discard, destroy or otherwise divest itself of possession of the ladder." (R. 37-38)

HUMANA is a successor in interest to B & E (which became insolvent) and B & E was predecessor in interest to PCA. Thus, HUMANA effectively sought a declaration that HUMANA did not, under policy terms, cover the tort [negligent destruction of evidence] allegedly committed by its own related entity, PCA. (R. 3, 9-24)[4]

The ad damnum clause of the MILIANs' underlying suit averred

[4] HES's policy is a "WORKER COMPENSATION ***AND*** EMPLOYERS LIABILITY POLICY". (R. 15). HUMANA paid policy benefits for workers compensation. (R. 129) It denied coverage under "Part Two" of the contract for "employers liability". (R. 20-22)

[R. 39]:

> "WHEREFORE, Plaintiffs, ALBERT MILIAN and ROSE MILIAN, demand judgment against the Defendants, KELLER LADDERS, INC., HOME DEPOT U.S.A., INC., [***Respondent***] HOME EMERGENCY SERVICES, INC., and PCA SOLUTIONS, INC., ***jointly and severally,*** for all damages available under the law under this case, including past pain and suffering of the Plaintiff, future pain and suffering of the Plaintiff, both physical and psychological, economic damages for loss of employment, loss of ability to earn a living in both the past and in the future, all medical expenses/expenditure incurred in the past and in the future, loss of enjoyment of life to the Plaintiff, both in the past and in the future, loss of enjoyment and consortium to Plaintiff, ROSE MILIAN, and for such other and further relief as this Honorable Court shall deem just and proper; and Plaintiffs further demand trial by jury of all issues so triable."

The trial court entered a summary judgment in favor of HUMANA, finding that the employers' liability insurance did not apply to pay all sums the insured legal must pay "because of bodily injury" to its employees simply because that liability was predicated upon spoliation of evidence. (R. 154-155). HES appealed to the district court, which reversed, reaching the opposite conclusion reached by the trial court.

STANDARD OF REVIEW

This case is subject to de novo review. The facts are undisputed; the only question presented is the meaning of policy

language chosen and written by the insurance company. See Malon v. Colony Ins.Co., 778 So.2d 1014 (Fla.3d DCA 2000); Central Cold Storage, Inc. v. Lexington Ins. Co., 452 So.2d 1014 (Fla.3d DCA), review denied, 461 So.2d 115 (Fla.1984); Rittman v. Allstate Ins. Co., 727 So.2d 391 (Fla.1st DCA 1999); State Farm Fire & Cas. Co. v. Nickelson, 677 So.2d 37, 38 (Fla.1st DCA 1996). While HUMANA is correct that "...the underlying complaint governs the insurer's duty to defend...." (IP. 6), it is also true that courts find coverage whenever allegations of a complaint "fairly and potentially" allow coverage. State Farm Fire & Cas. Co. v. Higgins, 788 So.2d 992, 995 (Fla. 4th DCA 2001); SM Brickell Ltd. Partnership v. St. Paul Fire & Marine Ins. Co., 786 So.2d 1204, 1206 (Fla. 3d DCA 2001); Auto Owners Ins. Co. v. Tripp Const. Co., 737 So.2d 600, 601 (Fla. 3d DCA 1999) ["...[T]he allegations contained within the four corners of the Complaint must set forth a cause of action *for the type of damages that are covered by the insurance policy in question.*"].

SUMMARY OF ARGUMENT

The result here is dictated by rules governing the interpretation of language employed by the adhesion contracts of insurers. State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So.2d 1072, 1076 (Fla.1998) [overruling Hardware Mut. Cas. Co. v. Gerrits, 65 So.2d 69 (Fla.1953) because Gerrits "...adopted

a more restrictive definition (of “accidents”)– a definition that was improperly derived from tort law.”] The broad promise of the insurer to the employer is that the insurer:

> “...will pay all sums you legally must pay as damages because of bodily injury to your employee, provided the bodily injury is covered by this Employers Liability Insurance.”

The only coverage requirements are that the employee’s (here Mr. Milian’s) injury “arise out of and in the course of ... employment” and that the employer be claimed liable “in a capacity other than as employer”. The policy’s coverage language does not require that the employer ***cause*** the “bodily injury”--only that the employer be liable, in part or in whole, “because of bodily injury”.

In the instant case, if the MILIANs prevail in the spoliation claims, it will be “because of” the underlying bodily injury to Albert Milian, coupled with the loss of the evidence. Indeed, the MILIANs will only prevail in the spoliation claim if they prove the viability of the underlying claim for bodily injury –- that is, that they would have recovered but for the spoliation. In this sense too, the spoliation recovery would be “because of” the underlying tort.

This Court should reject, as did the district court, the Petitioner’s specious contention that the damages for Mr.

Milian's severely injured arm are somehow converted into limited "financial injury and emotional or psychological damages", which HUMANA asserts are not damages "because of bodily injury". (IP. 13). Of course they are damages "because of" bodily injury. To be actionable, the cause of action for spoliation must prove the underlying "damages", which are the same or at least measured by the original accident or wrong. Moreover, HUMANA's policy makes no attempt at such a distinction of what type of "damages" it will pay. Rather, the policy assures HES that HUMANA will pay "all sums you legally must pay as damages", and does not exclude "financial injury", etc. damages from coverage.

HES is not immune from liability for spoliation, having undermined the MILIANs' claim against a third party, merely because HES was Mr. Milian's employer. HES was not sued as employer. Although HES was sued for serious "bodily injury" ... "aris[ing] out of and in the course of employment...," the claim was made against HES in the capacity of an alleged tortfeasor, responsible for preserving a ladder as evidence, not in its capacity as an employer. HES is not immune from liability for spoliation under worker's compensation exclusivity. HES was sued in a capacity "other than as employer...". (R. 21-22)

Moreover, neither policy exclusion invoked by HUMANA--C.1 ["liability assumed under a contract"] or exclusion C. 4 ["any

obligation imposed by a workers compensation ... benefits law, or any similar law..."]-- unambiguously excludes the broad grant of liability coverage for Employer's Liability. See Auto Owners Ins. Co. v. Anderson, 756 So.2d 29, 34 (Fla. 2000) ["...In fact, exclusionary clauses are construed even more strictly against the insurer than coverage clauses. *See State Comprehensive Health Ass'n v. Carmichael,* 706 So.2d 319, 320 (Fla. 4th DCA 1997)."].

