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## **STATEMENT OF THE CASE AND FACTS**

The statement of facts in BCBSF's<sup>1</sup> initial brief contains a significant omission.

In its statement, BCBSF quotes in full the intoxication exclusion upon which BCBSF relied to deny coverage to Ms. Steck for medical expenses arising from her accident.

This exclusion provides:

This contract does not provide benefits for: . . . a condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician; . . .

BCBSF's brief then states that the Conversion Option III health insurance policy under which Ms. Steck was insured (the "BCBSF Policy") defines the word "condition" used in this exclusion to include "any covered disease, illness, ailment, injury or bodily malfunction of an insured" (IB, at p. 4).

BCBSF's brief, however, neglects to mention the uncontroverted affidavit of Barbara Steck, Angela Steck's mother and the person who purchased and paid the

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<sup>1</sup> Respondent, Angela Steck, will employ the same references to the parties used in Petitioner's initial brief, referring to herself as "Angela Steck" or "Ms. Steck," and to Petitioner, Blue Cross and Blue Shield of Florida, Inc., as "BCBSF." References to the appendix submitted with BCBSF's initial brief will be referred to by the designation "App.," followed by the tab number of the reference. References to BCBSF's initial brief in this Court will be referred to by the prefix "IB" followed by the page number of the reference; references to BCBSF's Second District initial brief will be referred to by the prefix "DCAIB," followed by the page number of the reference.

premiums under the BCBSF Policy, which unequivocally states that the Steck's were never furnished a copy of the BCBSF Policy (App., Tab 10). All the Stecks received was a nine-page policy summary, titled "Introducing Conversion Option III," a copy of which is attached to the affidavit. *Id.* While this policy summary contains BCBSF's intoxication exclusion, it contains no definition of the term "condition," nor even any indication that this term is defined in the BCBSF Policy. This omission from BCBSF's statement of facts is significant because, under Florida law, an insurer may not rely on an undisclosed policy provision it has not provided to the insured.

The balance of BCBSF's statement of facts is primarily devoted to reciting in detail the facts supporting BCBSF's position on matters which are not at issue in this appeal. For example, whether Ms. Steck's accident was caused by her 20/400 uncorrected vision and Moebius syndrome, or by her intoxication, presents a jury question. However, for purposes of this appeal from a summary judgment, it is presumed that intoxication caused the injury, and BCBSF's detailed recitation of the facts on which it bases its position on causation is superfluous.

## SUMMARY OF ARGUMENT

The Second District below held that Angela Steck's coverage for substantial medical expenses incurred as a result of an automobile/pedestrian accident was not barred by BCBSF's intoxication exclusion based on the authority of two on-point decisions of this Court, the *Mason* cases. The *Mason* cases involved facts which BCBSF concedes are the same; one of them also construed an intoxication exclusion functionally identical to BCBSF's.

BCBSF advances a host of arguments in an attempt to undermine this plainly controlling law. For example, BCBSF asserts that the *Mason* cases have been superceded by the enactment of a statute expressly authorizing intoxication exclusions in certain Florida insurance policies. This contention is misplaced. The *Mason* cases presumed the validity of such exclusions, and refused to apply the exclusions before them only because the insurer had failed to show the loss was within the scope of the exclusion.

BCBSF also incorrectly argues that the *Mason* holding is inconsistent with subsequent Florida case law interpreting intoxication exclusions. The cases BCBSF cites involve exclusions which follow the *Mason* holdings and incorporate language to extend their exclusions to include injuries indirectly related to intoxication. BCBSF's exclusion does not incorporate such language, and BCBSF is in effect

asking this Court to rewrite its policy after the fact to add language it could have but did not include.

BCBSF also argues that the second *Mason* decision represents "bad law" and should be reversed. This argument has no merit. The *Mason II* decision correctly applied fundamental principles of insurance law that remain in force today, and there is no inconsistency between the two *Mason* decisions.

BCBSF's claim that the *Mason II* decision renders meaningless an entirely different exclusion, the "illegal occupation" exclusion, is also incorrect. BCBSF's argument fails to appreciate the different focus of the intoxication and "illegal occupation" exclusions. In fact, the interpretation of the intoxication exclusion which BCBSF requests would inappropriately broaden other similarly-worded exclusions in its policy.

BCBSF's claim that public policy considerations support its position is also misplaced. Its arguments do not address how such an exclusion should be interpreted, only whether the exclusion should be allowed. However, several significant policy considerations, including those articulated in a special occurrence to the Second District opinions, demonstrate that placing intoxication exclusions in standard health policies "would create more problems than it would solve."

