IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC 02-311

COREGIS INSURANCE COMPANY,
Designated as Movant,

VERSUS

MOSQUITO CONTROL SPECIAL TAXING DISTRICT a/k/a
THE FLORIDA KEYES MOSQUITO CONTROL DISTRICT,
Designated as Respondent.

ANSWER BRIEF

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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INTRODUCTION

Defendant/Appellant COREGIS INSURANCE COMPANY will be referred to as it stands in this Court, as it stood in the federal district court, and as "Coregis" or "the insurance company." Plaintiff/Appellee MOSQUITO CONTROL DISTRICT OF FLORIDA, a/k/a/ THE FLORIDA KEYS MOSQUITO CONTROL DISTRICT, will be referred to as it stands in this Court, as it stood in the district court, and as "the District."

For this Court's convenience, the District has filed a separate appendix with this brief containing excerpts from the record on appeal most often cited in this brief. Therefore, citations to the record will be to the appendix, if therein, for example "A" followed by the appendix tab number and page number where appropriate. Citations to other portions of the record on appeal will be to the volume and docket number of the record followed by the page number or exhibit number where appropriate, for example "R3-555 at 3." Emphasis is supplied by counsel unless otherwise indicated.

QUESTIONS PRESENTED

The United States Court of Appeals for the Eleventh Circuit certified the following questions to this Court:

1) Whether a petition before the Florida Monroe County Career Service

Counsel was a proceeding in a "court of law."

2) If so, whether the petition was seeking "money damages."

STATEMENT OF THE CASE AND FACTS

This is an action by an insured, the Mosquito Control District of Florida, for declaratory relief and damages caused by its insurance company's failure to defend the District against a claim by a District employee in the Monroe County Career Service Council ("MCCSC"). Coregis refused to defend the District, even though the entire purpose of the Public Officials and Employment Liability Insurance Policy was to indemnify the District for claims by employees, the relief requested was covered by the policy, and the policy did not exclude coverage for claims filed in the MCCSC. Applying Florida law, the district court granted summary judgment for the District, and the insurance company appealed to the federal Eleventh Circuit. The Eleventh Circuit certified two questions to this Court because there is no definitive Florida law on these issues. (A1).

The policy. The District purchased a Public Officials and Employment Liability Insurance Policy with an "Enhanced Employment Liability Endorsement" from Coregis in 1996. (A3). The policy states: "The Company will pay on behalf of the Insureds Loss as a result of civil Claims made against the Insureds." (A3 at ¶ I.). In the "Defense, Investigation and Settlement of Claims" section, the police

states:

> As respects **Claims** for **Loss** which is covered by the Policy:
>
> A. The Company shall have the right and duty to select counsel and to defend any **Suit**.
>
> B. In addition to the applicable limit of liability, the Company shall pay:
>
> 1. **Claim Expense**s incurred in the defense of covered **Suits**.

(A3 at ¶ II.).

The policy defines a "**suit**" as "a proceeding in a **court of law** where **Money Damages** may be awarded." (A3 at ¶ V.K.). The policy does not define either "proceeding" or "court of law." However, the policy contains an extensive "Exclusions" provision which provides that the policy does not apply to sixteen separate categories of claims. (A3 at ¶ VI.). As part of the "Enhanced Employment Liability Endorsement," that list of exclusions was amended to include "any obligation of the Insured under a worker's compensation, disability benefits, or unemployment compensation or any similar law." (A3). With all these express exclusions, the policy does not expressly exclude claims for wrongful termination or claims before the MCCSC.

The policy defines a "**Claim**" as "a demand for **Money Damages** as of

right." (A3 at ¶ V.H.). The policy defines "**Loss**" as "**Money Damages** which the Insured becomes legally obligated to pay by reason of a Wrongful Act." (A3 at ¶ V.L.). The policy defines "**Money Damages**" as "monetary compensation for past harms or injuries." (A3 at ¶ V.I.). The policy does not define either "compensation" or "past harms or injuries."

However, the policy contains numerous exclusions from the definition of "**Loss**." (A3 at ¶ V.L.). That section expressly excludes fees, but only in a very limited context, i.e., where they are taxed against the Insured but "another entity or insurer is obligated to defend or reimburse the Insured for such costs." (A3 at ¶ V.L.7.).

The MCCSC. The MCCSC was created by the Florida Legislature in 1969 to handle public employee grievances, disciplinary actions, and appeals of certain employer decisions, for the public employees in Monroe County, Florida. Ch. 69-1321, Laws of Fla., amended Ch. 76-439, Laws of Fla. Thus, the MCCSC is the only forum in which District employees have a remedy for basic employment disputes.

> Any career service employee who has been suspended, discharged, given a reduction in pay or a demotion, shall have the right to appeal said action to the career service council by filing a petition with the said council within thirty (30) days following such suspension, discharge,

> reduction in pay or demotion . . . .
>
> After hearing said petition, said council may order the reinstatement of said employee, **with or without back pay**, or otherwise amend, alter, sustain, or reverse the decision of the employer. The employer and the employee concerned shall be notified immediately if any action taken by said council, and the decision of said council shall be binding on all parties concerned.

Id. The MCCSC has five members who judge these actions, one of whom is appointed by the District. Id. The MCCSC has subpoena power and holds hearings on employee petitions. Id.; Ch. 76-439, Laws of Fla.

The District is a special taxing district of the state of Florida, and its employees are career service employees. Therefore, at the time the District purchased the policy from Coregis in 1996, the MCCSC was the proper forum for disputes by District employees who were "suspended, discharged, given a reduction in pay, or a demotion." Coregis has never argued, nor is there any evidence in the record to suggest, that the insurance company was unaware of the MCCSC at the time it sold a "Public Officials and Employment Liability Insurance Policy" to the District.

The underlying claims. The underlying facts in this case are undisputed. In 1997, the District's Board of Commissioners decided to downsize by eliminating various positions. Two of the employees affected were Dennis

Wardlow, the Assistant District Director, and Gregory Scott, the District Director. (R3-55 Exhibit 3). Employee Wardlow was placed on paid administrative leave prior to the elimination of his position, and Scott was fired. (R3-55 Exhibit 4).

Wardlow and Scott filed an action in circuit court in May 1997 against the District and two of its Commissioners--Stephen Smith and William Shaw. See (R3-55 Exhibit 7 at 1). The employees alleged that the manner in which their positions were eliminated was unlawful, and that Commissioners Smith and Shaw were engaged in a civil conspiracy and tortious interference with advantageous business or contractual relationships. (R3-55 Exhibit 3).

