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.

INITIAL BRIEF OF MOVANT, COREGIS INSURANCE COMPANY

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

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

STATUTES

CASES

STATEMENT OF THE CASE

(I) Course of Proceedings and Disposition Below

This is an insurance coverage dispute. This appeal arises from a lawsuit filed by Plaintiff/Appellee, Mosquito Control District of Florida, Special Taxing District, a/k/a The Florida Keys Mosquito Control District of the State of Florida Special Taxing District (hereinafter "Plaintiff" or "the Mosquito District"), against Coregis

Insurance Company (hereinafter "Defendant" or "Coregis") which sought, inter alia, a declaration that the Plaintiff's costs of defending a petition filed against Plaintiff before a Florida administrative agency are covered under a Public Official's and Employment Liability Insurance policy issued to Plaintiff by Defendant. (R.E. Tab C).[1]

On December 7, 2000, the District Court for the Southern District of Florida ruled on cross motions for summary judgment and granted summary judgment in Plaintiff's favor and denied Defendant's motion for summary judgment. (R. 62). On September 7, 2001, Defendant appealed this ruling to the United States Court of Appeals for the Eleventh Circuit contending that the District Court erred in denying defendant's Motion for Summary Judgment and in granting summary judgment in Plaintiff's favor (R. 73). The Eleventh Circuit has now certified two (2) pure issues of contract construction concerning terms which are expressly defined in Coregis' Policy: (1) "Suit" (defined as a "proceeding in a court of law"); and (2) "Money Damages" (defined as "monetary compensation for past harms or injuries"). These questions of law are now presented to this Court for resolution under Florida law.

(II) Statement of Facts

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[1] R.E. is a reference to the Record Excerpts. Certain documents such as the Complaint and the Coregis Policy do not have separate document numbers in the Docket. Therefore, for ease of reference, Coregis will cite to these documents in the Record Excerpts when necessary.

Coregis issued to the Mosquito District a claims-made "Public Official's and Employment Liability Insurance" policy, No. 524-451359-7 ("the Coregis Policy" or "the Policy") for the period of October 1, 1996 to October 1, 1997 (R.E. Tab B). With respect to coverage for defense costs, the Policy only obligates Coregis to pay "**Claim Expenses**" (i.e., defense fees and costs) incurred in the defense of "covered **Suits**." (Emphasis added.) The Policy expressly defines "**Suit**" as "a proceeding in a court of law where **"Money Damages"** may be awarded". (Emphasis added.) The Policy defines **"Money Damages"** as "monetary compensation for past harms or injuries". (Emphasis added.) (R.E. Tab B - Section V-Definitions).

In this action, the Mosquito District seeks a declaration that the Policy obligates Coregis to reimburse it for the costs it incurred in responding to an administrative petition brought against it before an administrative agency -- the Florida Monroe County Career Service Counsel (hereinafter "F.M.C.C.S.C.") by Dennis Wardlow, (hereinafter "Wardlow") a former employee of the Mosquito District. (R.E. Tab C). All other claims between the parties were previously settled and released.[2] (R. 51).

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[2] In this action the parties also previously disputed other claims by the Mosquito District for recovery of defense costs it incurred to defend itself against lawsuits filed in Florida State Court. The parties settled these claims. The Mosquito District claim for recovery of "**Claim Expenses**" in connection with the

The F.M.C.C.S.C. consists of five (5) "members" created by the Florida legislature pursuant to Chapter 69-1321 of the Florida Statutes. *Ch. 69-1321, § 4, Laws of Fla. (1969) (amended by Ch. 76-439, Laws of Fla. (1976)*. (R. 54 - Exhibit B). Pursuant to the limited authority granted by the Florida legislature, the F.M.C.C.S.C. has authority to conduct hearings only on employment-related matters where a qualified employee has been suspended, discharged, given a reduction in pay or demoted. The F.M.C.C.S.C. has no other authority. *Id.* (R. 54-Exhibit B).

