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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC13-696

LETICIA MORALES, Individually and as Personal Representative of the Estate of Santana Morales,Jr., deceased, as parent and natural guardian of SM and RM, minors, as legal guardian for Santana Morales, III and Marciela Morales, individually,

Petitioner/Appellant,

v.

ZENITH INSURANCE COMPANY,

Respondent/Appellee.

ZENITH INSURANCE COMPANY'S ANSWER BRIEF ON THE MERITS

ON CERTIFIED QUESTIONS FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

Statutes

Other Authorities

INTRODUCTION

This case is now before the Court on three certified questions from the United States Court of Appeals for the Eleventh Circuit. The facts from which the questions arise are undisputed – indeed, the federal district court entered a summary judgment based on the parties' submissions – and those facts are fully set forth in the Eleventh Circuit's decision, which is attached as an appendix to this brief. The primary legal question is whether a workers' compensation policy exclusion bars an employee's simple negligence claim against the employer's insurer. It does.

Indeed, there is no question, under this Court's entrenched precedent, that employers who purchase workers' compensation coverage are immune from employees' actions for work-related injuries – at least in the absence of an employer's deliberate intent to injure the employee or conduct that is substantially certain to result in injury or death. Even gross negligence, much less mere negligence, will not satisfy the "substantially certain" exception. Petitioner/Appellant Morales makes no effort to invoke either exception, because she could not.

Rather, her argument turns entirely on the tort judgment that she obtained against her decedent's employer, which judgment arose from a default and an uncontested one-day jury trial on damages that produced a $9.525 million judgment against the employer, Lawns Nursery and Irrigation Designs, Inc. (Lawns). Morales pursued that action *after* she had settled the workers'

compensation claim against the employer by electing to take compensation benefits as her exclusive remedy, and she did not disclose the settlement to the court before which she sought and obtained the tort judgment.

The primary certified question asks this Court whether the workers' compensation policy exclusion bars coverage of Morales's claim against the insurer for the tort judgment obtained in the simple negligence action. As the Eleventh Circuit noted, Florida courts "have concluded that a liability policy does not cover a negligence-based tort judgment against an employer when the policy contains a workers' compensation exclusion." Appendix (hereinafter "A") at 20-21. The federal district court based its summary judgment on that established Florida law. But the Eleventh Circuit, describing Florida law as "unsettled" on this issue, certified to this Court the question whether the exclusion applies to Morales's tort judgment. *Id.* at 29-30.

Regardless of whether this Court agrees that Florida law is indeed "unsettled," decisions of the Third and Fourth Districts, *Indian Harbor Ins. Co. v. Williams*, 998 So. 2d 677 (Fla. 4th DCA 2009); *Fla. Ins. Guar. Ass'n v. Revoredo*, 698 So. 2d 890 (Fla. 3d DCA 1997), correctly apply the Florida workers' compensation exclusion to tort judgments, such as Morales's judgment. This Court should adopt those decisions as proper interpretations of Florida law. Resolution of that certified question in accordance with Florida law would resolve the dispute in this case in the insurer's favor.

The remaining two questions certified by the Eleventh Circuit were not addressed by the federal district court on summary judgment – because that court granted summary judgment on the exclusion of coverage – but were raised on appeal solely as alternative bases for upholding the district court's judgment. There is no suggestion by the Eleventh Circuit as to any uncertainty in Florida law on either the standing or election-of-remedies issues, and rightly so.[1] Should the Court elect to reach those questions, it will find no basis for Morales's standing to sue the employer's insurer as a third-party beneficiary and, failing that, would be bound to hold Morales to her election of workers' compensation benefits.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY.

Petitioner/Appellant Morales, both individually and as representative of the Estate of Santana Morales, Jr., sued Respondent/Appellee Zenith Insurance Company (Zenith) in Florida state court, seeking to recover against Zenith on an employers' liability policy for a fatal work-related injury. Zenith removed the case to federal court, and a district court thereafter granted summary judgment for Zenith based on the insurance policy's workers' compensation exclusion. Morales appealed the judgment to the United States Court of Appeals for the Eleventh Circuit.

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[1] Morales acknowledges that "there is controlling precedent from this Court" on those questions. Appellant's Initial Brief (Morales Brief) at 12.

II. FACTS.

The Eleventh Circuit's opinion sets forth the undisputed facts from which the legal questions presented to this Court arise. (A:2-11). The pertinent facts will be addressed in setting forth Zenith's arguments on the legal questions. See Fla. R. App. P. 9.210(c).

SUMMARY OF ARGUMENT

On the critical certified question, which asks this Court whether the workers' compensation policy exclusion bars coverage of Morales's claim against Zenith for the judgment obtained against Lawns in the simple negligence action, the Court should adopt the reasoning and analysis set forth in *Indian Harbor Insurance Co. v. Williams*, 998 So. 2d 677, 678-79 (Fla. 4th DCA 2009), and *Florida Insurance Guaranty Ass'n v. Revoredo*, 698 So. 2d 890, 892-93 (Fla. 3d DCA 1997). The Fourth District's pre-*Indian Harbor* decision in *Wright v. Hartford Underwriters Insurance Co.*, 823 So. 2d 241 (Fla. 4th DCA 2002), has no bearing on an insurer's ability to raise a policy-based *coverage* defense, which is available to an insurer regardless of whether the insurer correctly declined to defend the underlying action.