Exclusion C.1 fairly applies only to indemnification contracts when liability is directly "assumed" by contract. It will not be expanded to exclude liabilities "incurred" only when a contract is breached. See Mitchel v. Cigna Prop. & Cas. Ins., 625 So.2d 862, 864-65, fn. 9 (Fla. 3d DCA 1993) Western World Ins. Co., Inc. v. Travelers Indem. Co., 358 So.2d 602, 604 (Fla. 1st DCA 1978); Home Ins. Co. v. Southport Terminals, Inc., 240 So.2d 525 (Fla. 2d DCA 1970). Moreover, the complaint also alleges a common law duty to preserve the evidence, wholly apart from any contractual obligation.

The vague language of exclusion C.4 does not plainly apply because Milians' lawsuit is not for the benefits imposed under the workers compensation law "or any similar law". Employer's Liability coverage (PART TWO) is described as a "gap-filler". It provides "protection in those situations where the employee has a right to bring a tort action despite the provisions of the

workers' compensation statute...." Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal. 3d 903, 916, 226 Cal. Rptr. 558, 718 P.2d 920, 927 (1986). This is one of those situations. The employer is liable for spoliation –- not as employer and notwithstanding the workers' compensation laws. That is precisely the purpose of the PART TWO liability coverage.

ARGUMENT

THE DECISION OF THE DISTRICT COURT SHOULD BE APPROVED BECAUSE IT FAITHFULLY ADHERES TO FLORIDA'S TIME-HONORED PUBLIC POLICY AND RULES OF CONSTRUCTION OF BOTH COVERAGE AND EXCLUSIONARY CLAUSES CONTAINED IN ADHESION INSURANCE AGREEMENTS, PARTICULARLY WHEN SUCH CONSTRUCTION ENTAILS NOVEL, JUDICIALLY-CREATED THEORIES OF NEGLIGENCE LIABILITY.

A. HUMANA's Chosen Wording Unambiguously Provides Coverage.

HUMANA's policy is not susceptible even to the claim that its policy has "two reasonable interpretations...." See Union American Ins. Co. v. Maynard, 752 So.2d 1266, 1268 (Fla.4th DCA 2000). "Part Two" unambiguously "*applies* to bodily injury by accident". If "bodily injury" is an element of the lawsuit against the insured, it is covered if the injury "arises out of and in the course of employment...", and damages are claimed against the insured "in a capacity other than as Employer."

The coverage warrants that HUMANA will "pay all sums" the

insured “legally must pay as damages because of bodily injury”. It nowhere requires the damages to be of a particular legal variety, nor that the insured cause the injury, nor that the injury be the only contributing cause to the liability, only that the “recovery is permitted by law.”

Further, the policy’s term “arise out of” applies only to the injury and has a much broader significance than the words “caused by” in an accident policy, and thus affords the insured much broader protection. See St. Paul Fire & Marine Ins. Co. v. Thomas, 273 So.2d 117, 120 (Fla.4th DCA 1973); National Indem. Co. v. Corbo, 248 So.2d 238 (Fla. 3d DCA 1971). See also Gov. Employees Ins. Co. v. Novak, 453 So.2d 1116, 1119 (Fla.1984). Such a term should be construed liberally in favor of the insured because its function is to extend coverage broadly. Valdes v. Smalley, 303 So.2d 342 (Fla.3d DCA 1974).

The court explained in Corbo, supra, that “arise out of” ordinarily equates to “originating from”, “having its origin in”, “growing out of”, “flowing from”, “incident to, or having connection with ....” (248 So.2d at 240). In automobile negligence policies, it is settled that “arise out of” does not require “... proximate causation as employed in a negligence action....” Stilson v. Allstate Ins. Co., 692 So.2d 979, 981 (Fla. 2nd DCA 1997). See also Gov. Employees Ins. Co. v.

Batchelder, 421 So.2d 59, 61 (Fla. 1st DCA 1982) ["arise out of the ... use of the automobile" "requires something far short of proximate cause and has been defined as 'some connection' or a 'nexus' between the two (citations omitted)."]. Such terminology in those policies "...must be construed liberally to extend coverage broadly whenever there is 'some nexus' between the car and injury. (citation omitted)." Stilson, 692 So.2d at 981.

B. Rules of Interpreting Policies Mandate Coverage.

If the policy is ambiguous, it must be construed in favor of coverage; or, stated another way, policy ambiguities must be read to cover and indemnify the insured. Auto Owners Ins. Co. v. Anderson, 756 So.2d 29 (Fla. 2000); Sunshine Birds and Supplies, Inc. v. U.S.F. & G., 696 So.2d 907 (Fla.3d DCA 1997). See also Fla.Stat. § 627.4145 ["readable" policy language legally mandated]. Coverage will be found to exist "whenever possible" [Sanz v. Reserve Ins. Co., 172 So.2d 912, 913 (Fla.3d DCA 1965)], and insurance policies, written by experts, are construed to avoid absurd results. See Praetorians v. Fisher, 89 So.2d 329, 333 (Fla.1956); James v. Gulf Life Ins. Co., 66 So.2d 62 (Fla.1953); Westmoreland v. Lumbermens Mut. Cas. Co., 704 So.2d 176, 188 (Fla.4th DCA 1997) [Judge Gross, specially concurring]. The "proverbial Philadelphia lawyer" should not be summoned to solve riddles within policy language. Hartnett v. Southern Ins.

Co., 181 So.2d 524, 528 (Fla.1965); U.S. Fire Ins. Co. v. Fleekop, 682 So.2d 620, 628, fn. 9 (Fla. 3d DCA 1996) ["Insurance is unlike Forrest Gump's box of chocolates. The insured is entitled to know exactly what it's getting for its premiums."]; Nat. Merchandise Co., Inc. v. United Service Automobile Ass'n., 400 So.2d 526, 529 (Fla.1st DCA 1981).

