IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-630

TRAVELERS INDEMNITY CO.,

Appellant,

vs.

PCR INCORPORATED,

Appellee.

==========

On Certification from the United States
Court of Appeals for the Eleventh Circuit
No. 02-12829
D.C. Docket No. 1:01CV54 MMP

==========

ANSWER BRIEF OF APPELLEE

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE
Professional Association

John A. DeVault, III
Florida Bar No. 103979
Michael D. Whalen
Florida Bar No. 256811
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307

Counsel for Appellee PCR, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF CITATIONS

CASES **PAGE(S)**

TABLE OF CITATIONS (cont.)

STATUTES and RULES

STATEMENT OF THE CASE

This is a discretionary proceeding to review certified questions from the United States Court of Appeals for the Eleventh Circuit pursuant to Rule 9.150, Florida Rules of Appellate Procedure.

I. The Course of Proceedings and Dispositions in the Court Below.

The Appellant, Travelers Indemnity Company ("Travelers"), filed this action against its insured, PCR, Incorporated ("PCR"), asking the federal district court for a declaratory judgment that it was not liable to defend or provide coverage for certain personal injury and wrongful death claims brought against PCR by two of PCR's employees, Paul Turner ("Turner") and James Creighton ("Creighton"), arising out of a workplace accident. The underlying claims were the subject of extensive litigation in the state courts of Florida including an opinion by this Court published March 2, 2000. Turner v. PCR, Inc., 732 So.2d 342 (Fla. 1st DCA 1998), quashed, 754 So.2d 683 (Fla. 2000). In denying coverage, Travelers contends that the underlying tort claims fall outside the applicable coverage provision for "bodily injury by accident" and fall within the exclusion for "bodily injury

intentionally caused or aggravated by [the insured]."[1] (R1-1-¶¶ 13, 16). PCR filed its answer and counterclaim, seeking a declaration that the claims of the employees were covered under the policy. (R1-9).

On October 24, 2001, Travelers filed a Second Amended Complaint which attached the fourth amended complaints newly filed by the two injured employees in their underlying tort cases after this Court's opinion in Turner v. PCR, Inc. was published (R1-22). These fourth amended complaints significantly changed the scope of the underlying tort actions. Tracking this Court's opinion, the fourth amended complaints dismissed several counts and asserted a single cause of action for damages based solely on the second prong of the two prong test established by this Court. (R1-22-Exs. A and B). Both plaintiffs affirmatively alleged that PCR had not acted with the specific intent to injure them but rather had engaged in conduct

---

[1] In its declaratory judgment complaint, Travelers only raised the exclusionary basis for denying coverage. In its briefs in the federal court action it also raised the argument, for the first time, that the injuries were not within the coverage provision of the policy. Because the entire policy must be read in pari materia, it is only proper to consider the coverage provision and exclusion together. State Farm Fire & Casualty Co. v. CTC Development Corp., 720 So.2d 1072, 1075 (Fla. 1998)

substantially certain to result in their injury or death. The fourth amended complaint of Turner, who died as a result of his injuries, alleged that PCR had intentionally created a situation where injury or death was a substantial certainty but admitted that PCR had acted "without deliberate intent to injure the decedent." (R.1-22-Ex. A, ¶ 10). Similarly, Creighton alleged that PCR "did not specifically intend to injury [sic] the Plaintiff." (R1-22-Ex. B, ¶ 6).

PCR filed in the federal district court a motion for judgment on the pleadings (described in the docket as a motion for summary judgment), (R2-23); Travelers filed a cross- motion for summary judgment. (R2-32).

On April 23, 2002, the Honorable Maurice M. Paul, Senior District Judge for the United States District Court for the Northern District of Florida, Gainesville Division, entered an order granting PCR's motion and denying Travelers' motion for summary judgment. (R2-46). In his opinion, Judge Paul defined the issue before the court to be:

> Does the exclusion in the policy for "bodily injury intentionally caused or aggravated by you" cover the exact same range of conduct covered by the Florida Supreme Court's holding [in Turner v. PCR, Inc.] that "in order to prove an intentional

> tort, the employer must be shown to have either 'exhibite[d] a deliberate intent to injure or engage[d] in conduct which is substantially certain to result in injury or death.'"

(R2-46-7).

Applying Florida substantive law, Judge Paul noted the "narrow interpretation of policy exclusions based on 'intentional' conduct." (R2-46-6). He contrasted this with the broad definition of "intentional" used in analyzing the applicability of workers' compensation immunity in cases such as Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000). (R2-46-4-5).