Wardlow then filed a petition in the MCCSC on June 25, 1997 challenging the District's actions. (A4 Exhibit "C"). In his initial petition, Wardlow sought a determination that he had committed no disciplinary violation and that there was no basis for eliminating his position. The petition stated that Wardlow believed the District would "'lay off' the Petitioner at its next 'emergency' Board meeting." (A4 Exhibit "C" at ¶ 25). He requested a determination that he had "committed no action which would constitute a disciplinary violation," that he be awarded fees and costs. (A4 Exhibit "C"). On April 6, 1998, after Wardlow's position was finally eliminated, Wardlow filed a Position Statement which stated that he was also seeking back wages and other remedies in the MCCSC action. (A5).

The District notified the insurance company of both the circuit court action and the MCCSC petition. (R3-55 Exhibit 7 at 2). Coregis agreed to defend the circuit court action under a reservation of rights. (R3-55 Exhibit 8). However, despite repeated requests, Coregis refused to defend either the District or its commissioners before the MCCSC, on the grounds that the petition was not covered by the policy. (A4 Exhibits "H" & "K"). Indeed, Coregis instructed the District not to even forward a copy of the MCCSC petition. (R3-55 Exhibit 7 at 3). Coregis also refused to provide independent counsel for commissioners Smith and Shaw to defend the circuit court action. (A4 Exhibit "D").

In March 1998, employees Wardlow and Scott voluntarily dismissed their circuit court action without prejudice. (R3-55 Exhibit 14). Commissioners Smith and Shaw then filed a civil action for malicious prosecution against Wardlow, Scott, and their attorneys. (R3-55 Exhibit 15). In response, Wardlow and Scott filed a Counterclaim and Third Party Complaint against Smith, Shaw, the District, their attorneys, and another District Commissioner alleging conspiracy, civil rights violations, and violations of the Florida Whistleblower Act. (R3-55 Exhibit 16). Again, Coregis agreed to defend the circuit court counterclaim and third-party action under reservation of rights, but continued to refuse to defend the MCCSC petition. (R3-55 Exhibit 17). The insurance company also refused to provide

independent counsel for the District commissioners who were sued in the circuit court action despite the obvious conflict of interest.[1]

On October 6, 1998, the District filed the present action, which was removed from Florida state court to the Southern District of Florida, seeking declaratory relief and recovery of fees paid defending the MCCSC petition, and defending Commissioners Smith and Shaw in the circuit court actions. (R1-1). The District also sought fees for the present action under section 627.428, Florida Statutes.

In July 1999, during mediation for the pending circuit court actions, Coregis agreed to settle all actions between the employees, the District, and its commissioners -- **including the MCCSC petition** -- by paying the employees $80,000. (R3-55 Exhibit 19). After that, the only action remaining was the District's claim against Coregis in this action for its refusal to defend the District before the MCCSC and to provide independent counsel for Smith and Shaw in the circuit court actions. The latter claim was settled in mediation of November 7, 2000. All other claims were dismissed with prejudice. See (R3-55 Exhibit 19).

Both Coregis and the District filed motions for summary judgment in the

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[1]Two of these commissioners had criminal charges pending allegedly arising out of the same conduct as the circuit court actions. The conflict of interest between the interests of the two commissioners and the District was clear. See Rule 4-1.7, Rules Regulating The Fla. Bar.

district court. (R2-52, R3-55). Coregis argued the MCCSC was not covered under the policy because the initial petition sought only injunctive relief and attorney's fees and that the MCCSC was not a "court of law." (R2-52, R3-55). The District argued that Coregis had a duty to defend the MCCSC petition under the policy because Wardlow sought "Money Damages" under the policy, including back pay, and that the MCCSC is a venue covered by the policy because it is a judicial tribunal and petitions before the MCCSC are not expressly excluded by the policy. (R3-55).

The district court granted summary judgment for the District on December 6, 2000. (A2). The court relied in part on the definition of "court of law" in Black's Law Dictionary, to rule that the MCCSC was a "court" under the policy because it is a "'duly constituted tribunal administering the laws of the state or nation.'" Id. at 6. The district court also noted that the petition sought monetary compensation in the form of attorney's fees. Id. at 7. Therefore, the district court held that Coregis was obligated under the policy to provide a defense to the MCCSC action and was now liable for attorney's fees. Id.

The parties stipulated that the amount of damages -- including attorney's

fees, costs, and expenses for the MCCSC petition -- was $217,560.77. (R2-72).[2] However, Coregis also filed a motion to amend the judgment under Rule 59. (R2-64). The district court denied that motion on August 23, 2001. (R2-70).

Coregis appealed to the United States Court of Appeals for the Eleventh Circuit. (R2-73). Finding no definitive Florida law on the subject, the Eleventh Circuit certified two questions to this Court:

1) Whether a petition before the Florida Monroe County Career Service Counsel was a proceeding in a "court of law."
2) If so, whether the petition was seeking "money damages."

(A1 at 3).

[2]The District's motion for fees and costs under section 627.428, Florida Statutes, for prosecuting this cases which is currently pending. Pursuant to Fla.R.App.P. 9.400, the District is also filing a motion for appellate attorney's fees with this Court.

SUMMARY OF ARGUMENT

The Eleventh Circuit certified two questions requiring interpreting an insurance contract under to Florida law. The first issue is whether the MCCSC is a forum covered by this Public Officials and Employment Liability Insurance Policy -- which provides coverage for proceedings in a "court of law where Money Damages may be awarded." The insurance policy does not define the term "court of law." However, Florida courts have given a broad definition to "court" and have recognized that administrative agencies can function in as judicial or quasi-judicial tribunals. Also, interpreting this term narrowly would defeat the purpose of the policy as it would eliminate coverage in the forum required for the types of actions this policy was purchased to cover. At a minimum, this term is ambiguous and must be construed against the insurance company. Applying well-settled Florida law on interpreting insurance contracts, this Court should answer the first question in the affirmative.

This Court should also answer the second question in the affirmative. Wardlow's petition to the MCCSC included a request for attorney's fees and also included facts indicating that he would also be seeking back wages. Both are "Money Damages" under the terms of this policy.

ARGUMENT

Introduction. This is a case about whether an insurance company can interpret its policy so narrowly that it defeats the purpose for which the policy was purchased. Coregis seeks to read key language in this Public Officials and Employment Liability Insurance Policy to deny coverage for precisely the types of claim that would logically come within such a policy -- a claim for wrongful termination of a District employee -- in the forum designated as the only one appropriate for such claims for decades before this policy was issued.