When the term "accident" or "caused by accident" is not defined, a "person-in-the-street" test defines coverage. See, e.g., Roberson v. United Services Auto. Ass'n, 330 So.2d 745, 746 (Fla.1st DCA 1976); Beneficial Standard Life Ins. Co. v. Forsyth, 447 So.2d 459, 461 (Fla.2d DCA 1984). See also MacTown, Inc. v. Continental Ins. Co., 716 So.2d 289, 292 (Fla.3d DCA 1998). This Court in State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So.2d 1072 (Fla. 1998), confirmed that "when an insurer fails to define a term in a policy,... the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage provided.' (Citations omitted)." 720 So.2d at 1076. Moreover, insurance policies must be interpreted in accordance with their own terms. Fla.Stat.§ 627.419(1); State Farm Fire & Cas. Co. v. CTC Dev. Corp., supra. In doing so, the court must apply the policy's language, and not "outmoded" or "improper" principles borrowed from "tort law. *Id.* at 1076.

The issue of interpretation before the Court is the meaning and effect to be given to the undefined word “because” in the scope of HUMANA’s coverage clause. The venerable insurance law cited above requires that the insured benefit from any reasonable construction which most allows coverage. The clauses reviewed states: “We will pay all sums you legally must pay as damages ***because*** of bodily injury to your employees, ...”

While HUMANA seeks to limit coverage only to liability for damages solely *caused* by bodily injury –- such that the bodily injury be THE cause (or only cause of the liability) –- the insured is entitled to coverage when the bodily injury is A cause of liability for the damages.

Clearly, the language chosen by HUMANA affords acceptance of either usage –- with equal reasonableness. Surely a liability for damages that is in part legally because of a bodily injury to the employee –- but for which there would be no liability here – qualifies as a proper interpretation as a matter of law.

Mr. Milian suffered severe “bodily injury” in an “accident”. HES is alleged to have negligently disposed of the ladder which constituted the evidence necessary to prove up the underlying “bodily injury” claim. While the policy never expressly requires it, the damages sought against HES are those damages which the

Plaintiffs would have collected from the tortfeasor for the "bodily injury", but for the spoliation. As the Fourth District Court put it in Builder's Square, Inc. v. Shaw, supra, 755 So.2d at 725: "From the very nature of the spoliation claim, however, it would appear to us that the damages in a spoliation claim are derivative of the damages in a products liability claim whose viability has been spoiled by the loss of critical evidence...." See General Cinema Beverages of Miami, Inc. v. Mortimer, 689 So.2d 276 (Fla.3d DCA 1995).

Damages for bodily injury are an alleged element of the tort claimed against HES. Continental Ins. Co. v. Herman, 576 So.2d 313, 315 (Fla.3d DCA), review denied, 598 So.2d 76 (Fla.1991); Miller v. Allstate Ins. Co., 650 So.2d 671 (Fla. 3d DCA 1995), review denied, 659 So.2d 1087 (Fla. 1995). See also St. Mary's Hosp. v Brinson, 685 So.2d 33, 35, review dismissed, 709 So.2d 105 (Fla. 1998). If the MILIANs prevail, the damages which they will recover are for the "bodily injury" caused by the defendants in the underlying lawsuit, and HUMANA must defend and indemnify HES for those damages under the terms of the policy.

In Miller, supra, the Third District Court accepted the holding of Smith v. Superior Court, 151 Cal.App.3d 491, 498, 198 Cal.Rptr. 829, 834 (1984) that the "underlying lawsuit" and the spoliation claim are "concurrent claims". See 650 So.2d at 673.

The following definitions of "concurrent" are found at ***Black's Law Dictionary*** (Rev. 4th Ed. 1968) at pg. 363:

> "Running together; having the same authority; acting in conjunction;...contributing to the same event; contemporaneous...Co-operating, accompanying, conjoined, associated, concomitant, joint and equal, existing together, and operating on the same subject...."

Without question, the spoliation claim in this case is concurrent with the underlying tort claim. It derives from that claim. It requires proof of that claim. Its damages are measured by that claim. It arose "because of" that claim. If HES "legally must pay", it is certainly in part "because of" Mr. Milian's bodily injury.

C. Public Policy & Confusing Decisions Underscore the Ambiguity, and Mandate Coverage.

The courts must be vigilant to insure coverage when the common law is expanded by judicial pronouncement, as here, with the relatively new tort of spoliation. See Travelers Ins. Co. v. Industrial Indem. Co., 18 Cal.App. 3d 628, 96 Cal. Rptr. 191 (5th Dist. 1971). See also Monroe v. Sarasota Cty. School Bd., 746 So. 2d 530, 535, fn. 8 (Fla. 2nd DCA 1999) ["...courts hesitate to create negligence claims for which no insurance coverage will be available. *See, e.g., Ard v. Ard,* 414 So.2d 1066 (Fla. 1982)."]. The California court in Travelers Ins. Co. v.

Industrial Indem. Co., supra, considered an analogous dispute between a CGL carrier and a workers' compensation/employer liability carrier (the same types of carriers denying coverage for HES). An employer sought coverage of its workers' compensation/employer's liability and CGL insurers to defend and indemnify a third party's claim for concurrent tort liability because of injury to an employee. The CGL insurer sought contribution from the workers' compensation/employers liability carrier. California courts had created a claim against an employer for *concurrent* negligence with a third party after the workers' compensation/employers liability policy was drafted.

The court held that both carriers (CGL *and* the workers compensation/employer's liability carrier) owed the defense and indemnity because "the scope of liability" had been "enlarged by judicial pronouncement". (96 Cal. Rptr. at 194) The court observed that the policy had been written 20 years before the new court-recognized tort liability against an employer. It held that the failure to expand "general" liability coverage for the employer in both its CGL and workers compensation/employers' liability policy would produce a:

> discordant result for it would mean that where courts enlarge liability during the effective period of a liability policy, an

> insured who contracted for complete coverage of a possible risk would be left without coverage because the scope of the risk had been enlarged by decisional law. Many examples come to mind where liability has been enlarged by a novel judicial interpretation of the law or by an expanded application of existing law.