Non-Florida authority also does not support BCBSF's position. While such an analysis is unnecessary since this Court and numerous other Florida courts have spoken directly to the issue, only one of the foreign decisions cited by BCBSF even supports its position, while several adopt positions that have already been expressly rejected by the Florida courts.

Finally, the BCBSF exclusion does not bar coverage for Angela Steck's medical expenses for a totally independent reason. The BCBSF Policy containing an expansive definition of the word "condition" was never furnished to the Steck's, who received only a policy summary containing no definition of that word or even an indication that "condition" was defined. Under Florida law, an insurer may not rely on a policy provision not included in the policy materials provided to its insured. The undefined word "condition" in its ordinary meaning and common usage does not refer to physical injuries caused by external trauma, such as Angela Steck's injuries, but instead to illnesses or ailments. Thus, Ms. Steck would still be entitled to coverage from BCBSF even if the *Mason* decisions did not exist or were reversed.

## ARGUMENT

### **I. THE BCBSF INTOXICATION EXCLUSION DOES NOT EXCLUDE COVERAGE FOR ANGELA STECK'S INJURIES UNDER CONTROLLING FLORIDA LAW.**

#### **A. Interpretation Of The BCBSF Intoxication Exclusion Is Directly Controlled By This Court's On-Point *Mason* Decisions.**

The principal thrust of BCBSF's brief is to attempt to convert this appeal<sup>2</sup> into something it is not. This appeal is **not** about whether intoxication exclusions in health insurance policies are permissible in Florida, although this Court may in its discretion decide to address that issue.<sup>3</sup> Rather, the threshold issue presented by this appeal is whether BCBSF's particular intoxication exclusion, as written, is sufficiently specific to exclude medical expenses associated with accidental injuries caused by its insured's intoxication.

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<sup>2</sup> This appeal is from a summary judgment in Ms. Steck's favor; the standard of review is *de novo*. See *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1974 (Fla. 2001).

<sup>3</sup> Judge Altenbernd of the Second District, in a special concurring opinion to the decision below, sharply criticized the inclusion of intoxication exclusions in standard health insurance policies on public policy grounds. *Blue Cross & Blue Shield of Florida, Inc. v. Steck*, 778 So. 2d 374, 377-378 (Fla. 2d DCA 2001) ("*Steck*"). Public policy issues are discussed under Points IIB and III, *infra*.

BCBSF's lack of focus may be due to the fact that, as the Second District expressly found, and BCBSF's brief essentially acknowledges, the answer to this question is clearly determined by this Court's prior decisions in *Mason v. Life & Casualty Ins. Co. of Tennessee*, 41 So. 2d 153 (Fla. 1949) ("*Mason I*"), and *Mason v. Life & Casualty Ins. Co. of Tennessee*, 41 So. 2d 155 (Fla. 1949) ("*Mason II*") (*Mason I* and *Mason II* are collectively referred to as "*Mason*").

The *Mason* decisions have been cited in several Florida appellate opinions interpreting intoxication exclusions. These subsequent opinions demonstrate that most Florida insurers have taken note of the *Mason* holdings regarding the type of policy language which must be included in order to make intoxication exclusions applicable to accidental injuries, and have drafted their exclusions to meet the *Mason* requirements. However, BCBSF did not, instead issuing a policy to Ms. Steck with an intoxication exclusion functionally identical to the exclusion this Court held to be insufficient to exclude accidental injuries in *Mason II*. BCBSF is now asking this Court to rewrite its policy after the fact to convert its intoxication exclusion into, in the words of the Second District, "the type of exclusion Blue Cross clearly thought it had provided but did not." *Steck, supra*, 374 So. 2d at 376-377.

The *Mason* cases, just as the present case, involved the issue of whether insurance coverage was available for injuries incurred when the insured was struck by

a vehicle while a pedestrian, allegedly because of the insured's intoxication. In *Mason*, the intoxicated insured was riding in a taxicab toward Pensacola, Florida, when she ordered the driver to stop and let her out of the cab on a dark, deserted stretch of road. While walking on the paved portion of the roadway in this inebriated condition, the insured was hit by a truck and killed. Here, Angela Steck was seriously injured while she was attempting to cross the street and was struck by an automobile, also allegedly due to her intoxication. BCBSF's brief concedes that the facts of *Mason I* and *Mason II* are indistinguishable from those of this case, noting that "the underlying facts of the two cases are the same" (IB, at p. 13).

