IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC02-1206

HUMANA WORKER'S COMPENSATION SERVICES,
FLORIDA BUILDERS & EMPLOYERS MUTUAL INS. CO.,

Petitioners,

v.

HOME EMERGENCY SERVICES, INC.,

Respondent.

On Appeal From the Third District Court of Appeal
Case Number: 3D00-2643
Reversing a Final Summary Judgment
in favor of the Petitioners
from the Eleventh Judicial Circuit Court
in and for Miami-Dade County, Florida
Case Number 99-8503, Hon. Eleanor Schockett

REVISED BRIEF ON THE MERITS OF PETITIONERS, HUMANA WORKER'S COMPENSATION SERVICES, INC. and FLORIDA BUILDERS AND EMPLOYERS MUTUAL INS. CO.

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ISSUES PRESENTED

[Restated]

I. WHETHER THE MILIANS' SPOLIATION CLAIMS AGAINST HOME EMERGENCY SERVICES FALL WITHIN THE TYPE OF COVERAGE AFFORDED BY THE APPLICABLE POLICY.

A. Whether the underlying complaint alleges damages for "bodily injury" by accident or disease.

B. Whether the underlying complaint alleges damages for bodily injury arising "out of and in the course of" Mr. Milian's employment, and acts "necessary and incidental" to Home Emergency Services' work.

II. WHETHER THE EXPRESS POLICY EXCLUSIONS APPLY TO PRECLUDE COVERAGE FOR THE PLAINTIFF'S SPOLIATION CLAIMS AS STATED IN THE UNDERLYING COMPLAINT.

B. Whether the policy expressly excludes coverage for liability assumed under a contract thus barring coverage for Count VII of the underlying complaint.

B. Whether the policy excludes coverage for any obligation imposed by a workers compensation law thus barring coverage for Count VIII of the underlying complaint.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This is a declaratory judgment action. The underlying Plaintiff, Alberto Milian, was injured when he fell from a ladder during the course and scope of his employment with Home Emergency Services. The ladder subsequently disappeared and Mr. Milian and his wife sued Home Emergency Services for spoliation of evidence based on their alleged inability to sue the manufacturer and distributor of the ladder for products liability. The sole issue before this Court is whether the employer's liability policy issued to Home Emergency Services provides coverage for the spoliation claims.

The trial court granted summary judgment in favor of the Petitioner/Insurer, Humana Workers Compensation Services, Inc., and Florida Builders and Employers Mutual Insurance Company (hereinafter collectively referred to as Humana), finding that Humana did not owe a duty to defend or indemnify Home Emergency Services for the claims brought by the Milians. The trial court based its conclusion on a legal determination that the spoliation claims were not claims for "bodily injuries."

The Third District Court of Appeal reversed in an en banc decision, finding that the spoliation claims did state claims for "bodily injury" and, in turn, that Humana had a duty to defend and indemnify Home Emergency Services. Home Emergency Services, Inc. v. Humana Worker's Compensation Services, Inc., 815 So. 2d 665

(Fla. 3d DCA 2002)(en banc). The Third District also certified conflict with the Fourth District Court of Appeal's decision in Norris v. Colony Ins. Co., 760 So. 2d 1010 (Fla. 4th DCA 2000). In Norris, the Fourth District held, to the contrary, that a spoliation claim is not a claim for "bodily injury." Id.

Based on the certified conflict, Humana sought discretionary review in this Court. This Court deferred ruling on jurisdiction and ordered the parties to submit their briefs on the merits.

Statement of the Facts

This case arises out of a complaint filed by Albert Milian and his wife against Home Emergency Services ("the underlying complaint"). (1R 1-42, Exh. B). The underlying complaint alleges that Mr. Milian, a carpenter, sustained serious and permanent injuries to his arm after a ladder collapsed, causing him to fall to the ground (1R 1-42, Exh. B, ¶¶8-12). Mr. Milian received workers compensation benefits which were paid pursuant to Part One, i.e., the Worker's Compensation coverage, of the Humana policy, a copy of which is attached as Appendix A to this Brief (1R 1-42; App. A).