When spoliation became part of Florida's common law, the Third District Court noted that "...[n]ew and nameless torts are being recognized constantly...." Bondu v. Gurvich, 473 So. 2d 1307, 1312 (Fla.3d DCA 1984). When the "scope of liability" is enlarged by law, general liability coverages for the insured must be concomitantly enlarged, unless expressly, conspicuously and *unarguably* excluded. Travelers Ins. Co., supra. The insured remains entitled to "...complete coverage of a *possible* risk." Id. Accord, AIU Ins. Co. v. FMC Corp., 51 Cal.3d 807, 274 Cal.Rptr. 820, 799 P.2d 1253, 1264, fn. 8 (Sup. Ct. 1990) (approving the holding in Travelers Ins. Co., supra).

Here too, absent clear language to the contrary, insureds in Florida should be "grandchilded-in" when our courts recognize new forms of torts. And there is obviously not clear language to the contrary when our appellate courts address coverage claims involving essentially the same language with disparate and inconsistent results. See Security Ins. Co. of Hartford v.

Investors Diversified Ltd., Inc., 407 So.2d 314, 316 (Fla. 4th DCA 1981).

This conclusion is not foreclosed by the so-called "doctrine of consumer-or insured– expectations" invoked by Chief Judge Schwartz in Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So.2d 433, 440 (Fla. 3d DCA 2001), citing Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1140 (Fla. 1998). Assertively, that doctrine would abandon the established rules of insurance-contract interpretation, and focus solely on the insured's reasonable expectations at the time the policy is executed. But in Deni, this Court rejected the "doctrine" because "in Florida ambiguities are construed against the insurer." That rule of construction is no less applicable when the specialists who write such contracts have, by their own "oversight", failed to expressly change policy terms to "bring home" to the insureds of Florida that they are not covered for a new negligent tort. See Hodges v. Nat'l Union Indem. Co., 249 So.2d 679, 681 (Fla. 1971) ["The fine print of an insurance policy...should not be read to exclude coverage unless it plainly and with certainty 'brings home' in unambiguous language to the insured that [it] is not protected in a certain particular...."]; Hartnett v. So. Ins. Co., 181 So.2d 524 (Fla. 1965); Pasteur Health Plan, Inc. v. Salazar, 658 So.2d 543, 545 (Fla. 3d DCA),

review denied, 666 So.2d 901 (Fla. 1996) [if insurer "... had intended to exclude injuries that occurred as the result of an ATC accident, they had every opportunity to say so explicitly. They have no cause now to complain because of their own oversight. (footnote omitted)."]; Indiana Ins. Co. v. Miguelarcaina, 648 So.2d 821 (Fla. 3d DCA 1995).[5]

Thus, even if HUMANA's chosen policy language did not plainly cover HES, the district court's decision should be affirmed because the insurer's language is then ambiguous. Disagreement by courts is a recognized basis for finding policy ambiguity. See Annot., *"Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, as Evidence that Particular Clauses of Insurance Policy is Ambiguous,"* 4 A.L.R. 4th 1253 (1981); Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc., 407 So.2d 314, 316

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[5] Deni was recently discussed in MacKinnon v. Truck Ins. Exchg., 115 Cal. Rptr. 369, 374-75 (Cal. 4th Dist. 2002). The court stated, "California courts do not apply the reasonable expectation doctrine in interpreting ***unambiguous*** insurance policies." (115 Cal. Rptr. 378) The "reasonable expectation doctrine" may be "an exercise in semantics". Cf. Tronconi v. Tronconi, 466 So.2d 203, 205 (Fla. 1985). The true issue is always whether the policy, construed favorably to insureds, is ambiguous. Thus, "public policy" should dictate a finding of ambiguity when courts cannot consistently interpret pre-existing, boilerplate coverage clauses, exclusions, exceptions to exclusions and policy definitions as applied to newly created negligence liabilities.

(Fla. 4th DCA 1981) ["...proof of *that* [court's emphasis] pudding the fact that the Supreme Court of California and the Fifth Circuit...have arrived at opposite conclusions from a study of essentially the same language."]; Alvis v. Mut. Benefit Health & Acc. Ass'n, 201 Tenn. 198, 297 S. W. 2d 643, 645-6 (1956) ["...[I]t is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it...," when judges reach "diametrically conflicting conclusions"]; Stroehmann v. Mut. Life Ins. Co. of N.Y., 300 U.S. 435, 439, 57 S. Ct. 607, 81 L.Ed. 732, 736 (1937) ["The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion."].

The district court's decision differs with the trial judge's interpretation of the same policy language, and with that of an intermediate Illinois appellate court, Fremont Cas. Ins. Co. v. Ace-Chicago Great Dane Corp., 739 N.E. 2d 85 (Ill. App. 2000). The decision also differs on the issue of liability coverage for the new tort of spoliation from Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So.2d 433 (Fla. 3d DCA 2001) and Norris v. Colony Ins. Co., 760 So.2d 1010 (Fla. 4th DCA 2000). Another appellate decision, DiGiulio v. Prudential Prop. & Cas. Ins. Co., 710 So.2d 3 (Fla. 4th DCA 1998), review denied, 725

So.2d 1109 (Fla. 1998), which like the district court in this appeal found coverage for a spoliation liability in a homeowners' policy and rejected analogous exclusions, conflicts with Norris, supra; Lincoln Ins. Co., supra; and Fremont Cas. Ins. Co., supra, all denying coverage.

As these decisions illustrate, the issue presented leaves even "the most learned judge or lawyer" "in a state of bewilderment and confusion". Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So.2d 467, 471 (Fla. 1993); Gulf Ins. Co. v. Nash, 97 So.2d 4, 10 (Fla. 1957). Given the presumptive ambiguity in the policy's meaning, this Court will afford maximum coverage to the public, particularly for a new theory of negligence liability. See Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29 (Fla. 2000).

The district court properly rejected HUMANA's "tort law" distortion of the insurance ***contract*** meaning of "bodily injury" damages resulting "by accident". The fact that the spoliation of evidence necessarily happens after the "bodily injury" is diversionary. The liability insured, if held liable, "legally must pay ... damages" "because of" the bodily injury, a necessary element in the sequence of events leading to the spoliation claim and liability for spoliation. Indeed, even though not required by the policy, the jury's award is the same damages for "bodily

injury" in the same lawsuit –- the damages for bodily injury which the plaintiff would have recovered but for the spoliation. See Builder's Square, Inc. v. Shaw, 755 So.2d 721, 725 (Fla. 4th DCA 1999), review denied, 751 So.2d 1250 (Fla. 2000); Miller v. Allstate Ins. Co., 650 So.2d 671 (Fla. 3d DCA 1995), review denied, 659 So.2d 1087 (Fla. 1995); Oliver v. Stimson Lumber Co., 297 Mont. 336, 993 P.2d 11 (1999).