*Mason I* and *Mason II* involved two insurance policies, each of which contained an intoxication exclusion. The policy in *Mason I* stated: "This accidental death benefit does not cover . . . death resulting directly from the use of intoxicating liquors . . . ." *Mason I, supra*, 41 So. 2d at 154. This Court found the exclusion inapplicable, holding that it plainly excluded only the effects of intoxicating liquors upon the system of an insured, and did not extend to injuries caused by acts committed by the insured by reason of being intoxicated. Specifically, the *Mason I* opinion stated:

This provision of the policy is plain, simple and unambiguous and plainly refers to the effect of the use of intoxicating liquors upon the system of an assured as distinguished from acts committed by him by

reason of his being under the influence of, or his mind being affected by, intoxicants.

To bring a cause of death within such an exception clause of a policy, the burden is on the insurer to show that the use of intoxicants by the insured was voluntary and that it was the direct cause of death.

*Mason I, supra*, 41 So. 2d at 155 (citations omitted).

The exclusion involved in *Mason II* was somewhat differently worded, principally in that it omitted the word “directly.” This exclusion provided: “This policy does not cover . . . loss or injury resulting from the use of intoxicating liquors . . . .” *Mason II*, 41 So. 2d at 155. This Court held that the difference in language did not serve to make the exclusion in *Mason II* applicable to accidental injuries, stating:

We see no valid distinction between the facts of this case and the companion case referred to above. In our view, the judgment in this case, as was the judgment in the companion case, must be reversed because of the failure of the insurance company to show that the death of the insured was within the exception clause of the policy.

*Mason II, supra*, 41 So. 2d at 155-156.

*Mason I* and *Mason II* recognize that there are two types of injuries which may result from a person’s intoxication, direct injury to biological systems of the insured, such as acute alcohol poisoning or liver damage, and indirect injuries, such as accidental injuries due to the actions of the insured while under the influence of

alcohol. *Mason I* holds that a policy exclusion which states it excludes the direct effects of intoxication does not also exclude indirect injuries. *Mason II*, applying the well-settled principle that an insurance policy's provisions, and particularly its exclusions, are construed strictly and narrowly against the insurer, simply adds the holding that an exclusion which fails to state that it covers both the direct and indirect effects of intoxication must be narrowly construed as being limited to the direct effects of intoxication. *See, e.g., Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000) ("*Anderson*") ("exclusionary clauses are construed even more strictly against the insurer than coverage clauses"). *Mason II*'s holding is directly applicable to the functionally identical exclusion found in the BCBSF Policy.

**B. The Authority Of The *Mason* Decisions Was Not Undermined By The 1953 Enactment Of The Statutory Predecessor to §627.629, Fla. Stat. (2000).**

As its initial effort to discredit the on-point *Mason* decisions, BCBSF's brief attempts to divide the Florida case law interpreting intoxication exclusions into "pre-1953 law" (*i.e.*, the *Mason* cases) and "cases decided after 1953" (IB, at pp. 13, 16). The basis for this purported line of demarcation is the 1953 enactment by the Florida legislature of a statute expressly authorizing intoxication exclusions in certain Florida

insurance policies. The current version of that statute is codified at §627.629, *Fla. Stat.* (2000).

BCBSF's suggestion that the *Mason* decisions are somehow undermined by §627.629, *Fla. Stat.* (2000), and its predecessor statutes is misplaced. As these statutes plainly state, they simply authorize an insurer to include an intoxication exclusion in certain insurance policies issued in Florida; the statute does not purport to address the manner in which an intoxication exclusion should be interpreted. Moreover, while the *Mason* decisions pre-dated the enactment of these statutes, both *Mason I* and *Mason II* presumed that intoxication exclusions were valid and permissible policy provisions. These decisions refused to apply the particular exclusions before them only "because of the failure of the insurance company to show that the death of the insured was within the exception clause of the policy." *Mason II, supra*, 41 So. 2d at 155-156.

**C. The *Mason* Decisions Were Not “Reversed By Implication” By *Harris v. Carolina Life Insurance Co.*, And Are Consistent With Subsequent Florida Authority.**

The centerpiece of BCBSF’s effort to undermine the *Mason* decisions, however, is its attempt to characterize these decisions, and particularly that in *Mason II*, as aberrational holdings inconsistent with the substantial body of later Florida authority involving intoxication exclusions. BCBSF even goes so far as to assert that *Mason II* was “reversed by implication” by this Court’s decision in *Harris v. Carolina Life Ins. Co.*, 233 So. 2d 833 (Fla. 1970) (“*Harris*”) (IB, at p. 12).