Nor can Morales prevail on either of the subsidiary certified questions. With respect to standing, Section 627.4136(1), Florida Statutes (2012), upon which Morales relies, does not create a right in third parties to sue an insurer, but merely addresses the procedure for joinder of liability insurers. And Morales cites no authority for the proposition that Florida's nonjoinder statute was intended to

change the common-law principles that govern the question whether, and when, a third party can be the beneficiary of a contract like the one in this case. Under those well-established principles, a would-be third-party beneficiary must establish that the contract creates rights in the third party, primarily and directly to benefit that party and that the contracting parties intended as much. Allowing Morales to sue as a third-party beneficiary for anything other than worker's compensation benefits would be an end run around Florida's statutory scheme.

On the election of remedies issue, Morales received all benefits due under the workers' compensation policy at issue here. In entering into the settlement agreement with Zenith and Lawns, Morales both "waive[d] all rights to any and all benefits," released Zenith and Lawns from any further liability under the Florida Workers' Compensation Law, and agreed that the settlement was her election of remedies "as to the coverage provided to [Lawns]" by Zenith, without qualification or specification. Nevertheless, after executing the settlement and accepting full workers' compensation benefits, Morales pursued unavailable benefits and recovered a default judgment in contravention of her election of remedies and settled Florida law. The federal district court correctly recognized that such recovery is impermissible and granted summary judgment in favor of Zenith.

The record and the governing law amply support that judgment. The parties are bound by their settlement agreement, the terms of which must be given effect. The unqualified and unlimited word "coverage" cannot be cabined to workers' compensation coverage, without rewriting the clause. Morales is bound to the

settlement agreement, which does not reserve her right to elect another remedy. She could only be authorized to pursue a civil action based on one of the recognized exceptions to the exclusivity of the Workers' Compensation Law, but she has never even attempted to invoke those exceptions.

ARGUMENT

I. THE WORKERS' COMPENSATION EXCLUSION IN ZENITH'S POLICY BARS MORALES'S CLAIM FOR RECOVERY BASED ON HER TORT JUDGMENT AGAINST THE INSURED EMPLOYER.

A. The Insurance Contract.

1. The policy provisions.

In performing its required *de novo* review on questions of contractual interpretation, *e.g.*, *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013), this Court construes an insurance contract "in accordance with the plain language." *Chandler v. Geico Indem. Co.*, 78 So. 3d 1293, 1300 (Fla. 2011) (citation omitted); *accord Washington Nat'l Ins. Corp. v. Ruderman*, No. SC12-323, 2013 WL 3333059, at *3 (Fla. July 3, 2013). Although exclusionary clauses "are construed even more strictly against the insurer than coverage clauses," *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *accord Chandler*, 78 So. 3d at 1300, "[i]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.

2d 528, 532 (Fla. 2005); *accord Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007).

Indeed, "the language of the policy is the most important factor." *Taurus*, 913 So. 2d at 537. Although "[a]mbiguities in insurance contracts are interpreted against the insurer," there must first *be* an ambiguity. *Garcia*, 969 So. 2d at 291 ("[t]o allow for such a construction, ... the provision must actually be ambiguous"); *accord Ruderman*, 2013 WL 3333059, at *5. "A provision is not ambiguous simply because it is complex or requires analysis." *Garcia*, 969 So. 2d at 291; *accord Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010). Thus, where an unambiguous exclusion is set forth in a policy, that exclusion must be enforced. *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 570 (Fla. 2011).

Here, Lawns purchased a "Workers Compensation and Employers Liability Insurance Policy" (the Policy) from Zenith. (R:97-1; A:2).[2] Under Part I of the Policy, Zenith was obligated to (i) pay "the benefits required of [Lawns] by the workers compensation law"; and (ii) defend Lawns in "any claim, proceeding or suit ... for benefits payable by this insurance." (R:97-1:3-4; A:2). The Policy's Part II, titled "Employers Liability Insurance," obligated Zenith to (i) "pay all sums [Lawns] legally must pay as damages because of bodily injury to [its] employees," provided the injury is covered; and (ii) defend Lawns in actions brought to recover

[2] The symbol "R" is used to designate the federal appellate court record.

such damages. (R:97-1:5-6; A:3). Listed under the exclusions clause is "any obligation imposed by a workers compensation ... law." (R:97-1:6; A:3). Pursuant to the Policy provisions, Zenith paid full workers' compensation benefits to the Morales family ($103,184.80 paid, consisting of bi-weekly installments of $513.36, with a final lump sum settlement payment; and, pursuant to statute, Zenith contributed $5,000 towards the funeral expenses). (A:4).

2. The workers' compensation exclusion.

An employer's liability under the Florida Workers' Compensation Law "shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee ... and anyone otherwise entitled to recover damages from such employer ... on account of such injury or death." § 440.11(1), Fla. Stat. (2012). The employee thus "gives up the right to a common-law action for negligence in exchange for strict liability and a rapid recovery of benefits." *Turner v. PCR, Inc.*, 754 So. 2d 683, 686 (Fla. 2000).

"[W]orkers' compensation is the exclusive remedy available to an injured employee as to any negligence on the part of that employee's employer." *Eller v. Shova*, 630 So. 2d 537, 539 (Fla. 1993).[3] Where, as here, a worker's compensation

[3] The statutory exceptions apply to the commission of an intentional tort, which can be established by a showing of either: (i) "deliberately intend[ing] to injure the employee"; or (ii) "engag[ing] in conduct that the employer knew ... was virtually certain to result in injury or death to the employee." § 440.11(1)(b), Fla. Stat. (2012). Morales has never invoked either exception, the boundaries of which are closely guarded by the Florida courts. *E.g., Bourassa v. Busch Entm't Corp.*, 929 So. 2d 552, 556-57 (Fla. 1st DCA 2006).

claim has resolved with a settlement (R:86:4 at ¶¶ 10, 12; R:89:30:43-44; R:89-31:1-7), workers' compensation remedies have been irrevocably invoked and further relief is barred by the exclusivity statute. *Petro Stopping Ctrs., L.P. v. Gall*, 23 So. 3d 849, 851-52 (Fla. 5th DCA 2009); *see Jones v. Martin Elecs., Inc.*, 932 So. 2d 1100, 1105 (Fla. 2006); *Lowry v. Logan*, 650 So. 2d 653, 657 (Fla. 1st DCA 1995).