D. Exclusion C. 1. Does Not Unambiguously Exclude Coverage.

HUMANA next relies on two exclusions. The first is C. 1. which excludes coverage for a "*liability* assumed under a contract". Under this language, the "liability" of another must be *directly* "assumed" "under a contract", not merely incurred only when the contract is breached. See generally Annotation, *"Scope and Effect of Clause in Liability Policy Excluding from Coverage Liability Assumed by Insured Under Contract not Defined in Policy, Such as One of Indemnity",* 63 A.L.R. 2d 1122 (1958). See also Action Auto Stores, Inc. v. United Capitol Ins. Co., 845 F. Supp. 428, 442 (W. D. Mich. 1993).

HES does not quarrel with an insurer's prerogative to exclude from its coverage an insured's deliberate indemnification of a third party for that party's own negligence. However, HES's claim for coverage is not based upon a prior agreement with either KELLER or HOME DEPOT to "assume" their liability. Rather,

it is based upon a potential *tort* liability imposed by law for breach of a duty owed to the MILIANs. HUMANA essentially concedes that Exclusion C. 1. is reasonably and fairly limited to indemnification agreements of a third party's own negligence, by arguing that spoliation of evidence should "be analogized to an indemnity type situation." (IP. 19-20)

Construed narrowly and in the light most favorable to coverage, the employer did not "assume liability" when it agreed to preserve evidence, or was placed on notice of the MILIANs' interest in the ladder as evidence; rather, it "became" *potentially* liable when it lost the evidence. These asserted "breaches of duty" must be proved. They are not a liability assumed by contract and certainly not by contract alone. The Plaintiffs must prove the comparative degree of impairment of Milian's claim against KELLER and HOME DEPOT as well as the comparative negligence between Respondent and Milian in the handling of the ladder as evidence. Until those issues are resolved, Respondent is not liable to Milian.

In Home Ins. Co. v. Southport Terminals, Inc., 240 So.2d 525 (Fla. 2d DCA 1970), cert. denied, 245 So.2d 85 (Fla. 1971), the court rejected an exclusion similarly worded to exclusion C. 1. of HUMANA's policy. In admiralty, stevedores were liable to indemnify shipowners sued by employees injured on the job. The

court concluded that the policy's exclusion for a liability assumed by contract was ambiguous, and the insurer should have sought to exclude "in plain language at the time the policy is issued, not after a claim has arisen." (240 So.2d at 526).

The Third District Court in Mitchel v. Cigna Prop. & Cas. Ins., 625 So.2d 862, 864-65, fn. 9 (Fla. 3d DCA 1993) relied on Home Ins. Co. v. Southport Terminals, Inc., supra, and U.S.F. & G. v. Virginia Engineering Co., Inc., 213 F. 2d 109, 63 A.L.R. 2d 1114 (4th Cir. 1954). The court rejected "out of hand" an exclusion similar to exclusion C. 1. See also Western World Ins. Co., Inc. v. Travelers Indem. Co., 358 So.2d 602, 604 (Fla. 1st DCA 1978) [this exclusion "has no effect upon the general liability of the insured arising by operation of law."]; ; County of Guilford v. Nat. Union Fire Ins. Co., etc., 108 N.C. App. 1, 422 S. E. 2d 360, 363 (1992) [liability assumed by breach of statutory duty].

The Mitchel court reminded that "exclusions in particular, are interpreted strictly against the carrier. *Stuyvesant Ins. Co. v. Butler*, 314 So.2d 567 (Fla. 1975)." (625 So.2d at 864). In Mitchel, supra, the insured had run his boat into a coral reef at a state park, and was criminally charged. The insured entered into a plea agreement to make restitution for the mishap. The court noted the insured's liability arose only from the insured's

"tortious act in running into the reef", not one assumed under a contract. Similarly, Appellant's liability, if any, occurs only because of an alleged tort: failing to preserve evidence.

HUMANA's contention that there is "no common law duty" to maintain or preserve evidence -- only contractual or statutory duties –- is wrong. See St. Mary's Hosp., Inc. v. Brinson, 685 So.2d 33 (Fla. 4th DCA 1996) [hospital knew it had a duty to preserve a vaporizer as evidence]; Hagopian v. Publix Supermarkets, Inc., 788 So.2d 1088 (Fla. 4th DCA 2001)[supermarket knew it had a duty to preserve broken bottle as evidence]. See generally Rockenbach, *"Spoliation of Evidence, A Double Edged Sword",* 75 Fla. B. J. 34, 36 (Nov. 2001) ["...In (St. Mary's Hospital, Inc. v.) Brinson, supra], the court apparently recognized a new duty to preserve evidence that did not require a contract or statute to create the duty...."]. Even if Appellee's duty to preserve the ladder was a "contract" with Milian, the underlying duty to cooperate was already created by operation of law, making exclusion C. 1. inapplicable, or at least ambiguous.

One of the decisions cited by HUMANA [IP 20], Karadis Painting Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 292 A. 2d 42, 45 (N. J. App. 1972), states: "[T]he exclusion clause does

not preclude coverage, even though some sort of liability is assumed by contract, where the insured would have been liable regardless of his contractual undertaking...." Karadis cites numerous decisions supporting such a holding.[6]

E. Exclusion C. 4. Does Not Unambiguously Exclude Coverage.

HUMANA also argues that exclusion C. 4. operates to preclude coverage since Milian was paid for "bodily injury" under PART ONE (for worker's compensation benefits). In other words, HUMANA argues that it can provide coverage under *either* PART ONE for workers' compensation benefits *or* PART TWO for spoliation damages, but not both. Unfortunately, despite every opportunity to say so, HUMANA's policy does not -– and for obvious reasons. The two parts cover two complimentary types of liability, which

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[6] In Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So.2d 433, 439, fn. 4 & 5 (Fla. 3d DCA 2001) the *en banc* Third District Court rejected an "insured contract" as an "exception" to an "employer's liability exclusion". The exception defined an "insured contract" as "[t]hat part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement." (812 So.2d at 439, fn. 5). The Lincoln court apparently interpreted this language limited the "insured contract" to "an indemnity or contribution agreement". (Id.) HES argued unsuccessfully in Lincoln, supra, that since an *exclusion* was involved, not a coverage clause as in this case, the "insured contract" exception should receive an expansive interpretation favoring the insured and coverage.

are not necessarily mutually exclusive.