BCBSF is incorrect. The subsequent Florida decisions which BCBSF has attempted to characterize as inconsistent with the *Mason* decisions involved policies which had incorporated language into their intoxication exclusions extending them to both the direct and indirect effects of alcohol abuse. Thus, far from demonstrating that the *Mason* decisions are a dead letter, these cases show that the *Mason* cases have provided a road map for extending intoxication exclusions to accidental injuries which insurers other than BCBSF have had no trouble following.

For example, the *Harris* decision, which BCBSF claims reversed the *Mason II* decision “by implication,” actually involves an example of an adequately-worded intoxication exclusion. In fact, the Second District specifically characterized the

*Harris* exclusion as “an excellent example of the type of exclusion Blue Cross thought it had provided but did not.” *Steck, supra*, 778 So. 2d at 376-377.

In *Harris*, the intoxicated insured had been killed in a collision involving a vehicle in which he was riding as a passenger. All parties agreed there was no causal connection between the insured’s intoxication and his death. Nonetheless, the trial court granted, and the district court of appeal affirmed, a summary judgment in favor of the insurer based on the following exclusion in the insured’s policy:

Death \* \* \* resulting **directly or indirectly, wholly or partially** from any of the following causes are risks not assumed under this policy:

\* \* \*

\* \* \*

Bodily injury while under the influence of alcohol or drug \* \* \*.

233 So. 2d at 833-834 (emphasis added).

This Court reversed the district court of appeal. It concluded that even a policy which explicitly excludes both the direct and indirect effects of intoxication, and purports to exclude any injury sustained while the insured is in an intoxicated state regardless of its cause, must be interpreted as requiring at least a causal relationship between the injury or death and the intoxication for the exclusion to be enforceable. In short, *Harris* held that, no matter how broadly an intoxication exclusion is worded, it may not eliminate the minimum requirement of a causal relationship between the intoxication and the injury.

In reaching its holding, this Court had the occasion to discuss its *Mason I* decision at length. After quoting the exclusionary language involved, recounting the facts of the case in detail, and summarizing the court's holding, this Court concluded that the district court of appeal decision under review in *Harris* conflicted with *Mason I*, which accurately represented the law of Florida. Specifically, *Harris* held:

While the facts in the *Mason* case would probably be sufficient to show death indirectly related to intoxication under the provisions of the policy in the instant case, the facts in the instant case clearly do not. Despite the difference in language in the policy provision, the cases do conflict.

233 So. 2d at 834.

Thus, far from overruling *Mason*, by implication or otherwise, *Harris* expressly reaffirmed *Mason I* and quashed a contrary ruling. Even more importantly, this Court explicitly observed that, while the facts in *Mason* would probably have been sufficient to show death indirectly related to intoxication, coverage was still found in *Mason* because of the difference in wording between the policy exclusions involved in *Mason* and in *Harris*. In other words, the exclusion in *Harris* was broad enough to exclude the indirect effects of intoxication, while the language in the *Mason* exclusions were not.

BCBSF's brief claims that the first Florida decision to construe a drunkenness exclusion after the *Mason* decisions was *Rivers v. Conger Life Ins. Co.*, 229 So. 2d

625 (Fla. 4th DCA 1969) (“*Rivers*”).<sup>4</sup> *Rivers* affirmed a judgment in favor of an insured who burned to death in his bed, allegedly while intoxicated; the relevant policy exclusion provided:

The Agreement as to benefit under this Policy shall be null and void if the Insured’s death \* \* \* results **directly or indirectly**, from one of the following causes: (a) \* \* \* while under the influence of alcohol \* \* \*.

229 So. 2d at 627 (emphasis added).

The policy involved in *Rivers* explicitly extended its exclusion to injury resulting “directly or indirectly” from alcohol abuse. Thus, BCBSF’s argument that the *Rivers* court “significantly” did not hold that the exclusion could apply only if the insured’s intoxication led directly to his death demonstrates no more than that a policy which expressly states that it excludes both the direct and indirect effects of intoxication may, under the appropriate facts, be enforced. This holding is entirely consistent with *Mason* and the decision below.

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<sup>4</sup> In its Second District brief, BCBSF claimed that the first post-*Mason* case to construe a drunkenness exclusion was *American Motorists Insurance Co. v. City Bank & Trust Co. of St. Petersburg*, 215 So. 2d 763 (Fla. 3d DCA 1968), *cert. denied*, 222 So. 2d (Fla. 1969) (“*American Motorists*”), a citation PCA (DCAIB, at p. 13). Ms. Steck pointed out in her answer brief that a decision which expressly relied on both *Mason I* and *Mason II* as authority could hardly be said to support BCBSF’s position under any rationale. In its brief to this Court, BCBSF has omitted *American Motorists* from the list of post-*Mason* cases construing the intoxication exclusion and does not cite this decision.