Following his injury, Mr. Milian alleges that Home Emergency Services entered into a contractual agreement to maintain that ladder in its possession, at the request of Mr. Milian's counsel (1R 1-42, Exh. B, ¶13). The underlying complaint further alleges

that Florida law imposed a statutory obligation on Home Emergency Services, as Milian's employer, to maintain the ladder in its possession. (1R 1-42, Exh. B, ¶56-67). The underlying complaint cites to Florida's "Workers' Compensation Law" set forth in Chapter 440, specifically, §440.39(7). (1R 1-42, Exh. B, ¶59).

After the ladder was allegedly misplaced or destroyed, the Milians filed suit against the former employer (Home Emergency Services), and the manufacturer (Keller Ladders) and distributor (Home Depot) of the ladder. (1R 1-42, Exh. B). A copy of the underlying complaint is attached hereto as Appendix B. In the two (2) counts against Home Emergency Services, the underlying complaint alleges that Home Emergency Services breached its (1) contractual and (2) statutory duties to maintain the ladder by "negligently and/or intentionally destroying, abandoning, misplacing, or otherwise divesting itself of possession of the ladder." (1R 1-42, Exh. B, ¶¶14, 47-67; Appendix B). The underlying complaint also includes various claims against the manufacturer and the distributor of the ladder (Home Depot and Keller Ladders) for products liability (1R 1-42, Exh. B, ¶¶15-46; Appendix B).

Following receipt of the complaint, Home Emergency Services forwarded a copy of the complaint to Humana and requested coverage for and a defense against the claims by the Milians pursuant to Part Two, the employer's liability portion, of the

attached policy.[1]

Upon receipt of the underlying complaint, Humana took the position that the policy did not provide coverage for the Milians' spoliation claims, as alleged in the underlying complaint, and Humana promptly filed a petition for declaratory relief in order to seek a legal determination regarding its coverage obligations (1R 1-42). Both Humana and Home Emergency Services filed motions for summary judgment and supporting memoranda of law, conceding that the coverage issue was a question of law to be decided by the Court (1R 62-126, 127-135, 136-146, 147-153). After several hearings (SR), the trial court agreed with Humana and concluded that there was no duty to defend or indemnify Home Emergency Services for the Milians' claims. The trial court thus entered a final summary judgment in favor of Humana (1R 154-155). Home Emergency Services' motion for rehearing was denied by the trial court (1R 156-160, 168-169, 170-171) and it appealed to the Third District Court of Appeal (1R 161-163, 164-167). As noted above, the Third District Court of Appeal reversed in

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[1] Home Emergency Services also forwarded a copy of the underlying complaint to its commercial general liability carrier, Lincoln Ins. Co., and demanded a defense and indemnification under that policy. In that related case, discussed in further detail below, the Third District first held that the Milians' spoliation claims were claims for "bodily injuries." The Third District nevertheless concluded that coverage was <u>not</u> afforded by the commercial general liability policy based on the application of an express policy exclusion. <u>Lincoln Ins. Co. v. Home Emergency Services</u>, 812 So. 2d 433 (Fla. 3d DCA 2001).

an en banc decision, holding that the subject employer's liability policy did, indeed, provide coverage, thus requiring Humana to defend and indemnify Home Emergency Services. Home Emergency Services, 815 So. 2d at 666. Humana seeks discretionary review in this Court based on the Third District's certified conflict with the Fourth District Court of Appeal in Norris, *supra.*

STANDARD OF REVIEW

As with the intermediate appellate courts, this Court reviews *de novo* questions of law as to coverage. *See, e.g.,* Allstate Ins. Co. v. Rush, 777 So. 2d 1027 (Fla. 4th DCA 2000). It also bears noting that the legal principles applicable to a coverage case provide that it is the allegations of the underlying complaint that govern the insurer's duty to defend the insured under the terms of the applicable insurance policy. Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977); Aetna Commercial Ins. Co. v. Am. Sign Co., 687 So. 2d 834 (Fla. 2d DCA 1996). If the alleged facts fall outside the policy coverage or within the exclusionary language, there is no duty to defend. Id. In reviewing the underlying complaint to determine whether the insured has a duty to defend, a court may look only at the factual allegations in the complaint and the applicable language of the insurance policy, i.e., the "eight corners" rule. Allstate Ins. Co. v. Travers, 703 F. Supp. 911 (N.D.Fla. 1988).