Judge Paul stated that the instant case involved "a straightforward question of contract interpretation." (R2-46-7). He cited the recent decision by this Court in Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29, 34 (Fla. 2000), holding that ambiguous insurance policy exclusions are to be construed against the drafter and in favor of the insured, with exclusionary clauses being construed even more strictly than coverage clauses. (R2-46-8). Judge Paul examined a series of Florida cases that hold that injury or damage is "caused intentionally" within the meaning

of an intentional injury exclusion clause only if the insured has "acted with the specific intent to cause harm to a third party." (R2-46-6).

As to the specific policy before this Court, Judge Paul, found that:

> Here, the exclusion simply covers injury "intentionally caused by you." At the time it was written, seven justices of the Florida Supreme Court had stated [in the workers' compensation context] their inclination to find that actions done with "substantial certainty of injury" fell within the definition of intentional conduct. On the other hand, thirty years of cases involving interpretation of the term "intentional" in insurance contracts have held that "intentional" requires a specific intent to cause harm. Therefore, drafting this contract after all these cases were on the books and using the words "intentionally caused" at least creates an ambiguity as to whether the term was intended [to] go beyond "specific intent to injure."

(R2-46-8). Judge Paul noted that the fourth amended complaints filed by Turner and Creighton both alleged that PCR had acted "without deliberate intent to injure [its employees]." (R2-46-2). Viewing the admissions in the underlying tort complaints in light of the exclusionary language in the policy, Judge Paul concluded that:

> the term "intentionally caused" in the policy excludes only conduct undertaken with the specific intent to injure. Because the claims in the state complaint against PCR allege no specific intent to injure but instead allege that PCR acted with "a

> substantial certainty of causing harm," the Court finds that the state law claims are not excluded by the policy.

(R2-46-8-9). Judge Paul entered judgment on his order (R2-47), and Travelers appealed to the United States Court of Appeals for the Eleventh Circuit. (R2-48).

Following oral argument the Eleventh Circuit certified the following dispositive questions:

1. Does Florida insurance law require a reading of specific intent into an insurance clause excepting from liability coverage "[b]odily injury intentionally caused or aggravated" by the insured?
2. Is PCR in this case entitled to liability coverage based on the language of this policy agreement, read in the light of Florida's law of interpreting insurance policies?

The Eleventh Circuit invited this Court to fully discuss interpretations of Florida law on the questions presented including, if it wishes, public policy arguments.

STATEMENT OF THE FACTS

The declaratory action complaint alleges that Travelers is an insurance company which issued a workers compensation and employers liability insurance policy to PCR,

which afforded $1 million in employers liability insurance for each covered bodily injury. (R1-22-¶ 13). The policy applies to bodily injury "by accident," a term not defined by the policy, and excludes "bodily injury intentionally caused or aggravated by [the insured]." (R1-22-¶ 13, Ex. C).

While the underlying tort claims arise out of the events that were the subject of this Court's opinion in Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000), it is important to note that the plaintiffs amended their complaints after this Court's opinion, making critical changes to their allegations that impact the insurance issue.

The two employees of PCR, Paul Turner and James Creighton, sued the company alleging that PCR had intentionally created a situation where injury or death was a substantial certainty, but, in their fourth amended complaints filed after this Court's decision, admitted that PCR had acted "without deliberate intent to injure," (R1-22-Ex. A, ¶ 10), and "did not specifically intend to injur[e]," (R1-22-Ex. B, ¶ 6), them.

SUMMARY OF THE ARGUMENT

For at least thirty years, Florida courts have held that intentional injuries are not excluded from insurance policies containing an exclusion for injuries intended or expected by the insured unless the insured acted with the specific intent to injure the third party. Nothing in this Court's decision in Turner v. PCR, Inc. has altered that long-standing rule. To deny coverage for such injuries would only lead to victimized workers (particularly those who sustain severe injuries or whose employer is insolvent) being left without compensation for injuries sustained while on the job.

Here, the insured, PCR has been sued by its employees for bodily injuries sustained in the course and scope of their employment. The employees expressly concede that PCR did not act with the specific intent to injure them. Instead they allege that PCR engaged in conduct that a reasonable person would have known was substantially certain to result in injury or death. Travelers has issued a policy of insurance insuring PCR for claims for "bodily injury by accident" unless it is proven that the "bodily injury [was] intentionally caused or aggravated by [the insured]."