In his administrative petition against Plaintiff, Wardlow sought only equitable relief. Wardlow requested that the F.M.C.C.S.C. "determine" (i.e. declare) the following employment-related issues:

(a) that Wardlow had committed no employment related act which would constitute a disciplinary violation; and

(b) that there was no budgetary or other managerial basis for the Mosquito District's termination or elimination of either Wardlow or his position with the Mosquito District.

For relief, Wardlow requested reinstatement of his job (i.e. equitable relief). He also requested the attorney's fees and costs incurred in seeking that equitable relief. (R.

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administrative petition is the only claim not compromised and adjudicated by the parties (via cross motions for summary judgment).

54-Exhibit C).

Coregis declined to pay for the Mosquito District's costs to defend against Wardlow's administrative petition because: 1) the petition did not seek "**Money Damages**" (as required); and, 2) was not a proceeding in a court of law (as required).[3]

SUMMARY OF ARGUMENT

It is clear that the F.M.C.C.S.C. is not a "court of law" but, rather, it is unquestionably an administrative agency created by Florida Statute. *See e.g. Department of Agriculture and Consumer Services v. Strickland*, 262 So. 2d 893, 895 (Fla. 1st DCA 1972). The District Court also erroneously held that the F.M.C.C.S.C. petition against Plaintiff sought "**Money Damages**" solely because in addition to requesting equitable relief, the petitioner sought reimbursement of his attorneys' fees incurred in pursuing the petition, even though "**Money Damages**" is defined as "monetary compensation for past harms or injuries". (R. 62, P. 6). Ironically, the

[3] There is no indemnity claim by the Mosquito District against Coregis because Wardlow's administrative petition only sought equitable relief and attorneys' fees (which are not covered under the Policy) and Wardlow received no award pursuant to his administrative petition.

District Court so held even though the plaintiff did not even assert this argument. Moreover, the District Court cited no authority to support either of its erroneous conclusions.

The Policy only obligates Coregis to pay defense costs in defense of covered "**Suits**". The definition of "**Suit**" is "a proceeding in a court of law." While the phrase "court of law" is not itself defined in the Policy, Florida law has clearly determined that an administrative agency is not a court of law. This rather obvious fact is supported by numerous decisions. (*See* Argument *supra*). Since there was no "**Suit**" the Policy does not obligate Coregis to defend the Mosquito District against the administrative petition.

Further, even if Wardlow had filed a suit against Plaintiff in a court of law, the Policy still only obligates Coregis to pay defense costs for "covered **Suits**" i.e. where "**Money Damages**" (as defined) are sought. Wardlow's request that he be reimbursed for his attorneys' fees spent in pursuing his petition against Plaintiff was not a request for "monetary compensation for past harm or injuries" (i.e. the definition of "**Money Damages**"). A request for attorneys' fees is a request to be compensated for a claimant's current expense of pursuing remedies but is not compensation for the past

harm or injury itself and, therefore, does not satisfy the policy definition of "**Money Damages**" (discussed *infra*.). Accordingly, since there could be no coverage under Coregis' Policy for the equitable relief sought in the administrative petition brought against the Mosquito District, the Policy does not obligate Coregis to defend the Mosquito District against the administrative petition for this reason too.

ARGUMENT

The United States District Court for the Eleventh Circuit has essentially certified these two (2) contract construction questions to this Honorable Court: (1) whether, under Florida law, the F.M.C.C.S.C. is a "court of law;" and (2) whether, under Florida law, Wardlow's petition sought "monetary compensation for past harms or injuries," i.e. "Money Damages" as defined by the Coregis policy. Because this matter is before this Court on certified questions from the Eleventh Circuit, standards of review are not properly addressed in this brief.