SUMMARY OF ARGUMENT

This coverage action arises out of claims against Home Emergency Services by its former employee, Albert Milian, for spoliation of evidence. Milian's complaint alleges that he has been precluded from bringing suit against the manufacturer and distributor of the ladder from which he fell by virtue of the fact that a piece of evidence, the ladder, is now missing. Because he asserts that his employer had contractually agreed to maintain the ladder, and was statutorily required to do so, Milian sued Home Emergency Services for spoliation, seeking to recover what, arguably, he cannot recover from Keller Ladders and Home Depot.

A spoliation claim like the one asserted by the Milians in this case does not state a claim for bodily injury by accident or bodily injury by disease. The Milians do not allege that any act or omission of Home Emergency Services resulted in his bodily injuries. As such, the trial court in this case appropriately concluded there was no coverage under the employer's liability portion of the Humana policy for the Milians' spoliation claims against Home Emergency Services. That conclusion is in line with the Fourth District Court of Appeal's well-reasoned decision in Norris v. Colony Ins. Co., 760 So. 2d 1010 (Fla. 2000), with which the Third District certified conflict. In addition, other policy language (both coverage descriptions and express policy exclusions) support a conclusion that there is no coverage here. As such, this Court

should reverse the Third District's determination of coverage and adopt the Fourth District's reasoning.

ARGUMENT

I. THE MILIANS' SPOLIATION CLAIMS AGAINST HOME EMERGENCY SERVICES DO NOT FALL WITHIN THE TYPE OF COVERAGE AFFORDED BY THE APPLICABLE POLICY.

A. The underlying complaint does not allege damages for "bodily injury" by accident or disease.

The language of the policy expressly states, "[t]his employers liability insurance applies to bodily injury by accident or bodily injury by disease." *See* Appendix A, Part Two, Subsection A. The Milians' claims against Home Emergency Services are for spoliation of evidence in violation of (1) a contractual agreement to maintain the ladder, and (2) a statutory duty to maintain any evidence to be utilized against a third party (i.e., the ladder).

When confronted with a similar coverage issue involving an underlying spoliation claim, the Fourth District Court of Appeal concluded that a spoliation claim is not covered as a "bodily injury" or "property damage" in a liability contract. *See* Norris v. Colony Ins. Co., 760 So. 2d 1010 (Fla. 4th DCA 2000). In essence, the Fourth District concluded that because there is no link between the "occurrence" (the destruction of the evidence) and the "bodily injury," the spoliation claim does not fall within the coverage contemplated by the insurance policy. Id. More specifically, since the "occurrence," i.e., the destruction of evidence, did not result in a "bodily

injury," the Fourth District concluded that the policy did not provide coverage for a spoliation claim. Id.

Although the majority of the original Third District panel agreed with the Fourth District's conclusion, the Third District later addressed rehearing, en banc, and the full court ultimately found to the contrary. In Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So. 2d 433 (Fla. 3d DCA 2002)(en banc), the related declaratory judgment action involving the general commercial liability policy issued to Home Emergency Services, the Third District concluded that Mr. Milian's fall from the ladder was an "occurrence" and further opined that his claim for spoliation of evidence is properly viewed as being "because of 'bodily injury.'" Id. at 437. Thus, the Third District concluded that the spoliation claim was within the scope of the insuring agreement. The Third District's opinion in the present case was based on its findings in the companion Lincoln Ins. Co. case. *See* Home Emergency Services, Inc. v. Humana Worker's Compensation Services, Inc., 815 So. 2d 665 (Fla. 3d DCA 2002). In the present case, the Third District certified the conflict between its decision and that of the Fourth District in Norris.

In a declaratory judgment action such as this, it is the cause of action or theory of liability (here, spoliation) that determines whether coverage is afforded under an insurance policy. Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533

(Fla. 1977); Commercial Union Ins. Co. v. R.H. Barto, Co., 440 So. 2d 383 (Fla. 4th DCA 1983). As held by the Fourth District, a claim for spoliation is not a claim for a bodily injury by accident or disease. To the contrary, the damages recoverable in a spoliation case are for the inability to prove the underlying case because of the lost or destroyed evidence — not for the bodily injury or property damage actually sustained.