There is no question that this insurance contract is governed by Florida law. Yet Coregis' argument ignores the well-established principles of Florida law on the interpretation of insurance contracts. "[I]nsurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29, 34 (Fla. 2000); Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So.2d 467, 470 (Fla. 1993); see also Key v. Allstate Ins. Co., 90 F.3d 1546, 1548-49 (11th Cir. 1996)(Under Florida law, "a court must first examine the natural and plain meaning of a policy's language"). "If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, the insurance

policy is considered ambiguous." Auto-Owners, 756 So.2d at 34; see also Dahl-Eimers v. Mutual of Omaha Life Ins. Co., 986 F.2d 1379, 1381 (11th Cir. 1993). "Ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy." Swindal, 622 So.2d at 470; see also Berkshire Life Ins. Co. v. Adelberg, 698 So.2d 828, 830 (Fla. 1997). Therefore, ambiguities in insurance contracts generally are construed in favor of providing coverage. Travelers Ins. Co. v. Bartoszewicz, 404 So.2d 1053, 1054 (Fla. 1981); Old Dominion Ins. Co. v. Elysee, Inc., 601 So.2d 1243, 1245 (Fla. 1st DCA 1992).[3]

Moreover, the context in which this Court must answer the certified question is significant. This case involves the insurance company's duty to defend -- not the duty to indemnify. An insurer's "duty to defend is distinct from and broader than the duty to indemnify against damages assessed." Baron Oil Co. v. Nationwide Mut.Fire Ins. Co., 470 So.2d 810, 813-14 (Fla. 1st DCA 1985); see also Lime Tree Village Community Club Ass'n v. State Farm Gen. Ins. Co., 980 F.2d 1402, 1405

[3]The importance of the rule that ambiguities in insurance contracts are interpreted liberally in favor of the insured and coverage was reaffirmed by this Court in Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1140 (Fla. 1998). In Deni, this Court rejected the doctrine of reasonable expectations to interpret insurance policy language as unnecessary "because in Florida ambiguities are construed against the insurer."

(11th Cir. 1993). "All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured, and if the complaint alleges facts which create **potential** coverage under the policy, the duty to defend is triggered." Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F.2d 810, 812 (11th Cir. 1985)(citations omitted); see also Grissom v. Commercial Union Ins. Co., 610 So.2d 1299, 1307 (Fla. 1st DCA 1992); Baron Oil, 470 So.2d at 814.

In this case, the policy states: "The Company will pay on behalf of the Insureds **Loss** as a result of civil Claims made against the Insureds." (A3 at ¶ I.). In the "Defense, Investigation and Settlement of Claims" section, the policy states:

> As respects **Claims** for **Loss** which is covered by the Policy:
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> A. The Company shall have the right and duty to select counsel and to defend and **Suit**.
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The policy defines a "**claim**" as "a demand for **Money Damages** as of right." (A3 at ¶ V.H.). The policy defines "**loss**" as "**Money Damages** which the Insured becomes legally obligated to pay by reason of a Wrongful Act." (A3 at ¶

V.L.). The policy defines "**Money Damages**" as "monetary compensation for past harms or injuries." (A3 at ¶ V.I.). The policy defines a "**suit**" as "a proceeding in a **court of law** where **Money Damages** may be awarded." (A3 at ¶ V.K.).

The Eleventh Circuit has sought this Court's opinion on the interpretation of this insurance policy under Florida law in two respects:

1) Whether a petition before the Florida Monroe County Career Service Counsel was a proceeding in a "court of law."

2) If so, whether the petition was seeking "money damages."

(A1 at 3). Coregis claims it had no duty to defend because the MCCSC is not a "court of law" covered by the policy and the relief requested in the MCCSC petition was not "Money Damages." Both claims must fail.

I. THE MCCSC IS A "COURT OF LAW" COVERED BY THE POLICY BECAUSE IT IS A TRIBUNAL SERVING A JUDICIAL OR QUASI-JUDICIAL FUNCTION.

The first question certified by the Eleventh Circuit is: "Whether a petition before the Florida Monroe County Career Service Counsel was a proceeding in a 'court of law.'" (A1 at 3). The quotation marks around the term "court of law" are significant; they serve as a reminder of the context in which the question must be answered. The issue before this Court is not whether the MCCSC is a "court" provided for in the Florida Constitution, or whether the Florida Legislature

exceeded its authority in creating the MCCSC, or whether the MCCSC is properly exercising judicial or quasi-judicial authority. The issue is whether the MCCSC is a forum covered by this Public Officials and Employment Liability Insurance Policy -- which provides coverage for proceedings in a "court of law where Money Damages may be awarded." (A3 at ¶ V.K.). Applying well-settled Florida law on interpreting insurance contracts, this Court should answer the first question in the affirmative.

Coregis chose not to define the term "court of law" in this policy. When an insurer chooses not to define a term in the policy, the insurer cannot "insist upon a narrow, restrictive interpretation of the coverage provided." National Merchandise Co. v. United Serv. Auto. Assoc., 400 So.2d 526, 530 (Fla. 1st DCA 1981); see also, e.g., Dahl-Eimers, 983 F.2d at 1382; State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So.2d 1072, 1076 (Fla. 1998); Budget Rent-A-Car Sys., Inc.v. Government Employees Ins. Co., 698 So.2d 608, 609 (Fla. 4th DCA 1997). Yet that is precisely what Coregis attempts to do here -- insist upon the most narrow, restrictive interpretation of "court of law" possible.

Coregis' argument is essentially this: A body is a "court" only when it is called a "court" -- an administrative tribunal is not called a "court" -- therefore, a tribunal like the MCCSC cannot be considered a "court of law" under the contract.

While an appealing syllogism on its face, there are several serious flaws in this argument.

A. Florida law recognizes that some forums not literally "courts" function as judicial tribunals.

Coregis' initial premise is incorrect -- Florida courts have not been so restrictive in defining what constitutes a "court." In Scholastic Systems, Inc. v. LeLoup, 307 So.2d 166 (Fla. 1974), this Court ruled that a body may be a "court" for some purposes, but not for others. The issue in Scholastic Systems was whether the Industrial Relations Commission ("IRC"), an administrative body that decides contested workers' compensation cases, is a judicial body satisfying the constitutional requirements of due process. The court stated that "[a] body may be a 'court' without being named within the constitutional article dealing with the judiciary (in the case of our state constitution Article V), so long as it fulfills the requirements making it a judicial body of review." Id. at 169. After reviewing definitions in two law dictionaries (Black's and Ballentine's), this Court found the IRC "easily fits within these definitions as a judicial tribunal meeting constitutional requirements," even though it was not "literally a 'court.'" Id. at 169-70. The IRC was "'[a] tribunal official assembled under authority of law at the appropriate time and place, for the administration of justice.'" Id. at 169 (quoting Black's Law

Dictionary). The IRC also qualified as:

> "An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in due course of law at times and places previously determined by lawful authority."

Id. at 169-70 (quoting Black's Law Dictionary). Thus, contrary to Coregis' claim at 10, this Court in Scholastic Systems did not distinguish between courts and administrative agencies for the purposes of due process when those agencies are acting as judicial or quasi-judicial tribunals. This Court did not rule that a hearing before the IRC satisfies due process because the decision can be appealed to a "court." This Court ruled that hearing before the IRC satisfies due process because the IRC is "a judicial tribunal performing the functions of a court." Id. at 170.