THE ADMINISTRATIVE PROCEEDING BEFORE THE F.M.C.C.S.C. WAS NOT A PROCEEDING IN A COURT OF LAW

The sole issue on appeal is the Mosquito District's claim to recover the defense costs it incurred in responding to the administrative petition brought against the Mosquito District by a former employee. The Policy only creates a duty on the part of Coregis to defend "covered **Suits**"(i.e. a proceeding in a court of law where "**Money Damages**" may be awarded) and limits Coregis' obligation to pay "**Claim Expenses**" to those incurred in the defense of "covered **Suits**."[4] (R.E. Tab B - Section

[4] The policy explicitly defines "**Claim Expenses**" to mean fees and costs charged by any lawyer retained by the Company and, if authorized by the Company, all other reasonable fees or costs incurred in the defense of a **Suit**.

II.B.1). The policy explicitly defines "**Suit**" to mean a "proceeding in a court of law where "**Money Damages**" may be awarded." Wardlow's petition against Plaintiff before the F.M.C.C.S.C. was not a "**Suit**" because it was a petition before an administrative agency and not a proceeding in a court of law. The question of whether the F.M.C.C.S.C. is a "court of law" under Florida has been certified.

At least one court applying Florida law has addressed what constitutes a "suit" as that term is utilized in the context of an insurance policy. *See Racal-Datacom Inc. v. Insurance Company of North America,* 1998 WL 1173527 (S.D. Fla. 1998). In *Racal*, the policy required the insurer to defend "suits." "Suit," however, was not defined in that policy. The *Racal* court determined that "suit" was understood to mean a "proceeding in a court of law." The *Racal* court held that an action by an administrative agency (in this case, the Environmental Protection Agency) did not constitute a proceeding in a court of law and, therefore, no defense obligation existed under the policy. 1998 WL 1173527 at 5. This position is supported by decisions of several courts across the country. *See e.g. Foster-Gardner, Inc. v. National Union Fire Ins. Co. Of Pittsburgh, Pa.*, 959 P.2d

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(Emphasis Added.) (R.E. Tab B - Section V - Definitions).

265 (Cal. 1998); *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d 842 (Ill. 1995); *City of Edgerton v. General Ca. Co. of Wis.*, 517 N.W.2d 463 (Wis. 1994). Likewise, the Wardlow petition was a proceeding before an administrative agency and not before a court of law. Therefore, no "**Suit**" within the meaning of the policy was brought.

Other courts have recognized that administrative bodies such as the F.M.C.C.S.C. are not courts of law but merely administrative agencies with limited jurisdiction which are not bound by the same rules that apply to courts. *See e.g.*, *Department of Corrections v. Career Service Commission,* 429 So. 2d 1244, 1245 (Fla. 1st DCA 1983) (holding that the Florida Career Service Counsel is an administrative body established by statute with limited jurisdiction); *Department of Agriculture and Consumer Services v. Strickland*, 262 So. 2d 893, 895 (Fla. 1st DCA 1972) (administrative *bodies like the Career Service Counsel are only quasi-judicial and are not bound by* formalities common to courts of justice); *Florida Department of Law Enforcement v. Hinson*, 429 So. 2d 723, 724 (Fla. 1st DCA 1983) (commission is an agency created by statute that may not exceed the authority granted by that statute). (R. 54 - Exhibit B).

The indisputable fact that administrative bodies are not courts of law has been

recognized by numerous courts at both the federal and state levels, including this Court. For example, in the case of *Scholastic Systems, Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1975) this Court held that :

> In recognizing the IRC as a judicial tribunal performing the functions of a court for purposes of the 'due process' provision of the constitution, we do not intend to imply that the IRC is literally a 'court....'

307 So. 2d at 170. Thus, this Court has already rejected the very argument that the Mosquito District makes now - that an administrative agency is a "court."