In a factually indistinguishable case, an Illinois appellate court was presented with the same question: "[w]hether the damages the [employee] seeks in his negligent spoliation of evidence claim against [his employer] constitutes damages for bodily injury by accident or bodily injury by disease." Fremont Cas. Ins. Co. v. Ace-Chicago Great Dane Corp., 739 N.E.2d 85, 90 (Ill. App. 2000). The arguments made to the Illinois court by the parties to that action mirror the findings of the diverging appellate court decisions now before this Court.

In Fremont, the insurance company took the position that the employee's negligent spoliation action did not seek damages for bodily injury but, rather, for his alleged inability to prove a cause of action against the manufacturer of the ladder. To the contrary, the employer argued that, in essence, the damages which the Plaintiff sought were for the injury he suffered when he fell from the ladder. The Illinois appellate court decision falls in line with Florida's Fourth District's decision in Norris,

supra. Stated the court, "[t]he inability to prove a cause of action against a third party does not fall within the plain and ordinary meaning of the term 'bodily injury.'" Id. at 91.

The injured claimant and the employee in Fremont argued, as Home Emergency Services does here, that such a finding emphasized "form over substance" by focusing on the cause of action asserted rather than the measure of the ultimate injury. This is the argument accepted by Florida's Third District in this case.

Nevertheless, the Illinois court disagreed because liability for the recovery of damages is quite different in a negligence or personal injury action as compared to a spoliation of evidence action. The damages allegedly suffered as a result of the employer's breach of its duty to maintain the ladder is "an inability to prove a cause of action" against the employer, "not bodily injury by accident or disease." As succinctly stated by the Fremont court, "[the employee's] negligent spoliation of evidence action against its employer... is not based on allegations that [the employer's] negligence contributed to his fall from the ladder but on allegations that [the employer's] negligent handling of the ladder deprived him of the ability to recover in a cause of action against the ladder's manufacturer." As the Illinois appellate court held, and the Fourth District similarly concluded, the allegations of a spoliation claim do not bring the action even potentially within the coverage provisions of the insurance

policies at issue.

The United States District Court for the Middle District of Florida similarly found no coverage for an underlying spoliation claim. In Council v. Paradigm Ins. Co., 133 F. Supp. 2d 1339 (M.D.Fla. 2001), the court implicitly concluded that the spoliation claim was one for property damage, not bodily injury. The court ultimately concluded that there was no coverage under the commercial general liability policy because of an express exclusion for "property damage" to property owned or controlled by the insured. Id. at 1343.

The present case involves an employer's liability policy which does not provide coverage for any property damage at all. Thus, even though the present case, and applicable policy, are distinguishable from those addressed by the Middle District of Florida in Council, its decision is yet another example of a court's legal determination that a spoliation claim is not a "bodily injury" claim.

In addition to these recent holdings, other long-standing decisions independently support Humana's contention that there is no coverage for the Milians' claims in this case. The Milians' alleged damages include financial injury and emotional or psychological damages. Although Mr. Milian suffered a bodily injury as a result of his fall, he recovered the appropriate damages for that injury through workers compensation coverage under Part One of the Humana policy. The claims against the

insured in this case do not seek recovery for that bodily injury, but seek recovery based upon Home Emergency Services' actions following that injury. Such claims do not fall within the policy's coverage which is expressly limited to bodily injury by accident or disease.

Claims for financial injury do not fall within coverage specifically limited to bodily injury. *See, e.g.,* Advanced Concrete and Masonry v. Minn. Workers Comp. Assigned Risk Plan, 1997 WL 259967 (Minn. App. 1997)(unpublished opinion)(where policy applied to "bodily injury by accident or bodily injury by disease," it did not cover claims for financial injury); Chatton v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 13 Cal. Rptr. 2d 318 (Cal. App. 1992)(financial loss constitutes injury to intangible property and is not covered as "bodily injury" or "property damage").