B. Morales Cannot Evade Both the Statutory Exclusion and the Contractual Bar on Recovery for Employer Negligence.

1. Morales's recovery against the defunct employer.

Morales sued Lawns on a claim of simple negligence. (R:76-2:7-11; A:4-5). Defending Lawns under a reservation of rights, Zenith filed an answer alleging, in part, that the claim was barred by Morales's receipt of workers' compensation benefits. (R:76-2:18-20; R:86:7 at ¶¶ 19-21; R:98-5:9-10; A:5).

It ultimately proved impossible for Zenith to continue defending Lawns in the negligence action, because "Lawns never responded to [counsel's] letters and phone calls, and [counsel] was never able to locate Lawns'[] lone corporate officer." (A:5). In April 2002, counsel moved to withdraw for these reasons, which motion was granted in May 2002. (R:76-11:1-3; R:76-16:1; A:5).

After Zenith withdrew its counsel from representing Lawns, Zenith and Morales settled the workers' compensation claim for a lump sum payment. (R:89-30:43-44; R:89-31:1-7; A:6-7). The settlement agreement expressly states that it "shall constitute an election of remedies by the claimant with respect to the

employer and the carrier as to coverage provided to the employer." (R:89-30:43; A:6-7). The settlement was approved by a workers' compensation judge in September 2003. (R:89-30:39-40; A:7). At that point, Morales had been fully compensated and should have dismissed the negligence action, but she did not.

Instead, Morales – through the same law firm that represented her in the worker's compensation proceeding – pursued the action for simple negligence and succeeded in obtaining a $9.525 million default judgment against Lawns in March 2005, after securing an order striking Lawns's answer and affirmative defenses and a one-day, uncontested jury trial on damages. (R:76-2:7-11; R:76-27:1-3; R:97-15:1-2; A:6). As the Eleventh Circuit noted, "the settlement of the workers' compensation claim was not brought to the state court's attention in [Morales's] ... tort lawsuit." (A:6 n.5).

Armed with the judgment, however, Morales filed the present action in Florida state court, alleging that Zenith had breached its policy with Lawns, and seeking to recover from Zenith the $9.525 million tort judgment against Lawns. (R:2:4-11; A:7). The district court, on summary judgment, ruled that Morales could not recover for alleged simple negligence through the vehicle of the uncontested tort judgment:

> Morales' negligent tort suit for workplace entry was subject to the exclusivity provisions of the Act, thereby triggering an obligation on the part of Lawns to pay workers' compensation benefits for Morales' injuries. As the underlying negligence tort suit triggered an "obligation imposed by the Act," the workers' compensation exclusion functions to bar coverage in this case. Notably, any other construction would allow the Plaintiff to "double dip," and recover

> both workers' compensation benefits and damages in tort; such a construction would belie the policy behind Florida workers' compensation law.

(R:121:7) (footnote omitted).

2. Florida law prohibits a "double-dip" recovery of workers' compensation benefits and tort damages in any guise.

In certifying its primary question to this Court, the Eleventh Circuit observed that, "[u]nder Florida law it is unclear whether a workers' compensation exclusion in an employer liability policy – which is intended to protect employers from tort liability to their employees – bars coverage of an employee's tort judgment obtained in a separate negligent suit against the employer." (A:15). Zenith submits that the Court should adopt the reasoning and analysis set forth in decisions of the Third and Fourth District Courts of Appeal. *Indian Harbor Ins. Co. v. Williams*, 998 So. 2d 677, 678-79 (Fla. 4th DCA 2009); *Fla. Ins. Guar. Ass'n v. Revoredo*, 698 So. 2d 890, 892-93 (Fla. 3d DCA 1997).[4]

(a) Extant Florida law.

In *Revoredo*, the employer – unlike Lawns – failed to provide workers' compensation insurance, which left the deceased employee's estate with no option

[4] The Eleventh Circuit noted that federal district courts have had occasion to apply Florida law to this question, in accordance with *Indian Harbor* and *Revoredo*, and "have concluded that a liability policy does not cover a negligence-based tort judgment against an employer when the policy contains a workers' compensation exclusion." (A:20-21). See Point I.B.2.(b), *infra*.

except a wrongful death action against the employer. 698 So. 2d at 890-91. The employer's insurer refused to defend based on the policy's exclusion of work-related injuries, whereupon the employer stipulated to a judgment in the estate's favor and assigned to the estate its rights against the insurer. *Id.* at 891. Addressing the question whether the death was excluded from coverage, despite the employer's failure to provide workers' compensation insurance, the Third District relied on the policy exclusion, which is identical to the exclusion here, of "[a]ny obligation of the insured under a worker's compensation ... law." *Id.*

The court held that "the statutory employer-employee relationship" is not "contingent on the securing of workers' compensation from the employee." *Id.* at 892. "None of our statutes declare, and none of our courts has decided, that a failure to secure payment of compensation disestablishes the statutory employer-employee relationship." *Id.* Because "there is no such disestablishment," notwithstanding that the employer had failed to "secure payment of compensation," the court held that the policy exclusion barred the insurer's liability. *Id.* at 892-93.