Furthermore, this Court has specifically distinguished courts from administrative agencies by holding that a party is afforded his "day in court" (as required by the Florida Constitution) when he has a right to a hearing and he has the right to appeal to a judicial tribunal the decision of an administrative body. 307 So. 2d at 169 (Emphasis added). This common-sense distinction is evident in other Florida cases as well. *See State v. Lewis*, 550 So. 2d 522 (Fla. 1st DCA 1989) (holding that the "judicial branch of government is not a state agency"); *see also Chief Judge v. Board of County Commissioners*, 401 So. 2d 1330 (Fla. 1981) (holding that "courts are not simply another agency of state or county government").

Courts in other jurisdictions agree. For example, in *United States of America v. Bowman*, 263 F. Supp. 548, 550 (M.D. Pa. 1964), the court held that investigations

by federal administrative agencies are not judicial proceedings and are not restricted by the rules of evidence applicable in courts of law. *See also*, *Yeager v. Boobytrap Lounge*, 429 N.W.2d 620, 621-622 Mich. Ct. App. (1998) (Workers' Compensation Appeal Board is not a court of law).

In holding that the F.M.C.C.S.C. is a "court of law," the District Court cited to no authority and relied solely upon an argument not even raised by the Mosquito District. The District Court's ruling that the F.M.C.C.S.C. is a "court of law" was based upon the District Court's selective reference to Black's Law Dictionary. The District Court referred to the definition of "court of law" contained in Black's Law Dictionary without reference to any of the definitions of the terms used in that definition. On Page 6 of its Order, the Court stated:

> Coregis argues that the MCCSC Petition is not covered because it is not a "suit" under the terms of the policy. The policy defines "suit" as: "a proceeding in a court of law where Money Damages may be awarded." Since "court of law" is not defined in the policy, the court refers to Black's Law Dictionary which defines "court of law" as "any duly constituted tribunal administering the laws of the state or nation." (R. 62, P. 6).

The District Court then implicitly concluded that the F.M.C.C.S.C. is a "tribunal administering the laws" of the State of Florida. Coregis respectfully asserts that the Court's reliance solely upon Black's definition of "court of law" was incomplete

without also relying upon Black's definition of "tribunal." Black's defines a "tribunal" as:

> "the seat of a judge; a court of law; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise." (Emphasis added.) *Black's Law Dictionary* (1991 6th Edition).

Pursuant to Florida Regulations, the F.M.C.C.S.C. consists of five "members." There is no requirement that any of these "members" even be an attorney, let alone a judge. (R. 54 - Exhibit B). Accordingly, Coregis respectfully asserts that the District Court erred in holding that the F.M.C.C.S.C. is a "court of law" under Florida law.

WARDLOW'S PETITION DID NOT SEEK "MONETARY COMPENSATION FOR PAST HARMS OR INJURIES," AND, THEREFORE, DID NOT SEEK "MONEY DAMAGES" AS DEFINED BY THE COREGIS POLICY

The administrative petition against the Mosquito District sought two specific forms of relief: 1) Reinstatement of petitioner's job and; 2) Reimbursement of the petitioner's attorneys' fees incurred in filing and pursuing the petition. (R. 54 - Exhibit C).

Based upon the language of the Policy's insuring agreement and the explicit definitions of the insuring agreement terms, there is no credible argument that the

relief requested via the petition could somehow be "covered" by the insuring agreement of the Policy. First, the petition itself, sought only equitable (i.e. not monetary compensation) relief plus attorneys' fees. (R. 54 - Exhibit C). Wardlow's request for his attorney's fees incurred in seeking that equitable relief against Plaintiff did not constitute "monetary compensation for past harms or injuries" and, therefore, could not constitute "**Money Damages**" as defined by the Policy.