The dictionary definitions used by this Court in Scholastic Systems are consistent with prior Florida law. This Court in Haddock v. State, 192 So. 802 (Fla. 1939), defined a "court" as "a place where justice is judicially administered."

Moreover, this approach is consistent with Florida law on construing insurance policies and other contracts. It is well established that '[i]n construing

terms appearing in insurance policies, Florida courts commonly adopt the plain meaning of words contained in legal and non-legal dictionaries." Watson v. Prudential Prop. & Cas. Co., 696 So.2d 394, 396 (Fla. 3d DCA 1996)); see also Continental Cas. Co. v. Wendt, 205 F.3d 1258, 1263 (11th Cir. 2000); Berkshire Life Ins. Co. v. Adelerg, 698 So.2d 828 (Fla. 1997). Coregis' argument at 11-12 that it was somehow improper for the district court in this case to rely on the similar Black's Law Dictionary definition of "**court of law**" as "'any duly constituted **tribunal** administering the laws of the state or nation,'" is not well taken.

Coregis also argues at 11-12 that the district court's reliance on the Black's Law Dictionary definition was incomplete without contemporaneously analyzing the definition of "tribunal" in the same dictionary. Black's Law Dictionary defines "**tribunal**" as "the seat of a **judge**; the place where he administers justice. The whole body of **judges** who compose a jurisdiction; a judicial court; the jurisdiction which the **judges** exercise." With this definition as its premise, Coregis concludes that the definition of "**tribunal**," and therefore the definition of "**court of law**," cannot include the MCCSC because the MCCSC consists of "**members**" and not "**judges**."

Coregis is guilty of the same error of omission which it assigns to the district

court. Specifically, Coregis fails to consider the Black's Law Dictionary definition of "**judge**," which is defined as "a public officer who, by virtue of his office, is clothed with **judicial** authority." Black's Law Dictionary 754 (5th ed. 1979). The term "**judicial**" is defined as anything "having the character of judgment or formal legal proceedings." Id. at 759. The members of the MCCSC are clearly public officers and there can be no question that a hearing before the MCCSC is a formal legal proceeding or that the MCCSC can legally bind the parties before it.

The question is not whether the MCCSC has the word "court" in its name, or whether it is listed in the judiciary section of the Florida Constitution as a "court," but whether the MCCSC fits within the plain and ordinary meaning of "court of law." See, e.g., Wright v. Auto-Owners Ins. Co., 739 So.2d 180, 181 (Fla. 2d DCA 1999). Dictionaries are the standard way to determine that common, ordinary meaning. See, e.g., Berkshire Life Ins. Co., 698 So.2d at 831 (using definitions in the American Heritage College Dictionary and Merriam-Webster's Collegiate Dictionary to interpret insurance contract language).

The MCCSC, like the IRC, fits comfortably within the definitions used in the dictionary and Florida caselaw of a "court" or judicial tribunal. Although it is an administrative agency, it serves a judicial or quasi-judicial function in handling public employee appeals of disciplinary and other employer actions. See Ch. 69-

1321, Laws of Fla. Although like the IRC, the MCCSC may not "literally be a 'court,'" it acts as a judicial body that satisfies a "reasonable and practical construction" of the policy language. See Lindheimer v. St.Paul Fire & Marine Ins. Co., 643 So.2d 636, 638 (Fla. 3d DCA 1994)(courts apply reasonable and practical construction); Weldon v. All American Life Ins.Co., 605 So.2d 922, 915 (Fla. 2d DCA 1992)(same).

Florida law is clear that an administrative agency can function in both capacities.[4] For example, in Anoll v. Pomerance, 363 So.2d 329 (Fla. 1978), this court distinguished the orders of an administrative agency acting in an executive capacity from those of an administrative agency acting in a judicial or quasi-judicial capacity. "[A] judgment becomes judicial or quasi-judicial as distinguished from executive, when notice and hearing are required and the judgment of the board is contingent on the showing made at the hearing." Id. At

[4]Chief Judge of the Eighth Judicial Circuit v. Board of County Commissioners, 401 So.2d 1330 (Fla. 1981), and State ex rel. Second Dist. Court of Appeal v. Lewis, 550 So.2d 523 (Fla. 1st DCA 1989), cited by Coregis, are not to the contrary. These cases stand for the unremarkable position that the judiciary and the executive are two co-equal branches of government so that an administrative agency cannot unilaterally control the spending or use of courthouse space by the judicial branch. These cases address the internal administrative structure of the state government, and not the operation or function of these branches.

331. An order or judgment from an agency acting in an executive capacity is reviewable on writ of mandamus. Id. On the other hand, an order or judgment issued by the agency acting in a judicial or quasi-judicial capacity is reviewable by certiorari, id., just like any orders of any other court or judicial tribunal, and the doctrines of res judicata and collateral estoppel apply. See Holiday Ins, Inc. v. City of Jacksonville, 678 So.2d 528, 529 (Fla. 1st DCA 1996); University of Miami v. Zapeda, 674 So.2d 765, 766 n.2 (Fla.3d DCA 1996).

The MCCSC holds hearings, has subpoena power, and decides cases based on the facts and the law. See Ch. 69-1321, Laws of Fla.; Ch. 76-439, Laws of Fla. Decisions of the MCCSC are reviewable by the Third District Court of Appeal. Florida Keys Aqueduct Auth. v. Steadman, 419 So.2d 677 (Fla. 3d DCA 1982). Furthermore, as the district court below noted, Florida courts have issued writs of prohibition to the MCCSC, Wright v. Knight, 381 So.2d 729 (Fla. 3d DCA 1980), which is significant because writs of prohibition are directly solely to judicial acts. See generally 35 Fla.Jur.2d, Mandamus & Prohibition §146.

Moreover, the Florida legislature not only granted the MCCSC the authority to hear and decide public employee actions, but also to award damages in the form of back pay and attorney's fees. Ch. 69-1321, Laws of Fla.; Ch. 76-439, Laws of Fla. Therefore, the MCCSC fits within the policy language as a forum "where

Money Damages **may** be awarded," and the MCCSC can "legally obligate" the District to pay those damages.

Coregis' reliance on the unpublished district court opinion in Racal-Datacom, Inc. v. Insurance Co. of N. America, 1998 WL 1173527 (S.D. Fla. 1998), is misplaced. That case addressed whether an administrative notice and order of the Environmental Protection Agency ("EPA"), acting in its **executive** capacity, is a "suit" for the purposes of an insurance contract. As the process in no way resembled the proceedings of a judicial or quasi-judicial tribunal, not surprisingly the district court ruled it was not a proceeding in a "court of law." See also Foster-Gardner, Inc. v. National Union Fire Ins. Co., 959 P.2d 265 (Cal. 1998)(EPA notice and order not a "suit" because not result of adjudicative proceeding and no adjudicative proceeding would be commenced unless order was not complied with); Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co., 655 N.E.2d 842 (Ill. 1995)(Same); City of Edgerton v. General Cas. Co., 517 N.W.2d 463 (Wis. 1994)(Same). Moreover, the court noted that this particular EPA procedure was not even in existence when the policy was issued. Therefore, the parties could not have intended the term "suit" to apply to this situation. Racal-Datacom, 1998 WL 1173527 at *5.