BCBSF next cites *Sasloe v. Home Life Ins. Co., New York*, 416 So. 2d 867 (Fla. 3d DCA 1982) (“*Sasloe*”), a case which involved the following policy exclusion:

The Company does not assume the risk . . . if death results **directly or indirectly, wholly or partly**, from . . . medicines; drugs; sedatives; . . . [or] committing or attempting to commit a crime; . . . .

416 So. 2d at 867-868 (emphasis added).

*Sasloe* held this exclusion, which again specifically uses the words “directly or indirectly,” was sufficient to bar coverage for an individual who died when the automobile he was driving struck a tree, and whose autopsy revealed the presence of Methaqualone in the “lethal range” and lower levels of alcohol and various other drugs in his blood.

Significantly, the *Sasloe* court specifically discussed both *Mason I* and *Mason II*; it characterized both these decisions as “readily distinguishable” on the ground that “the *Mason* cases involved different policy language.” 416 So. 2d at 868. Thus, the *Sasloe* decision specifically makes the point which is at the crux of this appeal, namely that while an intoxication exclusion which expressly includes both the direct and indirect effects of alcohol abuse may exclude coverage for accidental injuries, exclusions which are silent on this point, such as BCBSF’s, do not.

The next two decisions cited by BCBSF are even farther removed from this case. *New York Life Ins. Co. v. Coll*, 568 So. 2d 1306 (Fla. 3d DCA 1990), involved

an evidentiary issue as to whether an inference of impairment could be drawn from a certain blood alcohol level. The policy at issue purported to exclude coverage for “a loss caused **in any way** by intoxicants . . . .” (emphasis added). *Blue Cross and Blue Shield v. Ming*, 579 So. 2d 771 (Fla. 5th DCA 1991) (“*Ming*”), did not involve the interpretation of an intoxication exclusion, but rather the application of the claims administration statute, §624.426(2), *Fla. Stat.* Moreover, the opinion does not even disclose the specific language of the exclusion at issue in *Ming*.<sup>5</sup>

The next case cited by BCBSF, *Hastie v. J.C. Penney Life Ins. Co.*, 115 F.3d 895 (11th Cir. 1997) (“*Hastie*”), involved an exclusion which purported to state that “[no] benefit shall be paid for Loss caused by or resulting from . . . an Injury occurring while the Covered Person is intoxicated . . . .” This extremely broad exclusion, which purports to be triggered merely by the fact of intoxication, was

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<sup>5</sup> The *Ming* decision was the only allegedly conflicting decision cited in BCBSF’s petition for discretionary review on conflict grounds. Since the specific language of the intoxication exclusion at issue in *Ming* is not disclosed in the opinion, this decision cannot “expressly and directly conflict” with the holding of the Second District below that the particular language in the exclusion issued to Ms. Steck was insufficiently specific to extend to accidental injuries. *See Fla.R.Civ.P. 9.030(a)(2)(iv)*. Accordingly, this Court should also consider dismissing BCBSF’s petition for discretionary review as improvidently granted. *See, e.g., Guerra v. City of Miami Beach*, 782 So. 2d 868 (Fla. 2001); *Americana Dutch Hotel v. McWilliams*, 777 So. 2d 970 (Fla. 2001).

interpreted in light this Court's decision in *Harris*, to nonetheless require at least a casual connection between the intoxication and the injury for the exclusion to apply.

The final Florida decision construing an intoxication exclusion cited by BCBSF is *American Heritage Life Ins. Co. v. English*, 786 So. 2d 1280 (Fla. 5th DCA 2001) ("*English*"). *English* involved an intoxicated driver who died from injuries sustained when he ran off the road and struck a tree. The driver's life insurance policy contained the following intoxication exclusion:

[This] policy does not cover any loss incurred as a result of:

d. Any injury sustained while under the influence of alcohol or any narcotic unless administered upon the advice of a physician.

786 So. 2d at 1281.

The Fifth District held that this exclusion barred coverage under the facts of that case. Once again, this holding is fully consistent with the *Mason* decisions. As in *Harris* and *Hastie*, *English* involved a broadly worded exclusion that purported to be triggered merely by the fact of intoxication. Following the holding in *Harris*, the Fifth District held that a causal nexus between the intoxication and the death must be shown before such an exclusion is enforceable.