The Fourth District followed *Revoredo* in *Indian Harbor*, despite recognizing that "exclusionary clauses are strictly construed in a manner that affords the insured the broadest possible coverage." 998 So. 2d at 678-79. The insurer in that case brought a declaratory action to determine the employer's coverage in an action brought by injured employees; there, as in *Revoredo*, the employer had "violated his statutory duty to maintain workers' compensation

insurance for his employees." *Id.* The court adopted *Revoredo*'s analysis, noting that the employees had "the option of either pursuing workers' compensation claims directly against the [employer], or suing [the employer] in tort." *Id.* at 679 & n.2.[5]

The discordant note identified by the Eleventh Circuit is the Fourth District's pre-*Indian Harbor* decision in *Wright v. Hartford Underwriters Insurance Co.*, 823 So. 2d 241 (Fla. 4th DCA 2002) (A:17-19) – to which the Fourth District found no reason to refer in *Indian Harbor*. But there is good reason for that, and there was no oversight.

The injured employee in *Wright* sued his employer for *gross negligence*, after settling a workers' compensation claim. 823 So. 2d at 241. The insurer declined to defend the insured, and the parties settled, with the employer assigning their rights as insured to the employee. *Id.* The insurer declined to pay the judgment and, when the employee sued, obtained a summary judgment on workers' compensation immunity. *Id.*

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[5] The court cited Section 440.11(1)(a), Florida Statutes (2012), under which, "[i]f an employer fails to secure payment of compensation ..., an injured employee ... may elect to claim compensation under this chapter or to maintain an action at law ... for damages on account of such injury." That is the single instance in which – absent an intentional tort, see n.3, *supra*, – Florida's Workers' Compensation Law contemplates an original action in tort. Zenith, of course, complied with its obligation to have workers' compensation insurance in place. (A:2-3).

The Fourth District reversed because the insurer had failed to defend and was accordingly bound by its insured's settlement. *Id.* at 242-43.[6] Turning to the course of proceedings on remand, the court stated that "the workers compensation *exclusion* ... does not apply to Wright's civil action because the settlement judgment was not an 'obligation imposed by workers' compensation' law," but rather "arose from the claims in the civil action and the settlement agreement ..., neither of which involve obligations imposed by workers compensation law." *Id.* at 243. All but ignoring *Revoredo* and *Indian Harbor*, Morales urges the Court to adopt the reading of *Wright* as Florida law, which is something that no other court has done. Morales Brief at 22-23, 31.[7]

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[6] That holding is of no importance. It was the court's directions about proceedings on remand, as set forth in the text, that caught the Eleventh Circuit's attention. (A:19).

[7] The only reference to *Revoredo* or *Indian Harbor* in Morales's brief is in a single passage, in which Morales asserts that those decisions turned on the absence of a workers' compensation policy. Morales Brief at 31. Because the employers in those cases failed in their statutory obligation, purchasing only comprehensive general liability (CGL) policies, Morales apparently believes that the policy exclusion was properly applied to those would-be tort plaintiffs. But here, *because* the Lawns policy included the required workers' compensation coverage, the exclusion in the general liability part for employee injuries is *meaningless*. Morales Brief at 31-32. As the Eleventh Circuit correctly noted, the distinction that Morales attempts to draw was not addressed in *any* of the three decisions. (A:20 n.14). The only question – which must be answered in Zenith's favor – is whether the core of *Wright*'s holding – that the exclusion for injuries covered by workers' compensation does not apply to a tort settlement – is viable.

(b) This Court should not allow "double dip" recovery in violation of the policy.

As the Eleventh Circuit noted, federal courts that have applied Florida law on this issue "have more often relied on *Indian Harbor* and *Revoredo* than *Wright*, and have concluded that a liability policy does not cover a negligence-based tort judgment against an employer when the policy contains a workers' compensation exclusion." (A:20-21). Indeed, one federal court recognized that *Indian Harbor* "appears to have implicitly overruled the dicta in *Wright*." *Sinni v. Scottsdale Ins. Co.*, 676 F. Supp. 2d 1319, 1332 n. 18 (M.D. Fla. 2009).[8]

In *Sinni*, the employee "received significant workers' compensation benefits for the very injuries for which he subsequently sought relief in the underlying tort action." 676 F. Supp. 2d at 1330. The plaintiff settled the tort action after the insurer declined to defend, and then relied on *Wright* to argue that the workers' compensation exclusion in the employer's CGL policy did not apply to her claims because the insurer had not defended the tort action. *Id.* at 1330-31.

The court observed that "the actual holding in *Wright* is that an insurer cannot avoid its duty to indemnify by raising an affirmative defense that its insured

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[8] The district court accepted that characterization (R:121:9-11), but the Eleventh Circuit "disagree[d] with the district court's characterization of the relevant language from *Wright* about the inapplicability of the workers' compensation exclusion to an underlying tort judgment against the insured as dicta." (A:10 n.9). Nonetheless, in reciting the pertinent Florida law, the Eleventh Circuit noted that "the Fourth DCA seemingly changed course" in *Indian Harbor* "when it construed a similar exclusion albeit in a CGL policy." (A:19).

failed to raise or could have raised in the underlying action." *Id.* at 1331. That holding, the court continued, "has no bearing ... on insurer's ability to raise *coverage* defenses [for] exclusions that appear on the face of the policy." *Id.* (emphasis added). "[C]overage is determined by looking at the policy and the actual facts – not the labels attached to the underlying tort obligation," a distinction that *Wright* "fails to recognize." *Id.* at 1332. To the same effect is *XL Insurance America, Inc. v. Ortiz*, 673 F. Supp. 2d 1331 (S.D. Fla. 2009), in which the insured accepted workers' compensation benefits and then sued his employer. *Id.* at 1337. The court refused to condone a "double dip" recovery, because "the only coverage intended, and for which the premium has been paid, is the liability of the insured to the public, as distinguishing from liability to the insured's employees." *Id.* at 1344-45 (citation omitted).