By contrast, the MCCSC is acting in a judicial or quasi-judicial capacity, **not**

an executive capacity, in determining employee petitions such as Wardlow's. Moreover, the MCCSC existed, and handled employee grievances, long before the policy here was issued.

The MCCSC fits within the natural, ordinary definition of a "court of law," yet is not named a "court." At best, these represent two reasonable interpretations of the term "court of law." The former interpretation would allow coverage, and the latter would limit coverage. "If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the []other limiting coverage, the insurance policy is ambiguous . . . [and] is interpreted liberally in favor of the insured." Auto-Owners Ins. Co., 756 So.2d at 34. Therefore, the term "court of law" in this insurance policy must be construed in favor of the District, and in favor of coverage to include the MCCSC.

B. The purposes of this insurance contract can be met only if it is interpreted to provide coverage for proceedings before the MCCSC.

"To determine the intent of the parties, a court should consider the language of the contract, the subject matter of the contract, and the object and purpose of the contract." American Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So.2d 195, 197 (Fla. 1992). "In construing a contract the court must consider the objects to be accomplished, and to this end should place itself in the position of the parties

when the contract was entered into." Bay Management Inc. v. Beau Monde, Inc., 366 So.2d 788, 791 (Fla. 2d DCA 1978). "[I]nsurance policies will not be construed to reach an absurd result." Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1140 (Fla. 1998).

This insurance policy was not a general liability policy; it was a Public Officials and Employment Liability Insurance Policy, with an "Enhanced Employment Liability Endorsement." The purpose of this policy was specifically to protect the District against employee claims such as Wardlow's. The MCCSC is the required forum for such claims under the law. See Ch. 69-1321, Laws of Fla. Moreover, there is no evidence, and Coregis does not argue, that it was unaware at the time the policy was issued that the types of employee claims covered by this policy would be litigated in the MCCSC. The Florida Legislature created the MCCSC in 1969; this policy was issued in 1996.

It is simply absurd to interpret this policy in a way that would relieve the insurance company of a duty to defend, and bar coverage, for the cost of litigating precisely the types of claims for which this policy was purchased. When an agreement

> "is open to more than one interpretation, the reasonableness of one meaning as compared with the other and **the probability that men in the**

> **circumstances of the parties would enter into one agreement** or the other are competent for consideration as to what the agreement was which the written contract establishes."

James v. Gulf Life Ins. Co., 66 So.2d 62, 63 (Fla. 1953)(Citation omitted). The average purchaser of an employment liability policy would not expect it to begin coverage only when -- and if -- the lower tribunal's decision was appealed to the Third District Court.

If Coregis had intended to exclude employee claims in the MCCSC from coverage, it should have done so explicitly. It did not. Indeed, the policy does contain extensive exclusionary clauses in the policy itself and the attached endorsements. For example, the policy excludes actions arising out of most tortious, intentional, or criminal conduct, or breach of contract "except any Employment Contract." (A3 at ¶ VI.). The "Enhanced Employment Liability Endorsement" also excludes from coverage "any obligation of the Insured under a worker's compensation, disability benefits, or unemployment compensation or any similar law." (A3).

"[E]xclusionary clauses are construed even more strictly against the insurer than coverage clauses." Auto-Owners Ins. Co., 756 So.2d at 34; see also Purrelli v. State Farm Fire & Cas. Co., 698 So.2d 618, 620 (Fla. 2d DCA 1997). "[A]n

exclusionary provision must be narrowly and literally construed to ensure that it **unambiguously** prohibits coverage." Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 117 F.3d 1328, 1338 (11th Cir. 1997); see also Nixon v. Fidelity & Guar. Co., 290 So.2d 26, 28-29 (Fla. 1973); Progressive Ins. Co. v. Wesley, 702 So.2d 513, 515 (Fla. 2d DCA 1997); Croom's Transportation, Inc. v. Monticello Ins. Co., 692 So.2d 255, 256 (Fla. 1st DCA 1997).

Coregis was aware that it was selling an "employment claims" insurance policy to a public employer in Monroe County, Florida. The policy exclusionary clause indicates that Coregis was aware of the wide variety of possible employee claims, and expressly excluded some of them from coverage. Yet Coregis did not identify or expressly exclude either claims for wrongful termination or claims before the MCCSC. If Coregis had been aware from the express language of the policy that it would **not** defend or cover proceedings in the MCCSC, "'it might have rejected those terms and sought another policy.'" See Green v. Life & Health of America, 704 So.2d 1386, 1391 (Fla. 1998)(citation omitted).

This Court should interpret the term "court of law" in the insurance policy in favor of the insured -- the District -- to provide coverage. Coregis' hypertechnical interpretation is inconsistent with the natural, ordinary meaning of that term, with

the purpose of the policy, and with Florida law. Moreover, Coregis' argument merely highlights the ambiguity inherent in the term "court of law," which the insurance company itself chose to leave undefined in the policy. This ambiguity must be resolved in favor of the District. Therefore, the district court correctly ruled that under this policy Coregis had the duty to defend the District against employee actions in the MCCSC. This Court should answer the first certified question in the affirmative.

II. THE MCCSC PETITION SOUGHT "MONEY DAMAGES" TRIGGERING THE INSURANCE COMPANY'S DUTY TO DEFEND.

The second certified question is "whether the petition was seeking 'money damages.'" (A1 at 3). Coregis would like reframe this issue as whether attorneys fees constitute money damages. However, Coregis' argument ignores significant facts and is based on an interpretation of this policy and its duty to defend under that policy which is inconsistent with Florida law. This Court should answer the second certified question in the affirmative as well.

The reason why it matters whether Wardlow's petition was seeking "money damages" as contemplated by this contract is that the duty to defend is first determined by looking at the allegations in the complaint against the insured. See National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So.2d 533, 536 (Fla.

1977); see also Lime Tree Village, 980 F.2d at 1405. This means more than simply looking at the labels used in the complaint; it means looking at the facts alleged to determine whether under those facts the insured could be held liable for something covered by the insurance policy. "So long as the complaint alleges **facts** that create **potential** coverage under the policy, the insurer must defend the suit." Grissom v. Commercial Union Ins. Co., 610 So.2d 1299, 1307 (Fla. 1st DCA 1992); see also Lime Tree Village, 980 F2d at 1405 ("The insurer must defend when the complaint alleges facts which fairly and potentially bring the suit with policy coverage."); Trizec Properties, Inc. v. Biltmore Constr.Co., 767 F.2d at 811-12. Thus, the question is whether the **factual** allegations create the **potential** for coverage, not whether the causes of action or relief initially listed clearly come within the policy.