The principle which BCBSF studiously avoids, namely that "policy language matters" in interpreting the scope of an intoxication exclusion, is even noted in a

leading insurance treatise. *Couch on Insurance* specifically observes that the wording of intoxication exclusions is subject to wide variation, and that the reach of a particular intoxication exclusion is “obviously determined” largely by the language of the particular exclusion. Specifically, *Couch* states:

**Provisions of the kind under consideration here exist in great number and variation, and the precise reach of each clause is obviously determined largely by the language employed.** Common articulations of the clause exclude the insurer’s liability if the death shall be caused by the use of intoxicants, or by reason of intemperance, or in consequence of the use of intoxicating liquors, drugs, and the like, or while intoxicated or similar concepts. Specific articulations that have been employed include -

- Under the influence of any intoxicant or narcotic.
- The use of intoxicating liquors.
- Harm by reason of intemperance from the use of intoxicating liquors.
- Loss which is the direct result of drinking intoxicating liquors.
- The result of “intemperance or immoral conduct.”
- **Resulting, wholly or in part, directly or indirectly, from,** or while, or in consequence of being affected by intoxicants.
- While intoxicated, or in consequence of his or her having been under the influence of any narcotic or intoxicant.
- While the insured “has physically present in his body alcoholic or intoxicating liquors in any degree.”
- So uses intoxicating liquors as to impair his or her health.

10 *Couch on Insurance*, §143:81 (3d ed. 1996) (footnotes omitted) (emphasis added).

In summary, Florida case law subsequent to the *Mason* decisions is indeed consistent; however, contrary to BCBSF’s claims, the consistency is that it supports the *Mason* holdings and the decision below. In each case in which a Florida court has

held that an intoxication does or may apply to indirect effects of intoxication, it has done so on the basis of an exclusion significantly more broadly worded than BCBSF's. Thus, far from undermining the authority of the *Mason* cases, these decisions underscore *Mason*'s fundamental holding that the interpretation of an intoxication exclusion is controlled by the language of the particular exclusion.<sup>6</sup>

## II. THE *MASON* DECISIONS REMAIN GOOD LAW.

### A. *Mason II* Properly Applied Florida Law Regarding Insurance Exclusions.

As the second major point in its brief, BCBSF argues that this Court's controlling decision in *Mason II* is "bad law" and should now be reversed. The first ground advanced in support of this contention is that the *Mason* court improperly equated the exclusions in the two different policies before it. BCBSF's argument is based on faulty analysis, leading to an incorrect conclusion.

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<sup>6</sup> BCBSF's brief states that its policy "tracks" the statutorily authorized intoxication exclusion. (IB, at pg. 16). This is not correct. The statutory exclusion provides that "the company will not be liable for a loss resulting from the insured being drunk" while BCBSF's policy provides that "this contract does not provide benefits for . . . a condition resulting from you being drunk." The distinction between excluding a "loss," as provided in the statute, and a "condition," as provided in BCBSF's policy, has particular significance as discussed in Point IV, *infra*.

BCBSF bases its argument exclusively upon a comparison of the two exclusions involved in *Mason I* and *Mason II*. BCBSF asserts that, by reaching the same result in *Mason I*, a policy whose intoxication exclusion contained the phrase “resulting directly from intoxication,” and in *Mason II*, in which the exclusion used the phrase “resulting from intoxication,” this Court rendered the use of the word “directly” in the *Mason I* exclusion meaningless. According to BCBSF, such an interpretation was contrary to the well-settled axiom of contract construction that courts will give meaning to each provision in the contract if reasonably possible, citing *Peoples Gas System, Inc. v. City Gas Co.*, 147 So. 2d 334 (Fla. 3d DCA 1962). Alternatively, BCBSF argues that this Court effectively added the word “directly” to the exclusion in *Mason II*, although not found in the policy, thereby allegedly violating the axiom that the absence of a provision from a contract is evidence of an intention to exclude that provision, citing *Jacobs v. Petrino.*, 351 So. 2d 1036 (Fla. 4th DCA 1976), *cert. denied*, 349 So. 2d 1231 (Fla. 1977).

This is fallacious reasoning. First, *Mason I* and *Mason II* construed two separate policies, and the court’s interpretation of one policy neither added language to nor subtracted language from the other. There is nothing surprising about two differently worded policies both providing coverage under a particular set of facts. Further, any valid analysis of intoxication exclusions cannot be limited solely to the

two exclusions at issue in *Mason I* and *Mason II*, but must include all the intoxication exclusions which have been construed under Florida law.