Morales's reliance on *Travelers Indemnity Corp. v. PCR, Inc.*, 889 So. 2d 779 (Fla. 2004), to support her "double dip" recovery theory on the notion that "this Court specifically rejected the argument that Zenith makes here" (Morales Brief at 32) is utterly misplaced. *Travelers* was before this Court on certified questions from the Eleventh Circuit on "whether an employer's liability insurance policy that provides coverage for liability arising from work-related accidental injuries, but excludes from coverage liability arising from injuries intentionally caused by the employer, provides coverage for a tort claim" brought under the intentional-tort exception to the Workers' Compensation Law. 889 So. 2d at 781-82. The Court held that a claim based on an employer's intentional tort can be

covered by an employer's liability policy, *id.* at 795-96, and, in so holding, noted that an employer reasonably may address the risk, however small, that an employee will bring a claim that falls outside of the otherwise-exclusive remedy created by the Workers' Compensation Law. *Id.* at 784 n.7.

An employer may do so by purchasing CGL coverage, together with workers' compensation coverage, using the CGL coverage "as a 'gap-filler,' providing protection to the employer in those situations where the employee has a right to bring a tort action despite the provisions of the workers' compensation statute." *Id.* (citation omitted). Morales's reliance on *Travelers* truly begs the question whether she was entitled to bring the original negligence action in the first instance: the cited footnote means only that an insurer may be compelled to defend an action for an intentional tort under its general liability coverage, even if the claim is excluded from workers' compensation benefits. But it means nothing with respect to an insurer's right to defend against a claim for recovery based on a judgment on a simple negligence claim that *absolutely* is excluded from *any* coverage.[9]

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[9] Somewhat inconsistently, Morales *also* asserts that, because "[a]ny claims by employees are by definition excluded from coverage under a CGL policy ... it is meaningless that CGL case law holds the claims from which workers compensation benefits have been paid or excluded from CGL coverage." Morales Brief at 31. *Travelers*, as set forth in the text, holds directly to the contrary – because, in the case of intentional torts by an employer, workers' compensation exclusivity is cast aside, and the employer's CGL policy *can* provide coverage. The decisions upon which Morales relies to argue that "[d]ifferent types of policies are not subject to the same law and the case law is not interchangeable" (Morales (continued . . .)

In the end, it is important to perhaps step back a bit from the process of harmonizing case law to appreciate the full import of Morales's position. She does not, because she cannot, contend that there was any basis for her negligence claim against Lawns. Lawns carried workers' compensation coverage and Zenith *paid* in excess of $100,000 in benefits to the Morales family under that coverage. The workers' compensation statute, on its face, forbade a negligence action against the employer. Due to a series of unanticipated circumstances – essentially, that Lawns disappeared – Zenith, although having attempted to provide a defense to Lawns, could not defend the action. After having executed a settlement agreement that released Zenith and Lawns from all further liability, Morales nonetheless pursued the simple negligence action and, without disclosing the settlement agreement, obtained a default judgment and an uncontested damages verdict on a claim that could never have been brought in the first instance. Morales then leveraged that judgment into a purported basis for obtaining recovery from Zenith, which the workers' compensation exclusion absolutely prohibits.[10]

(. . . continued)
Brief at 30-31) have nothing to do with the issue before this Court. *Progressive Am. Ins. Co. v. Rural/Metro Corp. of Fla.*, 994 So. 2d 1202, 1207 (Fla. 5th DCA 2008) ("PIP insurance is not liability insurance," and "the two ... are not interchangeable terms" for purposes of interpreting statute); *Gov't Emps. Ins. Co. v. Sweet*, 186 So. 2d 95, 96 (Fla. 4th DCA 1966) ("medical payments insurance coverage [is] an entirely different type of insurance than public liability or property damage insurance").

[10] Courts outside of Florida that have interpreted workers' compensation exclusions, as set forth in Part II of the Policy at issue here, have consistently found the exclusion to be clear and unambiguous and held it to mean that injuries
(continued . . .)

This Court has long enforced the fundamental principle that "[w]hatever the law forbids to be directly done is also to be forbidden to be indirectly done." *State v. Atl. Coast Line R. Co.*, 47 So. 969, 983 (Fla. 1908); *accord N. Port Road & Drainage Dist. v. W. Vills. Improvement Dist.*, 82 So. 3d 69, 72 n. 4 (Fla. 2012). But that is precisely what Morales is asking this Court to condone, and what the Court should *not* condone or encourage in any respect.

(. . . continued)
eligible for coverage under Part I (or Part A) of a workers' compensation policy are not eligible for coverage under Part II (or Part B) of this type of policy. *See, e.g., Everest Nat'l Ins. Co. v. Valley Flooring Specialties*, No. CV F 08-1695 LJD GSA, 2009 WL 1530169, at *8-9 (E.D. Cal. May 27, 2009) (exclusion for "any obligation imposed by a workers' compensation law" clearly means that where workers' compensation liability exists, there is no coverage under the employers' liability portion of the policy; any other construction would permit a dual recovery, which is contrary to the concept of employers' liability insurance and violative of statutory policy); *Quick v. Ronald Adams Contractor, Inc.*, 861 So. 2d 278, 282 (La. Ct. App. 2003) (insurance coverage for employment-related injury did not exist under employer liability policy because of exclusion 4, which excluded coverage for any obligation imposed by workers' compensation law); *CompSource Okla. v. L & L Constr., Inc.*, 207 P.3d 415, 421 (Okla. Civ. App. 2008) (clear intent of workers' compensation policy exclusion was to cover employee injuries under Part One, but to exclude employee injuries from coverage under Part Two); *Danielson v. Larsen Co.*, 541 N.W.2d 507, 511 (Wis. Ct. App. 1995) (unambiguous workers' compensation policy exclusion means that the employer's liability insurance does not cover injuries that trigger obligations under workers' compensation law).