For example, in Lime Tree Village, the policy excluded coverage for intentional acts. 980 F.2d at 1403. The district court granted summary judgment for the insurance company because the underlying complaint alleged that the insured knowingly and intentionally engaged in numerous wrongful acts. Id. at 1404-05. The Eleventh Circuit, applying Florida law, vacated the judgment. The court ruled that under the facts alleged in the complaint the insured could be found liable for unintentional torts which would be covered by the policy -- even though

those torts were not specifically cited in the complaint. "If the facts alleged show **any basis** for imposing liability upon the insured that falls within policy coverage, the insurer has a duty to defend." Id. at 1406.

Here, the first pleading in the MCCSC setting out Wardlow's complaint was his initial petition. In that petition, Wardlow stated that he had been placed on administrative leave, that the District's Board had voted to eliminate his position and that the District would "'lay off' the Petitioner at its next 'emergency' Board meeting." (A4 Exhibit "C" at ¶ 25). Wardlow argued that the District's actions were contrary to law, and requested attorney's fees and costs incurred in bringing that petition. (A4 Exhibit "C").

The policy defines "**loss**" as "**Money Damages** which the Insured becomes legally obligated to pay by reason of a Wrongful Act." (A3 at ¶ V.L.). The policy defines "**Money Damages**" as "monetary compensation for past harms or injuries." (A3 at ¶ V.I.). The policy does not define either "compensation" or "past harms or injuries." However, Wardlow's allegations created at least the **potential** that Wardlow's petition would seek "Money Damages" which would be a "loss" covered by the policy because the foreseeable damages recoverable would include attorney's fees and back wages. Therefore, Coregis had a duty to defend.

A. Attorney's fees are "Money Damages" under this policy.

It is important to remember that the question is not whether attorney's fees constitute "damages" in the abstract, or for all purposes. The question is whether attorney's fees are "Money Damages" under this particular insurance policy. In construing contract language, "the terms of the contract must be given their everyday meaning and read in light of the skill and experience of ordinary people." Lindheimer v. St. Paul Fire & Marine Ins. Co., 643 So.2d 636, 638 (Fla. 3d DCA 1994); see also Braley v. American Home Assur. Co., 354 So.2d 904, 905 (Fla. 2d DCA 1978)(where insurer failed to define term in policy, the term should be given its everyday "man-on-the-street" meaning).

On its face, reimbursement for attorney's fees and costs expended in pursuing the MCCSC petition fits a common, ordinary interpretation of "damage" and "monetary compensation for past harms or injuries." However, Black's Law Dictionary 256 (5th ed. 1979) defines "compensation" as "that which is necessary to restore an injured party to his former position." The average reasonable person purchasing liability insurance would expect that insurance to cover the total sum of the judgment in favor of the plaintiff up to the policy limits. See City of Ypsilanti v. Appalachia Ins. Co., 547 F.Supp. 823 (S.D.Mich. 1982); Barton Protective Servs. Inc. v. Coverx Corp., 615 So.2d 438, 441 (La.Ct.App. 1993). Attorney's fees and costs of litigation incurred in obtaining relief would be necessary to

restore an employee plaintiff to his former position, and would be a logical consequence of the insured's past actions which harmed him.

"[R]esort should not be made to uncommon meanings nor contextual distortion." Morrison Assurance Co. v. School Bd. Of Suwannee County, 414 So.2d 581, 581 (Fla. 1st DCA 1982). It requires a very narrow, legalistic and hypertechnical interpretation of "monetary compensation for past harms or injuries" to exclude attorney's fees and costs from the definition of "Money Damages." Having failed to define those terms, Coregis cannot now insist on the most narrow interpretation of those terms possible. See National Merchandise Co., 400 So.2d at 530.

If Coregis wanted to exclude such compensation from coverage, it could easily have done so, and should have done so explicitly. See Golden Door Jewelry Creations, 117 F.3d at 1338; Nixon, 290 So.2d at 28-29; Progressive Ins., 702 So.2d at 55; Croom's Transportation, 692 So.2d at 256. Indeed, the policy contains numerous express exclusions from the definition of "**Loss**." (A3 at ¶ V.L.). Attorney's fees are specifically excluded only in a very limited context, i.e., where they are taxed against the Insured but "another entity or insurer is obligated to defend or reimburse the Insured for such costs." (A3 at ¶ V.L.7.).

Reading the exclusionary language strictly as required by law, the language

of the policy specifically contemplates that attorney's fees in other contexts would be covered. If attorney's fees were not otherwise covered as "**Loss**," there would be no reason to expressly exclude fees in that specific context. Thus, under the specific language of this policy, attorney's fees are "Money Damages" and Coregis had a duty to defend the District against Wardlow's petition.

As the Eleventh Circuit noted in its opinion certifying this case, there is no dispositive Florida case law on the issue of whether attorney's fees constitute "damages" under an insurance contract. Moreover, no Florida case addresses whether attorney's fees can be money damages under an insurance contract where, as here, there is language in the contract indicating that attorney's fees generally are covered. However, currently pending before this Court is Home Away from Home of Holly Hill, Inc. v. Scottsdale Ins. Co., Case No. SC01-2279, which addresses the issue of whether attorney's fees constitute "damages" in the context of a different insurance contract. In that case, the Fifth District ruled that attorney's fees did not constitute "damages" under policy language that "[t]he company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as **damages** because of injury to which this insurance applies." Scottsdale Ins. Co. v. Haynes, 793 So.2d 1006, 1008 (Fla. 5th DCA 2001). The language of the Scottsdale policy differs from the Coregis policy at

issue in this case both because the Coregis policy is not an "all sums" policy, and more importantly, because there apparently is no language in the Scottsdale policy excluding attorney's fees from the definition of "damages" in some contexts but not in others.[5]

To the extent the Fifth District ruled in Scottsdale that attorney's fees are never "damages" under an insurance policy, that decision is incorrect. First, the court did view the policy through the proper lens. The policy did not define "damages," yet the court apparently did not consider the rule that when an insurer chooses not to define a term in the policy, the insurer cannot "insist upon a narrow, restrictive interpretation of the coverage provided." National Merchandise Co., 400 So.2d at 530. Nor did the court look at the common, ordinary meaning of the term "damages," but instead at the narrow, specific legal use of that term.

Indeed, the Fifth District relied less on the the language of the policy itself than on a misapplication of Florida law addressing attorney's fees in a very different context. The court stated that: "It is generally held that attorney's fees are not damages, but are ancillary to damages, and are not part of a substantive claim." Id. at 1009. However, the court relied for support on cases involving pleading and

[5]As these cases involve different policy language, a ruling in one case does not necessarily mandate the same ruling in the other.

proof of attorney's fees: Cheek v. McGowan Electric Supply Co., 511 So.2d 977 (Fla. 1987); B&H Constr. & Supply Co. v. District Bd. Of Trustees of Tallahasse Community College, 542 So.2d 382 (Fla. 1st DCA 1989).