Under Florida insurance law, this exclusionary clause requires proof of specific intent and the employees here have conceded that PCR did not act with specific intent. Thus, the exclusion does not apply, and the district court was correct in entering judgment in favor of the insured, PCR, and against the insurer, Travelers. Travelers has a duty to defend PCR if any of the factual allegations of the underlying tort complaints allege claims that are covered under its policy of insurance.

Coverage issues under Florida insurance law, unlike under workers' compensation law, are to be construed in favor of the insured and against the insurer, especially when the policy language is susceptible to more than one reasonable interpretation, one of which provides coverage and the other limiting coverage.

Florida public policy does not prohibit insurance coverage for injuries caused by acts of the insured when those acts are done without the specific intent to injure. To deny coverage in cases such as this could lead to the undesirable result of victimized employees who are injured by judgment proof employers not receiving

any compensation for their injuries. This result would itself be against public policy.

First, the availability of liability insurance is unlikely to encourage a person lacking the specific intent to commit a harm to actually commit that harm. The very fact that an insured lacks the specific intent to injure makes it unlikely that the presence or absence of insurance would have any effect whatsoever on the insured's actions. Because it is already a crime to intentionally injure another person, i.e., assault and battery, and such conduct would expose the insured to punitive damages which are not covered by insurance in any event, an insured has a substantial interest in refraining from such conduct with or without the prospect of insurance coverage.

Secondly, Florida tort law is based on the compensation of victims rather than deterring wrongdoers. In fact, the only claims that would be covered by insurance are claims for compensatory damages. While Florida law may permit punitive damages in a tort case for the purpose of deterring future wrongdoing, punitive damages are expressly excluded by the policy. Thus, by permitting insurance for compensatory

damages only, the State can ensure that the person injured by an intentional tort receives compensation without removing the deterring impact of punitive damages.

Moreover, Florida law has expressly rejected the argument that Florida public policy is contrary to insurance coverage for injuries caused by the insured when the insured did not act with specific intent.

ARGUMENT

I. FLORIDA INSURANCE LAW REQUIRES A READING OF SPECIFIC INTENT INTO AN INSURANCE CLAUSE EXCEPTING FROM LIABILITY COVERAGE "BODILY INJURY INTENTIONALLY CAUSED OR AGGRAVATED" BY THE INSURED.

The first question certified by the Eleventh Circuit is whether Florida insurance law requires a reading of specific intent into an insurance clause excepting from liability coverage "bodily injury intentionally caused or aggravated" by the insured. In its briefs before this Court and the Eleventh Circuit, Travelers has argued that there are no controlling Florida cases. Although recognizing the existence of Florida district court and Supreme Court precedent, the Eleventh

Circuit nevertheless has asked this Court to give it guidance on specific questions in the context of the facts in this case in light of this Court's decision in Turner v. PCR, Inc.[2]

A. Existing Florida Law Excludes Coverage Only Where the Employer Acted with Specific Intent.

In granting summary judgment on the coverage issue, Judge Paul relied on "thirty years of cases involving interpretation of the term 'intentional' in insurance contracts [that] have held that 'intentional' requires a specific intent to cause harm." (R2-46-8). Among the cases relied on by Judge Paul was Cloud v. Shelby Mutual Insurance Co., 248 So.2d 217 (Fla. 3d DCA 1971). In Cloud, the insured under a standard auto liability policy used his car to try to push out of his way another car blocking his driveway resulting in serious injury to the occupant of the other car. The insurer denied coverage relying on an exclusion from coverage for "bodily injury or property damage caused intentionally by or at the

---

[2] Because the interpretation of an insurance contract is a question of law, the standard of review is de novo. Coleman v. Florida Insurance Guaranty Association, Inc., 517 So.2d 686, 690 (Fla. 1988); American Equity Insurance Co. v. Van Ginhoven, 788 So.2d 388 (Fla. 5th DCA 2001).

direction of the insured." The parties stipulated that the insured had intentionally pushed the other car, but the insured denied that he intentionally caused injury to the passenger. Reversing summary judgment for the insurer, the Third District Court of Appeal adopted the "majority rule" from other jurisdictions that:

> The courts have generally held that injury or damage is "caused intentionally" within the meaning of an "intentional injury exclusion clause" if the insured has acted with the specific intent to cause harm to a third party, with the result that the insurer will not be relieved of its obligations under a liability policy containing such an exclusion unless the insured has acted with such specific intent.