HUMANA's policy, in PART ONE, expressly indemnifies for workers' compensation benefits. By PART TWO, HUMANA covers damages "permitted by law" against the employer brought by the employee notwithstanding workers compensation immunity for bodily injury. In a case like this one, the employer may have to pay compensation benefits as employer, but liability damages as tortfeasor. The liabilities are not inherently inconsistent, and in fact are contemplated, and, therefore, the policy covers both.

When a policy exclusion has "completely swallowed up the insuring provision", the "grossest form of ambiguity" is created. Purelli v. State Farm Fire & Cas. Co., 698 So.2d 618, 620 (Fla. 2d DCA 1997), quoting Bailer v. Erie Ins. Exchange, 344 Md. 515, 687 A.2d 1375, 1380 (1997). HUMANA's position is that payment of benefits under workers' compensation law, required in PART ONE, "swallows up" any possibility of coverage for "damages" sought by an employee's independent lawsuit against the insured, covered by PART TWO. Such a position would render PART TWO meaningless. It "defeat[s] the very purpose for which the policy was procured". Michigan Millers Mut. Co. v. Benfield, 140 F.3d 915, 925 (11th Cir. 1998). It allows a construction which "is unreasonable, absurd and would lead to results never intended or

contemplated by the parties." James v. Gulf Life Ins. Co., 66 So.2d 62, 63 (Fla. 1953).[7]

The insuring provision of PART TWO broadly promises to satisfy the employer's liability for its employee's job injury whenever the claim against the insured may be said to be made against the insured "in a capacity other than as employer". Such a claim is not cognizable as one for benefits before the Florida Division of Worker's Compensation of the Florida Department of Labor and Employment Security. It is separately covered by PART

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[7] The trial court struggled –- with no assistance from HUMANA –- to find any purpose for PART TWO of HUMANA's policy, if not to afford coverage for "employer's liability", such as that created by a spoliation claim [R. 178, 194]:

> THE COURT: What does this policy [PART TWO] cover?
> MR. WHITE [HUMANA's counsel]: Your Honor, the policy terms and conditions of course control what is covered and what isn't covered.
> THE COURT: Yeah, but I'm trying to figure out what type of things y'all would acknowledge that it covered – separate and apart from the workmen's comp because I know about that now.
> MR. WHITE: It covers matters that are the responsibility of the employer that are not based upon its status as employer.
> THE COURT: What does that mean?
> MR. LANGBEIN [HES'S counsel]: That's the critical language, though.
> THE COURT: Can you give me an example of what that means?
> MR. WHITE: Not off the top of my head, Your Honor. I can't.

TWO ["Employer's Liability] of the policy, because that is the plainly intended and contemplated purpose for that coverage.

The proper, strict and narrow effect of this exclusion was recently addressed by the Fourth District Court in Wright v. Hartford Underwriters Ins. Co., 27 Fla. L. Weekly D1806 (Fla. 4th DCA, August 7, 2002). In that case, the workers compensation and employers' liability insurer refused to defend the insured/employer in a lawsuit filed by an employee against his supervisor and the employer. The employer, supervisor and employee settled the underlying claim and the insured assigned its rights under PART TWO, the employers' liability coverage, to the employee.

The Fourth District ruled the employer waived a workers compensation immunity defense by its refusal to defend. The Fourth District rules further that the trial court's reliance on the workers' compensation *exclusion* (C. 4.) was misplaced. The district court stated that exclusion "does not apply to Wright's civil action because the settlement judgment was not an 'obligation imposed by worker's compensation' law." (27 Fla. L. Weekly at D1807). The court added, in reconciling any perceived conflict, that the judgment arose from claims in a civil action and settlement agreement in that action, and thus necessarily did not "involve obligations imposed by workers compensation law."

Id.

By footnote, the Fourth District Court found it was "manifest" that the purpose of the workers compensation exclusion in PART TWO "was to omit coverage thereunder for claims already payable under part I." Id. The court confined the exclusion to the exact "benefits" paid under PART ONE, not applicable to damages paid in a civil action, in whole or in part, outside of the effect and benefits paid for workers' compensation.

All contracts, and particularly adhesion insurance contracts, must be understood according to their ordinary meaning. See 11 Fla. Jur. 2d Contracts, § 155; Shaw v. Bankers Life Co., 213 So.2d 514 (Fla. 3d DCA 1968). The words in exclusion C. 4. -- "obligation imposed ..." –- are modified by "a workers' compensation ... benefits law." This can only mean that "benefits" imposed by that law are the only "obligations" expressly excluded from coverage under PART TWO, so that the insured will not be subjected to double liability.

The Fourth District Court in Builder's Square, Inc. v. Shaw, 755 So.2d 721, 723 (Fla. 4th DCA 1999), review denied, 751 So.2d 1250 (Fla. 2000) and the Third District Court in General Cinema Beverages of Miami, Inc. v. Mortimer, 689 So.2d 276, 278-79 (Fla. 3d DCA 1995) implicitly applied the "dual persona doctrine": "'An employer may become a third person, vulnerable to tort suit by

an employee, if -– and only if -– he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.'" Percy v. Falcon Fabricators, Inc., 584 So.2d 17, 19 (Fla.3d DCA 1991), quoting 2A Larson, *The Law of Workmen's Compensation,* § 72.81 (1990).