3. Zenith is entitled to raise its coverage defense in Morales's action to recover based on the state-court tort judgment.

As the Eleventh Circuit noted (A:10-11), the federal district court ruled that Zenith's court-approved withdrawal from Lawns' defense does not disentitle Zenith to rely on policy exclusions on the workers' compensation policy exclusion. (R:121:12-13). Before this Court, however, Morales acknowledges that "Zenith can assert defenses to coverage ..., such as policy exclusions" and indeed, asserts that she "never challenged Zenith's right to assert policy exclusions." Morales Brief at 25, 29. Morales could hardly do otherwise, as Florida law has always drawn a distinction between tort defenses and coverage issues. *E.g.*, *Allstate Ins. Co. v. Candreva*, 497 So. 2d 980, 981 (Fla. 4th DCA 1986) (workers' compensation immunity "bear[s] on the right of recovery from the tortfeasor, not on the issue of coverage under the policy"); *see also Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 854 (Fla. 1992) (workers' compensation immunity "is an affirmative defense"); *Indep. Fire Ins. Co. v. Paulekas*, 633 So. 2d 1111, 1114 (Fla. 3d DCA 1994) (insurer "not permitted to assert all the defenses which could have been asserted in the underlying cause of action" in coverage dispute).

Thus, an insurer who refuses to defend may be bound by the insured's waiver of workers' compensation immunity in a settlement with the employee-plaintiff. *Gallagher v. Dupont*, 918 So. 2d 342, 347 (Fla. 5th DCA 2006). But that is not the same thing as waiving *policy*-based defenses, which remain available to the insurer regardless of whether the insurer correctly declined to defend the

underlying action. *Steil v. Fla. Physicians' Ins. Reciprocal*, 448 So. 2d 589, 592 (Fla. 2d DCA 1984); *accord Spencer v. Assurance Co. of Am.*, 39 F.3d 1146, 1149 (11th Cir. 1994); *Sinni*, 676 F. Supp. 2d at 1324-25. And, at least before this Court, Morales now acknowledges as much. Morales Brief at 25, 29. She nonetheless attempts to leverage foreclosed *tort* defenses into a *de facto* preclusion of *coverage* defenses. Morales Brief at 30. Morales's purported rationale is that the tort judgment "impliedly rejects all defenses, including workers' compensation immunity," such that "Florida law precludes Zenith from using that defense to its own benefit in this coverage case." *Id.* What Morales actually *means*, however, is that the courts cannot enforce the policy's unambiguous workers' compensation exclusion. That argument cannot prevail.

The exclusion denies coverage for "any obligation imposed by a workers compensation ... law." (R:97-1:5-6). Morales seems to believe that an employee can plead around that exclusion merely by suing an employer on a claim for simple negligence – which, indisputably, is barred by Section 440.11(1) – and the employer's insurer thereupon *must*, on pain of waiver, defend the insured employer or risk being unable to invoke the policy exclusion – because application of the exclusion turns on whether the liability sought to be imposed is a *workers' compensation* "obligation." Morales Brief at 25-29 (emphasis added). Accepting Morales's argument would be effectively to eradicate workers' compensation immunity under Section 440.11(1), because employees would be encouraged to

file negligence actions and insurers would be obligated to defend those actions.[11] That aside, Morales' argument is built on an unsustainable premise.

That is, Morales focuses on the district court's analysis of the workers' compensation immunity principle's applicability to her claim (R:121:6-7), and the court's determination that "the workers' compensation exclusion contained in the Policy is applicable and would function to exclude coverage for [Morales's] negligence tort claim." (R:121:11). But "even if ... policy defenses mirror defenses (e.g., workers' compensation immunity) that could have been raised to defend the tort claim itself," coverage under a workers' compensation exclusion "is determined by looking at the policy and the actual facts – not the labels attached to the underlying tort obligation." *Sinni*, 676 F. Supp. 2d at 1332. The district court followed this sound analysis to hold that, even when an insurer has "wrongfully failed to defend its insured in an underlying action, Florida law is clear that [the

[11] The absurdity of Morales's position, is, of course, that *any* action for negligence against an employer would inevitably fail, *e.g.*, *Turner*, 754 So. 2d at 686-87, making it unnecessary ever to reach the question of exclusions from coverage in a subsequent action against an insurer. The carefully protected intentional-tort exception to workers' compensation immunity, *e.g.*, *Bourassa*, 929 So. 2d at 557-59, would be all but obliterated in a flurry of frivolous lawsuits, filed in the hopes of an insurer's refusal to defend (or as here, a disappearing insured). Here, it is only the confluence of Lawns' disappearance and Morales's concealment of her settlement with Zenith that caused the imbroglio that the Eleventh Circuit has asked this Court to untangle.

insurer] may still rely on policy *exclusions* when it is later sued for indemnification for an underlying judgment." (R:121:12).[12]

Morales cites no authority for the intuitively dubious proposition that an employee can create coverage by securing a judgment that runs afoul of the workers' compensation immunity bar. Even if *the employer* would be bound by that judgment, an insurer – as Morales is forced to concede (Morales Brief at 25, 29) – is entitled to raise policy *exclusions* in an action by the insured to recover on the judgment against the employer.

II. THE DENIAL OF RELIEF TO MORALES MAY BE UPHELD ON ALTERNATIVE GROUNDS.

In the district court, Zenith moved for summary judgment on two grounds in addition to the basis set forth in Point I of this brief: lack of standing; and election of remedies. (R:85:7-11, 17-24). Because the district court ruled in Zenith's favor on the question whether Morales can recover against Zenith, the court had no occasion to address these grounds. (R:121:15). Zenith raised standing and election of remedies as alternative bases for upholding the district court's order.