248 So.2d at 218 (citation omitted)(emphasis added). The court also rejected the insurance company's contentions as to the public policy against obtaining insurance protecting against the insured's own intentional acts, noting that such arguments have been "systematically rejected." 248 So.2d at 218.

Judge Paul also noted that in Phoenix Insurance Co. v. Helton, 298 So.2d 177 (Fla. 1st DCA 1974), the First District Court of Appeal likewise held that an injury was not "caused intentionally" within the meaning of a policy excluding injuries

"caused intentionally by or at the direction of the insured" when the insured "intentionally" drove his car to the edge of a crowd in an apparent attempt to extricate his wife from a melee and struck another individual who sued him for damages.

Not specifically relied on by Judge Paul, but nonetheless significant, is this Court's opinion in Prudential Property and Casualty Ins. Co. v. Swindal, 622 So.2d 467 (Fla. 1993), in which the insurer under a homeowners policy brought an action seeking a declaration that the intentional injury exclusion in the policy excluded coverage for injuries sustained when the insured shot another person during an argument. In answering a certified question from the district court, this Court was called on to determine whether its earlier decision in Landis v. Allstate Insurance Co., 546 So.2d 1051 (Fla. 1989), had changed the intentional injury exclusion into a broader intentional act exclusion that would exclude coverage for damages that "inevitably flow" from an intentional act, but are proximately caused by a separate negligent act. Swindal, 622 So.2d at 470. The Court in Swindal, referring to both Cloud and Helton, confirmed that its holding in Landis "in no way changed" Florida's

adherence to the majority rule of law from Cloud, quoted in full above, that "the insurer will not be relieved of its obligations under a liability policy containing [an intentional injury exclusion clause] unless the insured has acted with such specific intent". Swindal, 622 So.2d at 471 (emphasis added).

The most recent Florida case on the subject, Allstate Indemnity Co. v. Wise, 818 So.2d 524 (Fla. 2d DCA 2001), review denied, 817 So.2d 844 (Fla. 2002), noted that: "In Swindal, our supreme court reaffirmed that Florida law requires both an intent to act and a specific intent to injure in order to bring a loss within the ambit of an intentional act coverage exclusion." 818 So.2d at 525. The insurer in Wise tried to distinguish the earlier cases based on the broader language contained in the insurance policy at issue which sought to exclude injury or damage "which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person." Id.[3]

---

[3] This rule was not altered by this Court in Prasad v. Allstate Insurance Co., 644 So.2d 992 (Fla. 1994), which relies on Landis to conclude that for the purpose of insurance coverage an insane person can have the necessary intent to commit certain acts "even if that intent is the consequence of a delusion or affliction." 644 So.2d at 995. Moreover, the "intentional act" policy exclusion (continued...)

In addition to being put in question by this Court's later holding in Swindal, the reasoning of Landis does not apply in the workers' compensation immunity setting. First, in reaching its decision, the Court agreed with the reasoning of Judge Frank in his dissent in Zordan ex rel. Zordan v. Page, 500 So.2d 608 (Fla. 2d DCA 1986)(Frank, J., dissenting). Judge Frank's dissent makes clear that his reasoning, and by inference the reasoning of the Supreme Court in Landis, is expressly limited to the unique equities of cases involving sexual molestation of children. As Judge Frank states: "Acknowledging validity in the concern stemming from the consequences of applying the foreseeability test to commonplace torts such as automobile accidents, I am absolutely unwilling to deny the foreseeability of injury to a child who is subjected to sexual abuse." 500 So.2d at 613 (emphasis added).

---

[3] (...continued)
in Prasad included a broader intentional act exclusion that would exclude coverage for damages for "bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person." 644 So.2d at 993 (emphasis in original). See the discussion that follows concerning the effect of broader "intentional act" language in insurance policies.

Thus, the rationale followed by this Court in Landis, is based on a court adopted rule that injury to a child subjected to sexual abuse is, by law, foreseeable. No such rule has been adopted by any court in workplace torts. In fact, the issue for liability under Turner, is not whether the employer "reasonably foresaw" the injury to its employee, but whether a "reasonable person" should have known that the injury was substantially certain to happen.