Similarly, claims for emotional or psychological damages do not constitute "bodily injury" within policy coverage. Although no Florida court has determined whether emotional distress is a "bodily injury" for insurance coverage purposes, the District Court for the Middle District of Florida has addressed the issue. In Allstate Ins. Co. v. Clohessy, 32 F. Supp. 2d 1333, 1336 (M.D.Fla. 1998), the court stated, "[i]n the context of insurance coverage, 'the overwhelming majority of jurisdictions which have considered the issue hold that 'bodily injury' standing alone or defined in a policy as 'bodily injury [or harm], sickness or disease' is unambiguous and

encompasses only physical harm.'"[2]

In addition, the Florida appellate courts have determined that spoliation of evidence is based upon "the loss of an intangible beneficial interest... in the preservation of identified evidence." *See* DiGiulio v. Prudential Property and Cas. Ins. Co., 710 So. 2d 3 (Fla. 4th DCA 1998). This does not support an argument that allegations of spoliation of evidence state a claim for bodily injury.

In sum, Part Two of the policy, the employer's liability portion, does not afford coverage to Home Emergency Services for the Milians' claims for spoliation of

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[2] *See also,* Salvioli v. Continental Ins. Co., 1996 WL 507297(N.D.Cal. 1996)(cause of action for negligent infliction of emotional distress did not trigger coverage because the facts alleged in the complaint did not indicate any physical manifestations of the emotional distress and, as such, the allegations did not suggest a claim for "bodily injury")(also holding that emotional distress arising out of non-covered acts or losses does not raise a potential of coverage); Nationwide Property & Cas. Ins. Co. v. Feryo Hearing Aid Serv., Inc., 895 F. Supp. 85 (E.D.Pa. 1995)(policy definitions of injury or bodily injury do not encompass mental or emotional harm); Kline v. The Kemper Group, 826 F. Supp. 123 (M.D.Pa. 1993)(emotional distress or humiliation of having employment terminated does not constitute "bodily injury"), *affirmed*, 22 F.3d 301 (3d Cir. 1994); Erie Ins. Co. v. Stalder, 682 N.E.2d 712 (Ohio App. 1996)(emotional distress is not a "bodily injury" (defined as "physical harm, sickness or disease) contemplated or covered under the terms of the insurance policy); David v. Nationwide Mut. Ins. Co., 665 N.E.2d 1171 (Ohio App. 1995)(emotional distress did not fall within policy definition of "bodily injury"(defined as "bodily injury, sickness or disease"); emotional distress, in the absence of some physical harm, does not even arguably constitute a "bodily injury"); Chatton v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 13 Cal Rptr. 2d 318 (Cal. App. 1992)(emotional distress without physical injury did not constitute "bodily injury").

evidence (and resulting loss of consortium) and their alleged financial and emotional damages. As such, this Court should reverse the Third District's finding, and conclude that Humana does not have a duty to defend or indemnify Home Emergency Services in the underlying action.

Although a finding that the Milians' underlying complaint does not seek recovery for "bodily injury" is dispositive of the initial coverage determination (and the conflict issue before this Court), there are a number of other reasons why the Humana policy does not provide coverage to Home Emergency Services for the Milians' claims. Humana has set forth each of these reasons below. Any one of these alternative arguments, standing alone, is sufficient to support a finding of no coverage (i.e., no duty to defend or indemnify) on the part of Humana, and each of these arguments was presented to the trial court in Humana's motion for summary judgment, and to the Third District on appeal (1R 62-126).[3]

B. The underlying complaint does not allege damages for bodily injury arising "out of and in the course of" Mr. Milian's

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[3] Pursuant to the "Tipsy Coachman" rule, even if this Court finds that the trial court's reason for its finding of no coverage was erroneous, that determination can be affirmed where there is some other basis to support it. *See e.g.,* Farrey's Wholesale Hardware Co., Inc. v. Hobesound Indus. Park, Inc., 719 So. 2d 374, 375 n.1 (Fla. 3d DCA 1998).

employment, and does not allege acts "necessary and incidental" to Home Emergency Services' work.