In Cheek, this Court held that proof of attorney's fees need not be presented at trial but may be presented after final judgment.

> The district courts of appeal which have held that contractually authorized attorney's fees are subject to jury trial do so on the premise that attorney's fees are recoverable as a part of the damages. We differ with that conclusion because the recovery of attorney's fees is ancillary to the claim for damages.

511 So.2d at 979. However, this Court's decision in Cheek (applied by the First District in B&H) had a very practical basis: "[A]n attorney's fee can only be recovered after the determination of the prevailing party has been made." Id.

This Court later clarified Cheek, and in so doing distanced itself from language in that opinion implying that attorney's fees are not damages:

> [T]he reference in [Cheek] to the "collateral," "independent," and "ancillary" nature of claims for attorney's fees recognizes only that the proof required in such claims is not integral to the main cause of action. A motion for attorney's fees requires consideration of factors distinct from the issues decided on the merits of the cause of action. Thus, it is not improper to adjudicate entitlement to attorney's fees after resolution of the other claims.

Stockman v. Downs, 573 So.2d 835, 837 (Fla. 1991). In Stockman, the district court had used the rationale of Cheek to rule that attorney's fees need not be pled because they are "collateral and independent" of a claim for damages. Id. This Court quashed the district court's decision, holding that a claim for attorney's fees must be pled or it is waived. Id. at 837-38. Thus, this Court in Stockman ruled that attorney's fees should be treated like damages for some purposes, but not for others.

This is not a new concept. For example, attorney's fees are considered elements of damage for the purpose of calculating the jurisdictional limits of the county court. See Prudential Ins. Co. v. Lamm, 218 So.2d 219 (Fla. 3d DCA 1969). The rationale for this is that attorney's fees are not considered "costs" unless made so by statute. Id. at 219. If not specifically designated as "costs," "they are to be treated as an element of damages." Id. Also, attorney's fees are "damages" when sought by an indemnitee when his insurance company wrongfully fails to defend. Pruess v. United States Fire Ins. Co., 414 So.2d 249, 250 (Fla. 4th DCA 1982). The context is all important. The fact that attorney's fees are not considered "damages" in one context does not necessary mean that are not or should not be considered "damages" in another.

This Court's choice of language in Cheek is very revealing in another way.

This Court specifically disagreed with the district courts' "**conclusion**" that a jury trial was required for attorney's fees claims, not with the "**premise**" on which that conclusion was based: "that attorney's fees are recoverable as part of the damages." 511 So.2d at 979. Especially after Stockman, the shoulders of Cheek are not broad enough to support the district court's use of it in Scottsdale.

Coregis cites only two cases in support of its claim that attorney's fees cannot be considered "Money Damages": A Seventh Circuit case interpreting Wisconsin law, United States v. Security Mgmt. Co., 96 F.3d 260 (7th Cir. 1996); and a California case applying California law, Cutler-Orosi Unified School Dist. v. Tulare County School Dists. Liability/Property Self Ins. Auth., 37 Cal.Rptr.2d 106 (Ct.App. 1994). Neither case is on point. Not only does neither case apply the same policy language used in this policy, neither apply Florida law. Moreover, both cases also involve claims under federal statutes that categorize attorney's fees as separate from damages. See Security Mgmt. Co., 96 F.3d 260 (Fair Housing Act); Cutler-Orosi, 37 Cal.Rptr.2d 106 (Voting Rights Act).

Other courts have held that attorney's fees were "damages" under insurance contracts. See Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 944 F.2d 940 (D.C. Cir. 1991); Hyatt Corp. v. Occidental Fire & Cas., 801 S.W.2d 382 (Mo.Ct.App. 1990); City of Ypsilanti v. Appalachia Ins. Co., 547 F.Supp. 823

(S.D.Mich. 1982), aff'd, 725 F.2d 682 (6th Cir. 1983); Kelloch v. S&H Subwater Salvage, Inc., 397 F.Supp. 742 (E.D.La. 1973); Barton Protective Servs., Inc. v. Coverx Corp., 615 So.2d 438 (La.Ct.App. 1993). For example, the court in Hyatt stated that "an award of attorneys' fees is indistinguishable from a damages award for coverage purposes." 801 S.W.2d at 393.

This Court should rule that, absent an express exclusion in the policy, attorney's fees constitute "damages" under liability insurance policies. To hold otherwise would frustrate the very purpose for which insureds purchase liability policies -- to protect them against all financial liability if sued. It is absurd to read policy language in such a way that insureds are left exposed to liability for attorney's fees assessed as part of the judgment -- an amount which often far exceeds the amount of "actual damages." If insurance companies wish to limit coverage in this way they must be required to do so unequivocally and in plain English.

Coregis did not so limit "Money Damages" in this policy and cannot do so now. At a minimum, what a review of the policy language, as well as the state of the law in Florida and elsewhere, shows is that reasonable minds can differ about whether attorney's fees should be considered "damages" or "compensation for past harms or injuries." One interpretation would allow coverage, and one would limit

coverage. As previously noted, this means that the policy language should be interpreted liberally in favor of the District, and in favor of coverage to include attorney's fees. See Auto-Owners, 756 So.2d at 34.

B. Wardlow's petition also sought damages in the form of back wages.

Coregis would like this Court to believe that resolution of this case depends on interpreting "Money Damages" in this contract to include attorney's fees -- it does not. There is a reason the Eleventh Circuit did not limit its certified question to whether attorney's fees constitute "Money Damages." Wardlow's MCCSC action also included a claim for back wages.[6]

The initial petition stated that petitioner Wardlow believed the District would "'lay off' the Petitioner at its next 'emergency' Board meeting." (A4 Exhibit "C" at ¶ 25). Improperly placing Wardlow on administrative leave and

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[6]The federal district court did not reach this question. It did not have to as it ruled the petition sought "Money Damages" in the form of attorney's fees. (A2 at 7). There is no factual dispute that Wardlow filed a "Position Statement" or what that pleading said. See (A5). The legal effect of that pleading is a question of law that is appropriate for summary judgment. See Cox v. CSX Intermodal, Inc., 732 So.2d 1092 (Fla. 1st DCA 1999)(where determination depends upon construction of written instrument and the legal effect of that instrument, issue is one of law determinable on summary judgment); see also TLZ Properties v. Kilburn-Young Asset Mgmt. Corp., 937 F.Supp. 1573 (M.D.Fla.), aff'd, 119 F.3d 10 (11th Cir. 1996)(Same).

eliminating his position would be a "Wrongful Act,"[7] and the District would be legally obligated for back pay if assessed by the MCCSC. See Ch. 69-1321, Laws of Fla. Back wages fit any reasonable definition of the terms "compensation" or "**past** harms or injuries."[8] Because the facts alleged in the MCCSC petition could

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[7]The policy defines "Wrongful Act" as "any act, error, or omission of an Insured constituting a breach of a duty imposed by law or a breach of an Employment Contract." (A3 at ¶ V.F.).