As seen in Wise, in an apparent response to holdings requiring proof of subjective intent, some insurance companies have expanded the language of their intentional injury exclusions to include injuries that were not the result of the insured's specific intent to injure. These broader policies expressly exclude both injuries which were specifically intended by an insured and injuries which should have been reasonably expected to result from the insured's intentional act.

Other courts have recognized that under Florida law, an intentional injury exclusion only excludes coverage where the subjective intent of the insured shows that he specifically intended to cause the injury. See, e.g., Allstate Ins. Co. v. Travers, 703 F.Supp. 911, 914 (N.D. Fla. 1988)("The general rule in Florida is that

an 'intentional injury' exclusion in a liability insurance policy does not apply to injuries caused by intentional acts, where the insured did not specifically intend to cause the injury which occurred. Under this rule, the insured's subjective intent to cause the result must be shown in order for an injury to be deemed an 'intentional injury' under this exclusion.")(emphasis added)(citations omitted); Allstate Ins. Co. v. McCranie, 716 F.Supp. 1440, 1445 (S.D. Fla. 1989)("Insurance provisions excluding coverage for intentional acts do not result in exclusion unless the insured acted with the specific intent to cause the injury . . . ."), aff'd, 904 F.2d 713 (11th Cir. 1990); Allstate Ins. Co. v. S.L., 704 F.Supp. 1059 (S.D. Fla. 1989), aff'd, 896 F.2d 558 (11th Cir. 1990).

B. This Court's Decision in Turner v. PCR, Inc. Does Not Change the Rule of Insurance Contract Construction.

Travelers ignores the fact that expanding an employee's right to sue the employer, based on the employer's intentional acts, leaves the employee without the benefit of workers' compensation insurance benefits. Unless that insurance is

replaced by the employers' liability insurance, this means catastrophically injured employees or the families of employees killed in the course of their employment could be left without compensation of any kind. Because of the important role insurance plays in our society, different rules apply when construing workers' compensation coverage and the coverage afforded by insurance policies.

Travelers urges the Court to follow the same rules of construction in this insurance policy construction case that it followed in the context of construing the Florida Workers' Compensation Act language in Turner v. PCR, Inc. Travelers urges this Court to borrow the definitions of "accident" and "intentional injury" from cases construing the Workers' Compensation Act. This argument incorrectly assumes, in the face of express holdings by this Court to the contrary, that Florida courts should apply the same rules of construction for the purpose of determining coverage under a liability policy that they apply for workers' compensation coverage.

The rules of construction applicable to Florida workers' compensation law, however, are different from those for construing liability policies. As has already been shown, liability policy provisions are to be interpreted liberally in favor of

the insured and strictly against the insurer who prepared the policy and are to be construed in the broadest possible manner to effect the greatest coverage, while exclusionary clauses are strictly construed. Florida's workers' compensation system, on the other hand, is based on a mutual renunciation of common law rights, and coverage under the act is not to be construed liberally in favor of either the employer or the employee. § 440.015, Fla. Stat. (2001).

This principle was recognized by this Court in Prudential Property and Casualty Ins. Co. v. Swindal, 622 So.2d 467 (Fla. 1993), in which the Court addressed the intentional act exclusion and said:

> Florida law has long followed the general rule that tort law principles do not control judicial construction of insurance contracts. Insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties. Ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. Thus, intentional act exclusions are limited to the express terms of the policies and do not exclude coverage for injuries more broadly deemed under tort law principles to be consequences flowing from the insured's intentional acts.

622 So.2d at 470 (citations omitted). Travelers ignores the above controlling authorities in its argument that there is a "parallelism in structure" between

Florida workers' compensation coverage and insurance liability coverage. (Appellant's Brief at 18). The definitions of "accident" and "intentional injury" in Turner and the other workers' compensation cases relied on by Travelers are inapposite to the construction of coverage under the Travelers liability policy at issue here.

II. THE CLAIMS OF PCR'S EMPLOYEES ARE COVERED CLAIMS FOR BODILY INJURY WHICH ARE NOT EXCLUDED BY THE INTENTIONAL INJURY EXCLUSION IN THE POLICY.

A. Travelers' Duty to Defend and to Provide Coverage for PCR Against the Claims of Turner and Creighton is Determined by the Factual Allegations of the Turner and Creighton Complaints and the Applicable Language of the Policy.