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[12] Morales's riposte to the district court's warning that the result urged by Morales would result in allowing an employee to "double dip" by securing workers' compensation benefits and then bringing an action for simple negligence (R:121:8-9) is entirely unconvincing. Morales cites this Court's decision in *Jones* for the proposition that "[t]his Court has specifically rejected the 'double' recovery argument." Morales Brief at 35. But *Jones* merely holds that accepting workers' compensation benefits is not inherently nor necessarily "a waiver of all common law *intentional tort* revenues." 932 So. 2d at 1107 (emphasis added).

Brief of Appellee at 21-31, *Morales v. Zenith Ins. Co.*, No. 12-11755-B (11th Cir. July 13, 2013). Much like Florida's "tipsy coachman" doctrine, *e.g.*, *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 212 (Fla. 2012), a federal appellate court may uphold a judgment "on any adequate ground, even if it is other than the one on which the court actually relied." *Fishermen Against the Destruction of the Envm't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1296 (11th Cir. 2002) (citation omitted).

Should this Court elect to reach those issues, it will find ample basis for upholding summary judgment in Zenith's favor.

A. Morales Has No Standing to Bring an Action Against Zenith.

To the extent that the Eleventh Circuit's decision identifies any question of Florida law on standing, the court focused on a possible dichotomy between common-law principles on third parties' entitlement to sue on a contract and Section 627.4136(1), Florida Statutes (2012), which governs non-insureds' actions against insurers. (A:24-25, 29). Before this Court, Morales relies on Section 627.4136(1) to argue for standing. Morales Brief at 18-19.

That reliance is misplaced. The statute does not create a right in third parties to sue an insurer, but merely addresses the *procedure* for joinder of liability insurers. *Hazen v. Allstate Ins. Co.*, 952 So. 2d 531, 535-37 (Fla. 2d DCA 2007).

The Florida Legislature adopted the original predecessor to Section 627.4136 in response to *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), and *Beta*

Eta House Corp., Inc. of Tallahassee v. Gregory, 237 So. 2d 163 (Fla. 1970), so as to require a judgment against the insured before an action is instituted against the insurer. *Hazen*, 952 So. 2d at 535. In *Beta Eta*, this Court held that, upon a determination of coverage, "the carrier is bound by the ultimate judgment in the trial on the merits to the extent of such elements as the validity of the insurance policy and the amount of the judgment." 237 So. 2d at 165. The Court authorized joinder of a liability insurer as a defendant, *id.*, which is what prompted the Florida Legislature to adopt the first nonjoinder statute in 1976. *Hazen*, 952 So. 2d at 535. The legal theory underlying *Shingleton* and *Beta Eta* is that an injured plaintiff is a third-party beneficiary of the liability insurance contract between insurer and insured with "a sufficient interest in such a contract to bring suit directly for its breach." *Shingleton*, 223 So. 2d at 715 (citation omitted). But neither *Shingleton* nor *Beta Eta* determines the applicability of the third-party beneficiary doctrine to workers' compensation insurance policies. *E.g.*, *Allen v. Estate of Carman*, 281 So. 2d 317, 323-24 (Fla. 1973) (declining to decide, notwithstanding the Court's earlier pronouncements in *Shingleton* and *Beta Eta*, whether the representative of employee's estate was a third-party beneficiary to a workers' compensation insurance policy entered into between the insurance carrier and the employer). And "[t]he third-party beneficiary analysis in *Shingleton* was expressly overridden by the legislature ... when it prevented the joinder of insurance companies in tort lawsuits." *Progressive Express Ins. Co. v. Scoma*, 975 So. 2d 461, 469 (Fla. 2d DCA 2007) (footnote omitted).

It is thus not surprising that Morales cites no authority for the proposition that Florida's nonjoinder statute was intended to change the common-law principles that govern the question whether, and when, a third party can be the beneficiary of a contract like the one in this case. Morales Brief at 18-19. Under those well-established principles, a would-be third-party beneficiary must establish that the contract creates rights in the third party, primarily and directly to benefit that party and that the contracting parties intended as much. *E.g.*, *Greenacre Props., Inc. v. Rao*, 933 So. 2d 19, 23 (Fla. 2d DCA 2006); *Biscayne Inv. Grp., Ltd. v. Guarantee Mgmt. Servs., Inc.*, 903 So. 2d 251, 254 (Fla. 3d DCA 2005)

Here, the Policy was entered into between Zenith and Lawns only, and expressly states that Zenith will defend "any claim ... *against* [Lawns] for damages payable by this insurance." (R:97-1:6) (emphasis added). Yet, Morales's claim against Zenith purports to have been brought by standing in Lawns' shoes. Morales Brief at 17-19. That is a particularly anomalous position for Morales to take with respect to an injury that – as Morales tacitly concedes – is within the Policy's *workers' compensation* coverage. (R:97-1:3-4). It makes no sense to constitute an employee covered by workers' compensation insurance as a third-party beneficiary of an employer's *liability* insurance; Part I of the Policy, in extending workers' compensation coverage, specifically makes Zenith "directly and primarily liable to any person entitled to the benefits payable by this [workers' compensation] insurance." (R:97-1:4).

A similar provision was addressed under Florida law in *Erhard v. Hartford Accident & Indemnity Co.*, No. 07-60532-CIV, 2008 WL 203583 (S.D. Fla. Jan. 23, 2008). The defendant insurer had denied an injured employee's workers' compensation claim, whereupon the employee sued his employer in an action that the insurer declined to defend. *Id.* at *1. The employer and employee entered into a consent judgment in the employee's favor and the employer then assigned its rights against the insurer to the employee. *Id.* On the insurer's motion to dismiss the employee's claim for breach of contract against the insurer, in the employee's individual capacity and not as the employer's assignee, the court relied on the contractual provision allowing enforcement by "a person entitled to benefits payable by this insurance" to dismiss the breach of contract claim. *Id.* at *3-4.