Insurers like HUMANA who issue the standard workers' compensation insurance policy have been on notice for many years that they may be liable to exercise the duty to defend and indemnify under the standard language of PART TWO of the policy, the "Employers' Liability Coverage", when an employee is not excluded under PART ONE, or by workers' compensation immunity, from seeking damages against the employer "because of" bodily injury. See Sturgess, *"Employers' Liability Coverage Under the Standard Workers' Compensation Insurance Policy",* 68 Fla.B.J. 30 (November 1994).[8]

The specific language of PART TWO was discussed in the above article of the Florida Bar. *Id.* [68 Fla.B.J. pg. 38]:

> In this instance, the original hypothesis in this article is altered so that the employer is also the manufacturer of the machine which injures the employee. The employee sues the employer solely in the

[8] Compare, exclusions C. 2, 5-10 and 12 which plainly state what is not covered under PART TWO.

> employer's role as manufacturer, just as if the employer was the manufacturer/third party. The notion that an employer can wear two hats in this sort of litigation is often referred to as the 'dual capacity doctrine'....

If an employer may wear a "second hat" enabling it to be sued, not as an "employer", but as a third party tortfeasor in breach of the "duty of cooperation" to preserve evidence, to wit: a ladder [Section 440.39(7), supra], it follows that PART TWO -- Employer's Liability Coverage –- covers a former "employer" who functionally "derives" liability to pay damages for "bodily injury" from a products liability claim.

Under General Cinema Beverages of Miami, Inc. v. Mortimer, 689 So.2d 276, 278-79 (Fla. 3d DCA 1995) and Builder's Square, Inc. v. Shaw, 755 So.2d 721, 723 (Fla. 4th DCA 1999), review denied, 751 So.2d 1250 (Fla. 2000), the employee has a "separate basis for liability" against his former employer, "...who would otherwise enjoy workers' compensation immunity...." for "damages"... "because of bodily injury". (689 So.2d at 278). This "separate liability" "arises out of and in the course of employment", and *ipso facto* means that HES was sued "in a capacity other than as employer", the phrase triggering coverage under PART TWO B of HUMANA's policy.

As previously noted, this interpretation of exclusion C. 4.

is equitable, since HUMANA may claim a statutory lien under Fla. Stat. § 440.39 to the extent it must indemnify the insured for Milian's "damages because of bodily injury". Since an employee who is receiving workers' compensation benefits may sue a third party [here the employer/insured] "for the use and benefit of the ... employer's insurance carrier", [Fla. Stat. § 440.39(3)(a)], HUMANA's exercise of its duty to defend and indemnify protects its own financial interests in the litigation.

In contrast, HUMANA seeks an exceptionally "absurd" result. James v. Gulf Life Ins. Co., 66 So.2d 62 (Fla. 1953). HUMANA's predecessor in interest, PCA, allegedly was negligent, in violation of Fla. Stat. § 440.39(7), for causing HES's spoliation. (R. 37-38) HUMANA argues that it has no duty to defend its insured despite the fact that a related insurer, PCA, allegedly caused HES to be sued by a third party. Such circumstances would sanction unfairness and injustice against HUMANA's insured, HES. See Crown Life Ins. Co. v. McBride, 517 So.2d 660, 662 (Fla. 1987) ["the form of equitable estoppel known as promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice."].

HUMANA's reliance upon Selkirk Seed Co. v. State Ins. Fund, 135 Idaho 434, 18 P. 3d 956, 960 (Sup. Ct. 2000) is misplaced.

(IP 23). Selkirk in fact supports our argument. The Idaho Supreme Court determined that PART TWO [Employer's Liability] covers damages because of bodily injury, since "[c]ircumstances may arise where an injured employee may seek redress in an Idaho forum other than the Industrial Commission where an alleged injury occurs in the course and scope of employment, but the injury is not compensable under the Worker's Compensation Act. (citation omitted.)" Thus, because PART ONE cannot cover "employer's liability" in tort, the plainly intended and contemplated purpose of PART TWO is to cover such liability.

HUMANA also relies on Culligan v. State Compensation Ins. Fund, 81 Cal. App. 4th 429, 436, 96 Cal.Rptr. 656, 662 (2000), for the proposition that the coverages of PART ONE and PART TWO of its policy have been deemed "mutually exclusive". But the claims in Culligan were held to be mutually exclusive, while the claims here are not. The Culligan court quoted the following passage from the California Supreme Court in Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal.3d 903, 916, 226 Cal. Rptr. 558, 718 P.2d 920, 927 (1986), which correctly states the rule:

> [E]mployers liability insurance is traditionally written in conjunction with workers' compensation policies, and is intended to serve as a 'gap-filler,' providing protection in those situations where the employee has a right to bring a tort action despite the provisions of the

workers' compensation statute. [9]

In Producers Diary, supra, the California Supreme Court emphasized that PART TWO applies when "...an employee has a common law right of relief against the employer in addition to his workers' compensation remedy...." (718 P. 2d 922). It noted that "employers' liability insurance is aimed at providing additional protection to the *same employer*, who has workers' compensation insurance covering the employee's injury." Id. at 926.

The Culligan decision only illustrates the principle. There the two claims in question were not independently viable. Under California law, the asserted tort claim was precluded by the workers' compensation of the plaintiffs. The plaintiffs suffered pre-firing exposure to noxious fumes causing them physical harm and "bodily injury" for which they received workers' compensation benefits. They then sued the employer for wrongfully discharging them "on a pretext of poor job performance but in fact in retaliation for having complained about noxious odors" to which they were exposed on the job. (96 Cal. Rptr 2d

[9] The court in Producers Dairy, by a footnote to this statement, cited Bell v. Industrial Vangas, Inc., 30 Cal.3d 268, 272-276, 179 Cal. Rptr. 30, 637 P.2d 266 (1981), discussing the "dual capacity" doctrine, and thus implying that whenever an employee has a right to sue in tort for "bodily injury", another "capacity" is presumed.

at 659). The Culligan court's primary holding was that a separate "wrongful discharge exclusion" applied. *Id.* at 662. [10] The court next determined that the claims for wrongful discharge "carefully" avoided damage claims for "bodily injury", because the plaintiffs sought damages only from their termination dates forward and for their lost wages and job benefits. *Id.* at 663.[11] Thus, the court concluded that to the extent that damages for bodily injury were implicated under PART TWO of the employer's policy, they already were compensated by the "benefits" paid under PART ONE. For this reason, coverage under PART TWO was impermissible.[12] But the court in Culligan expressly recognized

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[10] The "wrongful discharge exclusion" in Culligan, supra, was substantially similar to exclusion C. 7. in PART TWO of HUMANA's policy: "C. **Exclusions** This insurance does not cover: 7. damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions." This provision has no application to the spoliation claim here.