An insurer is required to defend an insured "if the allegations in the complaint could bring the insured within the policy provisions of coverage." Pentecost v. Lawyers Title Ins. Corp., 704 So.2d 1103, 1103 (Fla. 1st DCA 1997). To determine whether any of the claims fall within the coverage, the Court must compare the employees' claims in their fourth amended complaints to the specific language of the Travelers employers liability policy.

1. The Travelers Employers Liability Policy

The employers liability policy that was in effect at the time of the incident giving rise to this suit is attached to Travelers' complaint. (R1-22-Ex. C). The relevant portions of the policy provide coverage for "bodily injury by accident" and exclude "bodily injury intentionally caused or aggravated by you." (R1-22-¶¶ 14, 17). These coverage and exclusionary provisions must be read in pari materia. State Farm Fire & Casualty Co. v. CTC Development Corp., 720 So.2d 1072 (Fla. 1998). Thus, the issue here is whether the complaints of Turner and Creighton allege any basis for recovery for claims for "bodily injury by accident" which were not "intentionally caused" by PCR.

2. The Underlying Tort Complaints

In its opinion in Turner v. PCR, Inc., this Court discussed the two prong approach for determining whether the employer has committed an intentional tort, requiring that the employer (1) exhibited a deliberate intent to injure, or (2) engaged in conduct substantially certain to result in injury or death. This Court stated that under the second prong of the test "the employer's actual intent is not controlling;" instead applying an objective standard as to whether a reasonable

person would have foreseen that injury was substantially certain to occur. 754 So.2d at 688.

After this Court published its Turner v. PCR, Inc. decision, both plaintiffs in the underlying tort action substantially amended their complaints clearly alleging that PCR had not acted with the specific intent to injure them, (R1-22-Ex. A, ¶ 10; Ex. B, ¶ 6), and proceeding only on the claim that PCR had engaged in conduct substantially certain to cause them injury.

Thus, based on the language of the Travelers policy and the allegations of the complaints of Turner and Creighton, the issue is whether, under Florida insurance law, the Travelers insurance policy (which covers "bodily injury by accident" but excludes injuries "intentionally caused" by PCR) covers injuries caused by PCR without the specific intent to injure.

B. The Language in the Travelers Policy is Ambiguous and Must be Construed in Favor of Coverage.

In State Farm Fire & Casualty Co. v. CTC Development Corp., 720 So.2d 1072, 1075 (Fla. 1998), this Court noted that "few insurance policy terms have 'provoked more controversy in litigation than the word "accident."'" Where, as in the instant

case, the term "accident" is left undefined, it is susceptible to varying interpretations. 720 So.2d at 1076. The Court held:

> where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. In addition, "when an insurer fails to define a term in a policy, . . . the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage provided.'"

720 So.2d at 1076 (citations omitted).

Moreover, under Florida law, if the language of an insurance policy is susceptible to more than one reasonable interpretation, one of which provides coverage and the other limiting coverage, the insurance policy is considered ambiguous. It is also a well-established principle of Florida insurance law that ambiguous insurance policy provisions are to be interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So.2d 467, 470 (Fla. 1993). Thus, insuring or coverage clauses are construed in the broadest possible manner to effect the greatest extent of coverage, Hudson v. Prudential Prop. & Cas. Ins. Co., 450 So.2d 565, 568 (Fla. 2d DCA 1984), while exclusionary clauses in liability insurance

policies are always strictly construed. Demshar v. AAACon Auto Transport, Inc., 337 So.2d 963, 965 (Fla. 1976).

For these reasons the claims of PCR's employees are covered claims for bodily injury and are not excluded by the intentional injury exclusion in the Travelers policy.

III. FLORIDA PUBLIC POLICY DOES NOT PROHIBIT INSURANCE FOR INJURIES DONE WITHOUT SPECIFIC INTENT.

In support of its argument that Florida public policy prohibits insurance for these claims, Travelers relies almost exclusively on this Court's opinion in Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So.2d 1005 (Fla. 1989). While Bal Harbour Club addresses the factors to be examined in determining whether a particular liability insurance policy is contrary to Florida public policy, it does so in the context of an intentional religious discrimination case. The very characteristics of a discrimination case that led this Court to find that public policy would not allow for insurance against such claims are simply not present in this action concerning bodily injury.

In analyzing whether insurance for intentional religious discrimination is contrary to Florida public policy, this Court in Bal Harbour Club identified the factors to be considered for any particular policy of insurance: "the conduct of the insured (is it a type that will be encouraged by insurance?), and the purpose served by the imposition of liability for that conduct (is it to deter wrongdoers or compensate victims?)." 549 So.2d at 1007.