The court ruled that "[a]llowing an injured worker to sue as a third-party beneficiary for anything other than worker's compensation benefits ... would be an end run around Florida's statutory scheme." *Id.*[13] The same is true here.

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[13] The court's reasoning in *Erhard* is consistent with decisions of other courts that have declined to extend third-party beneficiary status to employees who seek damages in excess of the benefits conferred under state workers' compensation statutory schemes. *E.g.*, *Ocasek v. Krass*, 505 N.E.2d 1258, 1261 (Ill. App. Ct. 1987) (rejecting argument that employer's insurance policy as a third-party beneficiary contract for the employee's benefit to recover benefits in addition to those conferred by the state's workers' compensation law); *Brix v. Gen. Account & Assurance Corp.*, 93 N.W.2d 542, 545 (Minn. 1958) (refusing to permit employee to bring a third-party beneficiary action against employer's workers' compensation insurer because "the insurer has no independent liability to the employee"); *Mitchell v. Philadelphia Elec. Co.*, 422 A.2d 556, 561-62 (Pa. Sup. Ct. 1980) (employee was precluded from seeking relief as a third-party beneficiary of the (continued . . .)

B. Election of Remedies.

The Eleventh Circuit certified the question whether "the settlement agreement represents [Morales's] election of workers' compensation benefits over any other form of relief." (A:28). As set forth in the opinion (A:6-7), Zenith and Morales entered into a settlement agreement in September 2003 "for the specific purpose of jointly discharging the employer/carrier from any further liability for all benefits under the Florida Workers' Compensation Act." (R:89-30:43). In Paragraph 1 of the settlement agreement, titled "Election and Waiver," the parties agreed: (i) Morales "hereby waives all rights to any and all benefits under The Florida Workers' Compensation Act"; and (ii) the settlement "shall constitute an election of remedies by the claimant with respect to the employer and the carrier *as to the coverage provided to the employer.*" (R:89-30:44) (emphasis added). It is this second provision – the express election – that forms the basis for Zenith's alternative election-of-remedies argument. (A:6-7, 28).

Before this Court, Morales insists that the election clause "is a waiver of 'benefits under the Florida Workers' Compensation Act' and does not refer to a waiver of the tort claim." Morales Brief at 40. Morales asserts that "the intent was to settle and release only the workers compensation claim." *Id.* That reading fails to give appropriate effect to the parties' use of different terms in Paragraph 1.

(. . . continued)
employer's "excess liability" insurance policy where employee had a remedy against employer under the state's workers' compensation law).

That is, Morales *both* "waive[d] all rights to any and all benefits" under the Florida statute – *and* agreed that the settlement was her election of remedies with respect to Lawns *and* Zenith "as to the *coverage* provided to the employer" by Zenith, *without* qualification or specification. The parties' choice of words must be given due effect. *E.g.*, *Fowler v. Gartner*, 89 So. 3d 1047, 1048 (Fla. 3d DCA 2012) ("the use of different language in different contractual provisions strongly implies that a different meaning was intended" (citation omitted)).

The unqualified and unlimited word "coverage" cannot be cabined to workers' compensation coverage, without rewriting the clause. Once that proposition is accepted, as it must be, Morales should not be allowed to escape her agreement. *E.g.*, *Vallejos v. Lan Cargo S.A.*, No. 3D12-1259, 2013 WL 3015685, at *1-3 & n.8 (Fla. 3d DCA June 19, 2013) (employee received workers' compensation benefits and later obtained settlement with "broad release" properly precluded from bringing subsequent negligence action because release "did not contain a clause stating that the release should not be construed as an election of remedies"; settlement released employer and carrier "from any and all liability for the payment or provision of any class of benefits, of whatever kind or classification available under the Florida Workers' Compensation Law" (emphasis omitted)); *Gall*, 23 So. 3d at 852; *Michael v. Centex-Rooney Constr. Co.*, 645 So. 2d 133, 136 (Fla. 4th DCA 1994); *cf. Vasquez v. Sorrells Grove Care, Inc.*, 962 So. 2d 411, 415 (Fla. 2d DCA 2007) (release by workers' compensation claimant expressly stated that settlement did not elect remedies and reserved right to bring tort claim).

Morales obtained the default judgment without disclosing the existence of the settlement agreement under which she agreed to release Zenith and Lawns of any further liability. Because Morales did not specifically "reserve [her] right to elect another remedy" in the settlement agreement, she could only be authorized to "pursue a civil action based upon an exception to the exclusivity of the workers' compensation statute," *Vallejos*, 2013 WL 3015685, at *3-4, and there is no applicable exception.

Zenith thus respectfully requests the Court to answer the second certified question that the Eleventh Circuit posed by ruling that, under Florida law, Morales cannot evade the Policy's workers' compensation exclusion by seeking to recover against Zenith on her tort judgment against the employer. In the alternative (or in addition), Zenith requests the Court to rule that Morales has no standing to bring an action against Zenith and that her election of remedies would bar any claim based on the tort judgment.

CONCLUSION

Based on the foregoing, Zenith respectfully requests the Court to answer the second certified question that the Eleventh Circuit posed by ruling that, under Florida law, Morales cannot evade the Policy's workers' compensation exclusion by seeking to recover against Zenith on her tort judgment against the employer. In the alternative (or in addition), Zenith requests the Court to rule that Morales has no standing to bring an action against Zenith and that her election of remedies would bar any claim based on the tort judgment.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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