[11] In contrast, the MILIANs' claim for damages in their ad damnum clause was for the same "bodily injury" sustained in the underlying injury to Mr. Milian. (R. 39) See Continental Ins. Co. v. Herman, 576 So.2d 313, 315 (Fla. 3d DCA), review denied, 598 So. 2d 76 (Fla. 1991).

[12] Florida would not reach the same result as Culligan, supra, because in Florida a claim against an employer for retaliation is actionable independent of a workers' compensation exclusivity. See Smith v. Piezo Technology & Prof. Adm'rs., 427 So.2d 182 (Fla. 1983). Moreover, workers compensation payments never came close to fully compensating

that its holding depended on the conclusion that workers compensation coverage precluded the alternative claim. Citing another California decision, La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co., 9 Cal.4th 27, 36, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 (1994), the Culligan court concluded: "Part two [employer's liability coverage] covers situations where the employee, while not 'excluded' from the workers' compensation system, may not be required to use it exclusively...." (*Id.* at 664). That is precisely the MILIANs' situation, and it is why HES is covered.

Similarly, cases like Florida Ins. Guar. Assn. v. Revoredo, 698 So.2d 890 (Fla. 3d DCA 1997), and Greathead v. Aspludh Tree Expert Co., 473 So.2d 1380 (Fla. 1st DCA 1985), relied upon by HUMANA, apply only when the employer is protected by worker's compensation immunity, irrespective of whether the employer seeks such compensation. But an employer is not protected by worker's compensation exclusivity when sued for spoliation of evidence. See General Cinema Beverages of Miami, Inc. v. Mortimer, 689 So.2d 276, 278-79 (Fla. 3d DCA 1995). Therefore, exclusion C. 4., excluding "any *obligation* imposed by a workers compensation ... benefits law, or any similar law", does not apply since the MILIANs' lawsuit is not an "obligation imposed"

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the employee for all damages otherwise cognizable against third parties.

by the exclusive remedies for compensation benefits under that law.

Despite having paid workers compensation benefits to Mr. Milian for the injuries he sustained working on the ladder, HUMANA asserts here that the complaint does not fairly allege that he sustained the bodily injury while engaged in his employment. (IP. 17) The complaint alleges precisely that Mr. Milian was employed as a carpenter; was performing duties in accordance with his employment; and while using the ladder for that purpose suffer bodily injury. (R. 3-4; 6-9, paragraphs 8-12, 24, 25, 29, 30, 35, 36, 41, 44 and 46).

HUMANA also argues that PART TWO of its policy does not apply because the spoliation happened after Mr. Milian was injured, and thus bodily injury does not “arise out of” employment. (IP. 17) As already argued, the “arising out of” language, pertains only to the “bodily injury”, and does not require that the basis for the employer’s liability, “in a capacity other than as employer”, arise out of or for that matter even be related to the employment, so long as the recovery of damages is “permitted by law”.

CONCLUSION

The decision of the district court should be approved and affirmed.

Respectfully submitted,

RICHARD A. FRIEND, ESQUIRE
Co-Counsel for HES
9155 South Dadeland Blvd.
Dadeland Center – Suite 1012
Miami, FL 33156
(305) 667-5777
By: Richard A. Friend

LANGBEIN & LANGBEIN, P.A.
Co-Counsel for HES
20801 Biscayne Blvd.
Suite 506
Miami, FL 33180
(305) 936-9840
By: Evan J. Langbein

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Fl 33130-1720
(305) 358-2800
By: Joel S. Perwin

_____

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits of Respondent, HES, has been served by mail on counsel of record enumerated in the attached service list, this _____day of September, 2002.

_____

CERTIFICATE OF COMPLIANCE WITH FLA.R.APP.P. 9.210(a)(2)

I HEREBY CERTIFY that Courier New 12-point font was employed in this initial brief, in compliance with the rule.

_____
Evan J. Langbein

Service List

Courtney B. Wilson, Esquire
SHOOK, HARDY & BACON, L.L.P.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131-2312
Attorneys for PCA Solutions, Inc. and
PCA Property & Casualty Insurance Co.
Telephone: (305) 373-5200

Kenneth E. Cohen, Esquire
Holman & Cohen
2739 Hollywood Boulevard
Hollywood, Florida 33020
Counsel for Albert and Rose Milian
Telephone: (954) 924-0200
Fax: (954) 924-0148

Scott R. McNary, Esquire
Scott R. McNary, P.A.
Grove Forest Plaza
2937 SW 27th Avenue
Suite 203
Miami, Florida 33131
Co-counsel for Home Emergency Services
Telephone: (305) 442-1718
Fax: (305) 442-0252

Clinton D. Flagg, Esquire
1320 S Dixie Highway Suite 1180
Coral Gables FL 33146
Counsel for Lincoln Insurance Company
Telephone: (305) 669-0506
Fax: (305) 669-8980

Bradley E. Fischer, Esquire
Melito & Adolfsen
The 900 Building, Suite 203
900 SE Third Avenue
Fort Lauderdale, Florida 33316
Counsel for Keller Ladders, Inc. & Home Depot USA, Inc.
Telephone: (954) 728-1280

Debra Potter Klauber, Esquire
HALICZER, PETTIS & WHITE
101 ne Third Avenue
Sixth Floor
Fort Lauderdale, Florida 33301
Telephone: (954) 523-9922
Fax: (954) 522-2512

Richard A. Friend, Esquire
Co-Counsel For Humana Workers Comp.
9155 South Dadeland Boulevard
Suite 1012
Miami, Florida 33156
(305) 667-5777

Joel S. Perwin, Esquire
Co-Counsel for Humana Workers Comp.
25 West Flagler Street, Suite 800
Miami, Florida 33130-1720
(305) 358-2800

Evan J. Langbein, Esquire
Co-Counsel for Humana Workers Comp.
20801 Biscayne Boulevard
Suite 506
Aventura, Florida 33180
(305) 936-8844