This Court's reasoning in Bal Harbour Club starts with the observation that the general rule is that one should not be able to insure against one's own intentional misconduct, for to do so would directly stimulate the intentional wrongdoer to violate the law. 549 So.2d 1007. This begs the question, however, what is meant by "intentional misconduct."

This Court explained, however, that not all deliberate wrongful acts are excluded from coverage. The Court noted that the rule recognized an exception "where innocent third parties were involved," id., relying on its earlier opinion in Everglades Marina, Inc. v. American Eastern Development Corp., 374 So.2d 517

(Fla. 1979). In the Everglades case the Court was answering a certified question from the Fifth Circuit which the Court had rephrased to be:

> Does the public policy as established by the laws of Florida prohibit third-party beneficiaries of an insurance policy from recovery of benefits because the loss was intentionally caused by criminal acts of the insured when the insurance policy contains no express clause excluding such liability?

374 So.2d at 518. There a marina owner intentionally set fire to his marina but did not do so "with the purpose or motive," i.e., the specific intent, of destroying boats kept there by third parties. Id. The insurer of the third parties' boats brought a subrogation action against the marina owner and his insurer. Recognizing the long-established law in Florida that an insurer is not liable to indemnify the insured for losses directly incurred by the fraud or misconduct of the insured, the Court refused to extend the public policy to claims by innocent third parties injured as a result of the criminal act of the insured. Applying this reasoning to the case at bar, the injured PCR employees, like the boat owners in Everglades, are third parties who were injured as the result of acts by an insured, who had acted without the specific intent to injure them.

Moreover, in Bal Harbour Club, this Court cautioned against comparing acts of intentional religious discrimination to other wrongful acts, finding that:

> Assault and battery, arson, and reckless and drunken driving are crimes and as such involve substantial deterrents independent of potential civil liability. . . . Intentional religious discrimination, on the other hand, is not a crime, and no risk of injury exists to discourage the prejudiced from intentionally harming others by the exercise of their religious biases.

549 So.2d at 1008.

Obviously, there has been no allegation that PCR was charged with assault and battery or any other crime as a result of the incident at issue, but that does not alter the fact that it is the type of alleged wrong for which there is potential criminal liability. Thus, the type of conduct at issue already involves substantial deterrents not present in an employment discrimination action.[4]

---

[4] In Bal Harbour Club this Court also refers to the decision in Hartford Fire Ins. Co. v. Spreen, 343 So.2d 649 (Fla. 3d DCA 1977), in which the court rejected the introduction of the tort rule of reasonable foreseeability into insurance contract cases. There the court recognized that Florida courts "have generally held that injury or damage is 'caused intentionally' within the meaning of an 'intentional injury exclusion clause' if the insured has acted with the specific intent to cause harm to a third party." 343 So.2d at 651-52 (quoting Cloud, 248 So.2d at 218).

The second factor considered by this Court in Bal Harbour Club is whether the imposition of liability for the conduct in question is to deter wrongdoers or compensate victims. "If the primary purpose is to compensate victims, indemnification may be suitable." 549 So.2d at 1008. The Court examined the "numerous laws" passed by the legislature banning religious discrimination, citing to several provisions suggesting that the purpose of imposing liability for religious discrimination is, in fact, deterrence. No such laws exist for the personal injury and wrongful death claims by Creighton and Turner.

The personal injury claims of the underlying tort claimants are just that - personal injury claims. This Court has long held that common law tort actions of the type alleged by Turner and Creighton are remedial in nature rather than deterrent. See Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780, 785 (Fla. 1931) ("The American theory of constitutional protection to life, liberty, and property and the theory [of] Florida law as expressed in our State Constitution is clearly to the effect that actions for recovery of damages for torts are no longer

to be regarded as mere punitive retaliations against the tort-feasor, but are a means of recompense to the citizen wronged.")(emphasis in original).

Moreover, the only damages that would be subject to the insurance coverage in this action are the compensatory damages. The policy contains a separate provision that excludes coverage for punitive damages. The imposition of compensatory damages is obviously intended to compensate the victim while punitive damages are to deter wrongdoing.

Thus, the analysis in Bal Harbour Club is specific to an employment discrimination claim and for the above reasons does not apply to the facts in this case.