[8]Coregis argued in the district court that back wages were excluded from the definition of "Loss" by an "Employment Benefits Exclusion" attached to the policy. Coregis did not make the argument in its initial brief in the Eleventh Circuit and has not made that argument in this Court. It is therefore waived under the rules of the this Court and the Eleventh Circuit. See United States v. Kimmons, 1 F.3d 1144, 1145 (11th Cir.1993)("arguments raised for first time in a reply brief not properly before the reviewing court"); Cochran v. State, 476 So.2d 207, 208 (Fla. 1985).

Moreover, that provision excluded "Employment Benefits owed as a result of an Employment Contract." (A3). The policy defines "Employment Benefits" as "wages, salaries, bonuses, incentives, perquisites, fringe benefits, or other payments, entitlements benefits owed to any Employee as a result of an Employment Contract." However, Wardlow did not have an employment contract. He was a career service employee whose rights to employment, and any benefits which flowed from those rights, were imposed by law and not an employment contract. Wardlow's petition was based on a violation of Chapter 69-1321, i.e. that his damages were a result of "discrimination caused by political affiliations," and not a breach of an employment contract. See (A4 Exhibit "C").

Moreover, if that exclusion means what Coregis claimed, it directly conflicts with other provisions of the policy, such as the "Enhanced Employment Liability Endorsement." That endorsement, for which the District paid an additional premium, expanded the "Employment Claims" covered by the policy to include "any Claim by an employee Arising Out Of employee hiring, advancement, **remuneration**, **treatment**, condition or **termination of employment**." (A3). As

form the basis for relief clearly covered by the policy, at a minimum Coregis had a duty to defend under a reservation of rights. See First American Title Ins. Co.v. National Union Fire Ins.Co., 695 So.2d 475, 476-77 (Fla. 3d DCA1997).

Moreover, even if the potential for relief covered by the policy was ambiguous at the time of the initial petition, that ambiguity was removed when Wardlow filed his "Position Statement" after his position was finally eliminated. (A5). That pleading made it clear that Wardlow was seeking back wages.

If the complaint does not show a basis for relief covered by the policy, but "it later becomes apparent that claims not originally within the scope of the pleadings are being made which are within the insurance coverage, the insurance carrier upon notification would then become obligated to defend." C.A. Fielland, Inc. v. Fidelity & Cas. Co., 297 So.2d 122, 127 (Fla. 2d DCA 1974); see also Grissom, 610 So.2d at 1307; Baron Oil, 470 So.2d at 814-15. The reason for this is that we no longer follow the rigid pleading rules of the past. "'[T]he dimensions of a lawsuit are not determined by the pleadings because the pleadings are not a rigid and unchangeable blueprint of the rights of the parties.'" C.A. Fielland, 297

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such, the policy is ambiguous and must be construed in favor of coverage. Any other interpretation would render the "enhanced" coverage of this endorsement meaningless.

So.2d at 127 (citation omitted). Therefore, regardless of whether Wardlow's initial petition showed a basis for relief covered by the policy, when Wardlow filed his position statement that petition was effectively amended.[9] Once Coregis was notified of that position statement, the duty to defend attached.[10]

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[9]Coregis argued in the district court that Wardlow's "Position Statement" did not amend the petition. However, Coregis cited nothing in support of its position, and did not argue this in its initial brief to the Eleventh Circuit, and does not make that argument in this Court. That argument has also been waived.

Coregis' brief simply ignores the existence of that later pleading. There is no reason to believe that under the rules of the MCCSC, the possible relief was limited to what was mentioned in the original petition, or that a later filed pleading would not be sufficient where, as here, circumstances had changed from the time the initial petition was filed. The rules and regulations of the MCCSC do not specifically address amending a petition. (R2-60 at exhibit B). The "Position Statement" meets all the requirements in the rules for the information required in a petition. (A5). Moreover, Wardlow's claim for back wages did not accrue until his position was actually eliminated -- after the initial petition was filed.

[10]This Court may consider that Coregis arguably waived any argument that this particular claim was not covered by the policy when it settled that claim, along with the Wardlow and Scott's other claims. (R3-55 Exhibit 19); see Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982)(Once Supreme Court has jurisdiction "it may, if it finds it necessary to do so, consider any item that may affect the case"). When an insurer enters into a settlement agreement on behalf of an insured, with knowledge of facts which may take the claim outside the coverage of the policy, but without reserving its right to deny liability for coverage, an insurer is precluded from denying liability. See Lehman-Eastern Auto Rentals, Inc. v. Brooks, 379 So.2d 14, 16 (Fla. 3d DCA 1979). At the time Coregis entered into that settlement agreement, and agreed to pay the employees $80,000 for all their outstanding claims -- specifically including Wardlow's MCCSC petition -- Coregis was aware that the monetary relief requested in the petition was for attorney's fees and back wages. Yet, Coregis settled that action, without reserving its right to deny liability

Coregis' brief completely ignores the implications of the facts underlying Wardlow's initial petition and Wardlow's later position statement which effectively amended that petition. Coregis addresses only whether Wardlow's request for attorney's fees constituted "Money Damages" covered by the policy. This is a misleading, because the specific relief requested in the petition is not controlling where the facts alleged create the potential for relief covered by the policy, and the subsequent pleadings make it clear that such relief is sought. Here, the facts alleged clearly indicated that Wardlow's MCCSC petition created the potential for "Money Damages" in the form of back wages.

"The duty to defend is broader than the duty to pay." Allstate Ins.Co. v. RJT Enters., Inc., 692 So.2d 142, 144 (Fla. 1997). As all doubts as to whether a duty to defend exists must be resolved against the insurer and in favor of the insured, this issue must be resolved in favor of the District. Under this policy, and Florida law, Coregis had a duty to defend Wardlow's MCCSC petition, which indicated that Wardlow sought "Money Damages" covered by the policy in the form of both attorney's fees and back wages. Coregis failed to defend and must now be held

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for coverage. Under Florida law, Coregis should now be precluded from continuing to deny that the relief requested in the petition was not covered by the policy because Coregis paid that claim.

accountable. This Court should answer the second certified question in the affirmative as well.

CONCLUSION

For the reasons set forth above, Appellee MOSQUITO CONTROL DISTRICT OF FLORIDA, respectfully requests this Court to answer both questions certified by the Eleventh Circuit in the affirmative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I HEREBY CERTIFY that the text of this computer generated brief is Times New Roman 14-point as required by Florida Rule of Appellate Procedure 9.210(a)(2).

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