When this comparison is made, the exclusions plainly fall into three groups. First, there are policies which expressly limit the exclusion to injuries caused “directly” by intoxication, such as the policy at issue in *Mason I*; it is undisputed that such policies do not exclude coverage for the indirect effects of intoxication. Second, there are policies which expressly extend the intoxication exclusion to injuries caused “directly and indirectly” by intoxication, or words of similar import. Exclusions in this group were at issue in decisions such as *Harris*, *Rivers* and *Sasloe*, and may exclude indirect effects of intoxication. Finally, there is the third group of exclusions, represented by the *Mason II* policy and the BCBSF Policy, which fail to specify whether they exclude both direct and indirect effects of intoxication, or only the direct effects of alcohol abuse.

Under Florida law, the interpretation which must be given to exclusions in the third group is clear. It is settled Florida law that insurance policy exclusions are always strictly and narrowly construed against the insurer. *See, e.g., Demshar v. AAA Con. Auto Transport, Inc.*, 337 So. 2d 963, 965 (Fla. 1976). Further, because they limit coverage otherwise available under the policy, exclusionary provisions such as the BCBSF intoxication exclusion are construed even more strictly against the insurer

than other policy provisions. *See Anderson, supra*, 756 So. 2d at 34. *Mason II*, and the Second District below, merely applied these well-established principles of Florida law in reaching the conclusion that an exclusion which is silent on whether both the direct and indirect effects of intoxication are excluded must be narrowly construed to preclude coverage only for its direct effects.

BCBSF's brief acknowledges the principle that insurance policies are construed against the insurer, but peremptorily rejects its application to this case on the ground that the intoxication exclusion in the BCBSF Policy "is not ambiguous or otherwise susceptible of more than one meaning" (IB, at p. 29). According to BCBSF, the use of the unmodified term "resulting from" logically and necessarily applies to both direct results and indirect results, and no reasonable person would conclude to the contrary. *Id.*

There are several obvious responses to this argument. The first, of course, is that a unanimous decision of this Court in *Mason II* held that the same "resulting from" language in a functionally identical exclusion did not extend to the indirect results of intoxication. Accordingly, BCBSF's argument implies that the entire *Mason* court acted unreasonably in reaching that decision.

Second, BCBSF's contention is refuted by the fact that each Florida appellate decision interpreting an intoxication exclusion subsequent to *Mason* has involved an

exclusion employing broader language than the exclusion in the BCBSF Policy. In the policies involved in *Harris, Rivers, and Sasloe*, the insurers drafted the intoxication exclusions to apply expressly to injuries resulting “directly or indirectly” from intoxication; others insurers have used language of similar import. The obvious reason for these insurers to have drafted their policies to expressly exclude losses resulting “directly or indirectly” from intoxication was an appreciation that, without such language, the policy could reasonably be interpreted as applying only to the direct effects of intoxication. Thus, BCBSF apparently takes the position that its fellow insurers also are unreasonable.

Indeed, even other Blue Cross affiliates have found it appropriate to use the phrase “directly or indirectly” in their health insurance policies to specify that both direct and indirect matters are included. *See Park Land Medical Center of Kansas City, Inc. v. Blue Cross/Blue Shield of Kansas City*, 509 S.W.2d 721 (Mo.App. 1991) (“covered expenses” defined in policy to exclude expenses paid **directly or indirectly** by any state or local government or its agency) (emphasis added).

Finally, BCBSF’s position is refuted by ordinary common sense. What BCBSF is really arguing is that an average person would presume that intoxication played a role in Ms. Steck’s accident. However, this presumption does not necessarily lead to the conclusion that a person would also say that Ms. Steck’s

injuries “resulted from” her intoxication. To demonstrate this, one need only consider Ms. Steck’s likely answer to the following question: “How did you lose your leg?” Ms. Steck’s answer almost certainly would be something like: “It resulted from being hit by a car,” not “It resulted from bad eyesight,” or “It resulted from being drunk.” Moreover, even if the latter answers were given, the average person would consider them incomplete because poor vision and intoxication do not usually result in an amputation, and further information would be required to explain how the injury occurred. Ms. Steck submits that a reasonable person could easily conclude that her injuries “resulted from” their primary cause, namely an automobile accident.

**B. The *Mason* Decisions Do Not Vitiating The Illegal Occupation Exclusion.**

As the next ground for its argument that *Mason II* is “bad law,” BCBSF advances a unique claim. It argues that failing to interpret the phrase “resulting from” in an intoxication exclusion as applying to both the direct and indirect results of intoxication would render meaningless an entirely different exclusion, the so-called “illegal occupation” exclusion. This exclusion is authorized to be included in certain Florida policies by §627.628, *Fla. Stat.* (2000), which states that a policy may exclude the following:

Illegal occupation. The insurer will not be liable for any loss which results from the insured committing or attempting to commit a felony or from the insured engaging in an illegal occupation.