In order to be covered under Part Two of the Humana policy, a claim must not only seek recovery for a bodily injury arising out of an accident or a disease, but that bodily injury "must arise out of and in the course of the injured employee's employment" and be "necessary and incidental to" the insured's work. *See* Appendix A, Part Two, Subsection A(1).

To the extent that this Court might agree with the Third District, disagree with the Fourth District, and conclude that the Milian's have sufficiently alleged some bodily injury, those alleged bodily injuries did not "arise out of and in the course of the injured employee's employment."[4] The "injuries" set forth in Counts VII and VIII of the complaint arose out of the alleged destruction, abandonment, or misplacement of the ladder, at least one month after Mr. Milian's accident, and after the cessation of his employment. Further, the alleged action was by the employer, not the employee and, as such, was not in the course of Mr. Milian's employment.

Moreover, the act of maintaining a ladder for the purposes of a products liability

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[4] In addition, if the purported bodily injuries did occur in the course and scope of Mr. Milian's employment, his receipt of workers compensation benefits constitute his sole remedy under Florida law. *See* §440.11, Fla. Stat.(discussing exclusiveness of liability).

claim against some third party, which Home Emergency Services allegedly failed to do, is not "necessary or incidental" to its work, as required under the policy. As such, Humana has no duty to defend these claims.

II. THE EXPRESS POLICY EXCLUSIONS APPLY TO PRECLUDE COVERAGE FOR THE PLAINTIFF'S SPOLIATION CLAIMS AS STATED IN THE UNDERLYING COMPLAINT.

There are two claims against the insured, Home Emergency Services, in the underlying complaint filed by the Milians. Count VII specifically alleges that Home Emergency Services was aware of Mr. Milian's intent to initiate a claim against the manufacturer and distributor of the ladder by virtue of communication with Mr. Milian's attorneys. *See* Appendix B, p. 9, ¶48. The Milians further contend that Home Emergency Services entered into a contractual agreement whereby it undertook a duty to preserve the ladder, and that Home Emergency Services breached that contractual agreement and violated its duty to preserve the evidence when it disposed of the ladder. *See* Appendix B, p. 9-10, ¶50 (and attached letter). As will be discussed below, this policy expressly excludes coverage for a liability assumed under a contract or agreement.

Likewise, in Count VIII of the underlying complaint, the Milians allege that Home Emergency Services violated a statutory (as opposed to contractual) duty to

preserve the ladder. Specifically, the Milians contend that Home Emergency Services violated §440.39(7) of the Florida Statutes when it disposed of the ladder. *See* Appendix B, p. 11-12, ¶59-65. In addition, it is undisputed that Mr. Milian obtained workers' compensation benefits under Part One of this same policy. In Part Two, the employers liability portion, this policy expressly excludes coverage for "an obligation imposed by workers' compensation law." This would, of course, be similar to the exclusion in the Lincoln Ins. Co. general liability policy that the Third District, en banc, found applicable to exclude coverage for the "bodily injuries" in this case. *See* Lincoln Ins. Co., 812 So. 2d at 439.

B. The policy expressly excludes coverage for liability assumed under a contract thus barring coverage for Count VII of the underlying complaint.

Exclusion 1 of the policy precludes coverage for "liability assumed under a contract." *See* Appendix A, Part Two, Subsection C(1). The allegations of the complaint specifically state that Home Emergency Services "entered into an agreement/contract to maintain the ... ladder." *See* Appendix B, ¶¶13, 50, 62). Such exclusions have been applied to support a finding that an insurer has no duty to defend claims arising out of a contractual agreement.

This exclusion is generally applied to cases where an insured enters into an agreement whereby it undertakes the duty to indemnity a third party. *See, e.g.,* Aetna

Casualty and Surety Ins. Co. v. McKennedy Bros., Inc., 1996 WL 1186795 (Mass. Super. 1996); United States Fidelity & Guaranty Co. v. Illinois Transport Equipment Serv., Inc., 1994 WL 240479 *3 (N.D.Ill. 1994); Karadis Painting Co. v. Pennsylvania Nat'l Mutual Casualty Ins. Co., 292 A.2d 42, 45 (N.J. App. 1972). Home Emergency Services' contractual agreement to safely maintain the ladder can, and should, be analogized to an indemnity type of situation.