As discussed above, in Cloud v. Shelby Mutual Insurance Co., 248 So.2d at 218, the Third District Court of Appeal adopted the "majority" view that "coverage is not excluded as a matter of law where there was an 'intentional act'" but not an 'intentionally caused' injury." The court went on to reject the insurance company's contentions as to the public policy against obtaining insurance protecting against

the insured's own intentional acts, noting that the contention had been "systematically rejected."

The Supreme Court of Ohio recently addressed this very issue in Harasyn v. Normandy Metals, Inc., 551 N.E.2d 962, 964 (Ohio 1990), phrasing the issue thusly: "In this case, we must decide whether public policy prohibits an employer from insuring against tort claims by employees in cases where the employer did not intend to injure the employee but knew that injury was substantially certain to occur." The court refers to the two different levels of intent as "direct intent" (where the actor does something which brings about the exact result desired), and "substantially certain" behavior (where the actor does something which is substantially certain to cause a result, even if the actor does not desire that result). Id. It found that public policy did not prohibit insurance coverage for the second level of conduct.

The Ohio court had earlier adopted a two prong approach to defining "intentional" torts for workers' compensation immunity identical to that adopted by this Court in Turner. There an intentional tort occurs when "the actor desires to

cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it." Harasyn, 551 N.E.2d at 964. Noting that most employer intentional torts fall into the latter prong, the court stated that:

> Where the employer's alleged tortious actions were not taken with deliberate intent to injure the employee, and where the damages sought are to compensate for injury rather than to punish wrongdoing, the public policy argument for depriving the employer of insurance protection is not compelling.

Id. at 965.

The Ohio Supreme Court noted that liability insurance for negligence was at one time attacked on the same public policy grounds as encouraging antisocial behavior, but has been recognized since that "no dire consequences in fact resulted [from it]" and public policy of assuring victim compensation favored such insurance. Id. The court added that a blanket prohibition against liability for intentional torts "makes no distinctions as to the various forms of intentional wrongdoing and does not admit the possibility that some torts might not be particularly encouraged if insurance were available for them." Id. The court concluded that:

> In the case of a "direct intent" tort, the presence of insurance would encourage those who deliberately harm another. In torts

> where intent is inferred from "substantial certainty" of injury, the presence of insurance has less effect on the tortfeasor's actions because it was not the tortfeasor's purpose to cause the harm for which liability is imposed. In the latter situation, the policy of assuring victim compensation should prevail.

Id. (citation omitted)(emphasis added).[5]

Thus, there is no legitimate public policy against permitting insurance companies to provide insurance coverage for the benefit of employees injured by employers who acted without the specific intent to injure. Moreover, by allowing such coverage, public policy is favored in that it provides "a means of assuring that innocent persons are made whole." Harasyn, 551 N.E.2d at 965.

---

[5] While the Ohio Supreme Court mentioned a legislative enactment creating a state insurance fund to pay claims arising out of employer intentional torts in support of its finding that its decision was not against public policy, Harasyn, 551 N.E.2d at 966, recent decisions have made it clear that this was mere dicta provided as "additional support for its already well-reasoned holding that public policy does not bar insurance for 'substantially certain' intentional torts." Miller v. Midwestern Indemnity Co., No. 15360 1996 WL 397450 (Ohio Ct. App. Feb. 23, 1996).

CONCLUSION

For the foregoing reasons, this Court should answer the certified questions as follows:

1. Florida insurance law requires a reading of specific intent into an insurance clause excepting from liability coverage "bodily injury intentionally caused or aggravated" by the insured.

2. PCR is entitled to liability coverage based on the language of this policy agreement, read in light of Florida's law of interpreting insurance policies.

3. Florida public policy does not prohibit insurance for injuries caused without specific intent.

Respectfully submitted,

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE
Professional Association

By _____
John A. DeVault, III
Florida Bar No. 103979
Michael D. Whalen
Florida Bar No. 256811
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307

Attorneys for Appellee PCR, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished, via Federal Express, to the following, this _____ day of June, 2003:

Andrew W. Grigsby, Esquire
Hinshaw & Culberston
800 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131

Allan B. Taylor, Esquire
Day, Berry & Howard, LLP
City Place I
Hartford, Connecticut 06103-3499

Mr. F. Gregory Barnhart
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

Mr. Leonel Plasencia
Four Harvard Circle, Suite 100
West Palm Beach, Florida 33409

_____
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this Answer Brief of Appellee was prepared in Courier New 12-point font.

_____
Attorney