Furthermore, since no "**Money Damages**" were sought by the petition, no "**Claim**" (i.e., a demand for "**Money Damages**" as of right) was included in the petition. Additionally, since the definition of "**Loss**" includes the defined term "**Money Damages**," there also was no "**Loss**" sought against the Mosquito District. Moreover, even assuming *arguendo* that the relief sought via the petition could somehow have satisfied the insuring agreement of the Policy, Exclusion C would then apply to exclude any "coverage" for the relief sought, because claims for equitable relief are also specifically excluded from coverage.[5]

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[5] This Policy does not apply to the following, regardless of the cause of action or legal theory alleged: [...] C. any demand or proceeding seeking relief or redress in any form other than **Money Damages**, including any form of injunctive or other equitable relief, including, but not limited to, restitution, replevin, unjust enrichment, declaratory judgments, or an accounting. (Emphasis added.) (R.E. Tab B - Section IV - Exclusions).

Leaving aside the fact that no court of law was involved, the only way that the relief sought against Plaintiff could potentially be covered would be if the petitioner's request for reimbursement of his attorneys' fees against Plaintiff was a demand for compensation for past harms or injuries. The District Court summarily concluded that it was without any explanation or citation to authority. Specifically, page 7 of the District Court's Order states:

> Inasmuch as the MCCSC Petition is a "suit" [i.e. a "proceeding in a court of law"] and Wardlow was seeking monetary compensation for past harms or injuries in the form of attorney's fees, the policy required Coregis to indemnify FKMCD and to provide a legal defense for the claims asserted in the Petition because FKMCD could become legally obligated to pay the attorney's fees. (Emphasis added.) (R. 62, P. 7).

No where does the District Court's opinion explain how or why it could be that Wardlow's request for attorneys' fees against the Mosquito District constituted a demand for "monetary compensation for past harms or injuries."

Although no Florida court has addressed this specific issue, other jurisdictions have specifically held that an award of attorneys fees is not compensation for past injuries and, therefore, can not be considered "damages" under an insurance policy. *See e.g., U.S. v. Security Management Co.*, Inc., 96 F.3d 260 (7th Cir. 1996). Each of

these decisions is well-reasoned and should be accepted as persuasive authority under Florida law.

In the California case of *Cutler-Orosi Unified School Dist. v. Tulare County School Districts Liability/Property Self-Insurance Authority*, 31 Cal. App. 4th 617, 37 Cal. Rptr. 2d 106 (1994). In *Cutler-Orosi*, the insured sought insurance coverage for an award of attorneys' fees against the insured and pursuant to the Voting Rights Act. In holding that a claim for attorney's fees was not a claim for "damages", the court stated:

> ...an award of attorney fees like other costs, "does not compensate the plaintiff for the injury that first brought him into court[;] [i]nstead, the award reimburses him for a portion of the expenses he incurred in seeking...relief." (*Hutto v. Finney* 437 U.S. 678, 695 (1978) fn.24). Attorneys' fees therefore are inconsistent with the concept of "damages" as the term is used in its ordinary and popular sense, that is, compensation paid to a party for the loss or detriment suffered because of the wrongful act of another...Second, broadly interpreting the word "damages" to include all forms of civil monetary liability effectively renders meaningless the "as damages" limitation in the Industrial policies. (Emphasis added.)

Cutler-Orosi, 31 Cal. App. 4th at 632, 37 Cal. Rptr. 2d at 115.

Here, as in *Cutler-Orosi*, even if the F.M.C.C.S.C. had awarded Wardlow his attorneys' fees, against the Mosquito District, it clearly would not have been compensation for any past harm allegedly done to him. As such, his request for

attorneys' fees contained in an administrative petition that sought only equitable relief is not a demand for "**Money Damages**" under the Coregis policy.

CONCLUSION

For all of the foregoing reasons, Coregis respectfully requests that this Honorable Court respond to the certified questions of the United States Court of Appeals for the 11th Circuit as follows: (1) Florida law does not consider the F.M.C.C.S.C. to be a "court of law;" and (2) under Florida law, Wardlow's petition did not seek "Money Damages" as defined by the Coregis policy.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing notice of appeal was sent by U.S. Mail on this 1st day of November 2002 to: Dirk M. Smits, Esq., Vernis & Bowling of the Florida Keys, Post Office Drawer 529, Islamorada, Florida 33036.

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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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