Admittedly, this exclusion does not preclude coverage where the insured would have been liable regardless of the contractual undertaking. Id. In this case, however, there was no common law duty for Home Emergency Services to maintain the ladder, nor have the Milians alleged such a cause of action in their underlying complaint, the language of which is determinative of coverage. Absent its contractual agreement to do so, and the statutory duty discussed below, Home Emergency Services would not have been liable for misplacing or disposing of the ladder. *See, generally,* Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1990)(in this, the first decision, nation-wide to set forth the elements of a cause of action for spoliation of evidence, the court expressly held that there must be " a legal or contractual duty" to preserve the evidence).

In determining whether there is a duty to defend and/or indemnify the insured, a court must compare the allegations in the complaint with the relevant language in the

policy. *See* Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1997); Aetna Commercial Ins. Co. v. Am. Sign Co., 687 So. 2d 834 (Fla. 2d DCA 1996)*, rev. denied,* 698 So. 2d 543 (Fla. 1997); Allstate Ins. Co. v. Travers, 703 F. Supp. 911 (N.D.Fla. 1988). If the alleged facts fall outside the policy coverage or within the exclusionary language, there is no duty to defend. Id.

Here, the allegations of Count VII clearly set forth a claim for Home Emergency Services' breach of its contractual agreement to maintain the ladder. Count VII is framed in terms of a breach of contract, and such claims are expressly excluded from coverage. *See, generally,* Holman Erection Co., Inc. v. Employers Ins. of Wausau, 920 P.2d 1125, 1129 (Ore. App. 1996)(precluding coverage for breach of contract claim based on policy exclusion for "liability assumed under a contract"); Ross v. Briggs and Morgan, 540 N.W. 2d 843 (Minn. 1995)("To equate one set of claims with those covered under the policy is to engage in a far too generous reading of the complaint... ."). *See also,* Hertz Corp. v. Smith, 657 A.2d 1316, 1318-1319 (Penn. Super. 1995)(by entering into a rental agreement, the insured agreed to be contractually responsible for any and all damages; thus, the claim against the insured was for breach of contract, not tort, and it would be inappropriate to find coverage); David McDermott Chevrolet, Inc. v. Hanover Ins. Co., 1993 WL 489382 (Conn. Super. 1993)(applying contractual exclusion to preclude coverage where insured voluntary

assumed a duty in an automobile rental agreement). In turn, there is no duty to defend Count VII of the underlying spoliation action under the Employers Liability portion of this policy.

B. The policy excludes coverage for any obligation imposed by a workers compensation law thus barring coverage for Count VIII of the underlying complaint.

Likewise, Exclusion 4 of the policy precludes coverage for "any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law." *See* Appendix A, Part Two, Subsection C(4). Count VIII of the complaint alleges that Home Emergency Services was under a statutory obligation, pursuant to §440.39(7) of the Florida Statutes, to aid Mr. Milian in any and all third party actions arising out of the injury he sustained, which duty included the preservation of all evidence necessary to establish the third party's liability. *See* Appendix B, p. 11-12, ¶59-65. Thus, the complaint alleges a violation of Chapter 440 of the Florida Statutes, which is Florida's "workers compensation" law. *See* §440.01, Fla. Stat. ("This chapter may be cited as the 'Workers' Compensation Law.'")

In addition, it is important to recognize that the subject insurance policy in this case is separated into two parts. The first, Part One, governs workers' compensation injuries. The second, Part Two, expressly excludes coverage for obligations imposed

by workers' compensation laws. The two different types of coverage have been deemed "mutually exclusive." *See* Culligan v. State Compensation Ins. Fund, 96 Cal. Rptr. 2d 656, 662 (Cal. App. 2000)(also recognizing that an employers liability policy provides coverage for injuries to employees that are not covered by workers' compensation). *See also*, Selkirk Seed Co. v. State Ins. Fund, 18 P. 3d 956, 960 (Idaho 2000)("Part Two applies in only limited circumstances, and the exclusion of any obligation imposed by worker's compensation law serves only to preclude operation of Part One in the event the terms and conditions of Part Two have been met."). Here, it is undisputed that Mr. Milian obtained workers compensation benefits under Part One of the policy and, as such, should be precluded from recovering from the same employer, by virtue of the same carrier, under Part Two by virtue of this "workers compensation" exclusion.

Florida case law, in fact, suggests that the purpose of a "workers' compensation exclusion" is "to exclude coverage of those employees protected by the workers' compensation law." *See* Greathead v. Aspludh Tree Expert Co., 473 So. 2d 1380, 1383 (Fla. 1st DCA 1985). The exclusion has been interpreted to exclude coverage where the insured is otherwise liable for the claimant's injuries under workers' compensation. *See* Oppenheim v. Reliance Ins. Co., 804 F. Supp. 305, 308 (M.D.Fla. 1991)(noting that the exclusion prohibited the claimant from recovering from

the named insured because he recovered under workers compensation). *See also* Transamerica Ins. Co. v. Superior Court of Los Angeles County, 35 Cal. Rptr. 2d 259, 264 (Cal. App. 1995)("where workers' compensation liability exists, there is no coverage under the employer's liability portion of the policy, thereby affording only defense and indemnity for the workers' compensation claim").

It bears repeating that Mr. Milian obtained workers' compensation benefits under Part One of this same policy for the "bodily injuries" he suffered when he fell from the ladder. As such, this exclusion, which precludes coverage for any obligation to which workers' compensation laws apply, bars any coverage under Part Two of the policy and, thus, there is no duty to defend, or indemnify, Home Emergency Services for the spoliation claim (or for the "bodily injuries" for which Mr. Milian has already recovered).

It is also important to recognize that the Third District, sitting en banc, already determined that an exclusion for injuries arising out of the scope of one's employment effectively excluded the spoliation claims under the commercial general liability policy issued by Lincoln Ins. Co. That exclusion is substantially similar, in scope, to the workers compensation exclusion found here in the employers liability policy. If a spoliation claim is actually one for "bodily injury," that bodily injury arose out of Mr. Milian's employment and is covered by workers compensation coverage (Part One)

and expressly excluded from Employers Liability coverage (Part Two).

The Third District concluded that Home Emergency Services was sued in a "capacity other than as employer." *See* Home Emergency Services, Inc. v. Humana Worker's Compensation Services, Inc., 815 So. 2d 665 at 667. This is misplaced, particularly as to Count VIII of the underlying complaint, as Humana was only statutorily obligated to maintain the ladder for Milian's benefit by virtue of its relationship as his employer. Absent such a relationship, the "workers' compensation law," Chapter 440 and §440.39(7), would not be applicable.

CONCLUSION

The Milians claim is one for spoliation of evidence. Otherwise stated, they have sued Humana for the loss of an alleged ability to state claims against the manufacturer and distributor of the discarded ladder. Such a claim is one for an *intangible* interest. Mr. Milian's claim does not allege that Home Emergency Services is in any way responsible for his bodily injuries. Moreover, Mr. Milian recovered for his bodily injuries in accordance with Florida law, i.e., by virtue of his worker's compensation claim.

This Court should agree with the rationale of the Fourth District based on the specific allegations of the complaint and the clear language of the applicable policies and hold that a spoliation claim does not state a claim for "bodily injuries" arising out

an accident or a disease. Accordingly, this Court should disagree with the Third District, and affirm the trial court's entry of summary judgment in favor of Humana which was based on the same reasoning later adopted by the Fourth District in Norris. Specifically, this Court should reinstate the trial court's conclusion that "the underlying spoliation claim by Mr. Milian, for which coverage is sought by Home Emergency Services, Inc., is not a bodily injury or personal injury claim. Since the cause of action in the underlying case is one for spoliation of evidence which occurred after the personal injury itself, it cannot and does not constitute a bodily injury or personal injury claim." In addition, various other policy provisions and exclusions (which were presented to the trial court) support the finding of no coverage in this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief

was served by regular U.S. Mail this 13th day of August, 2002 to all counsel on the attached Mailing List.

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DEBRA POTTER KLAUBER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Merits Brief was prepared in 14-point Times New Roman Font.

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DEBRA POTTER KLAUBER