According to BCBSF, if the term “resulting from” in the intoxication exclusion is limited to the direct effects of intoxication, the result will be that this entirely different exclusion will have “no possible application as it currently exists” (IB, at p. 32). BCBSF then argues that, since this Court should never presume that a legislature intended to enact a purposeless and useless statute, it must interpret the intoxication exclusion broadly in order to protect the viability of the “illegal occupation” exclusion.

BCBSF’s argument is imaginative; however, it is also incorrect. This argument fails to appreciate the fundamental difference between the intoxication and “illegal occupation” exclusions as applied to injuries caused by external means, such as Angela Steck’s. With respect to the “illegal occupation” exclusion, these injuries occur simultaneously with the insured’s participation in the conduct which is the subject matter of the exclusion, namely the commission of a felony or engagement in an illegal occupation. Such injuries would therefore be considered a direct result of the excluded conduct. Thus, contrary to BCBSF’s contentions, injuries sustained by an insured as a result of being shot while committing a robbery would plainly fall within the “illegal occupation” exclusion under any rationale.

By contrast, the intoxication exclusion focuses exclusively on prior conduct of the insured. By definition, a person can only be “drunk” or “under the influence of a narcotic” as a result of having ingested alcohol or drugs at some time in the past. Unlike the “illegal occupation” exclusion, the conduct of the insured which causes the accidental injury (such as in this case attempting to cross the highway when the road is not clear) is not the same conduct which is the subject matter of the exclusion. Instead, the intoxication exclusion relates to the insured’s prior and separate act of having ingested alcohol or drugs. Thus, there is a valid basis for distinguishing between direct and indirect effects with respect to the intoxication exclusion which does not apply to the “illegal occupation” exclusion. BCBSF’s contention that the Second District’s holding destroys the viability of the “illegal occupation” exclusion is simply wrong.

Ironically, however, the underlying premise of BCBSF’s argument, namely that this Court should consider the potential effect of its decision on other policy provisions, is well-taken. However, this consideration cuts directly in the opposite direction from that BCBSF has suggested.

The BCBSF Policy contains other exclusions which are framed in language identical to the intoxication exclusion. These include an exclusion for “a condition

**resulting from** war or act of war, whether declared or not,” and an exclusion for “a condition **resulting from** your service in the armed forces.”<sup>7</sup>

If this Court were to hold that the phrase “resulting from” in the intoxication exclusion necessarily extends to both the direct and indirect effects of intoxication, there would be no principled basis upon which to refuse to apply that same construction to the identical language in the “act of war” and the “service in the armed forces” exclusions. BCBSF could then presumably rely on the “service in the armed forces” exclusion, for example, to refuse to pay the medical expenses of veterans who contracted latent diseases which often manifest only decades later, such as diseases related to exposure to products such as asbestos, if exposure occurred during their military service. Such expenses could be characterized as “indirect results” of the insured’s prior service in the armed forces.

Similarly, the application of BCBSF’s proposed construction to the “act of war” exclusion could be employed to drastically limit BCBSF’s obligations to pay medical expenses incurred as a result of events such as the recent terrorist attacks in New York City and Washington, D.C. Since President Bush declared the attacks to

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<sup>7</sup> For some reason not disclosed in the record, the policy summary provided to Ms. Steck omits the word “resulting” from the armed forces exclusion although this word appears in the BCBSF Policy.

be “acts of war,” injuries sustained by rescue workers, respiratory diseases caused by inhaling dust from collapsing buildings, or even grief counseling for the families of victims could be refused coverage on the ground they were the “indirect results” of an act of war.

Thus, the construction of the intoxication exclusion which BCBSF urges would inappropriately broaden the scope of other BCBSF policy exclusions. Angela Steck believes that it is fitting for this Court to consider the impact of its decision on policy provisions other than the intoxication exclusion; however, she suggests that these considerations militate strongly in favor of the Court endorsing a narrow construction of the intoxication exclusion consistent with the narrow and strict construction Florida courts have historically given to exclusionary provisions in insurance policies.

**C. The NAIC Model Codes Do Not Support BCBSF’s Position.**

BCBSF’s next ground for claiming that *Mason II* is “bad law” is unique. BCBSF argues that the original Florida statute authorizing intoxication exclusions appears to have been patterned after an NAIC model code provision promulgated in 1950, and that the 1982 amendment to the statute appears to have been patterned after a simplified language version of the exclusion promulgated by NAIC in 1979. BCBSF then points to a commentary to the simplified language version of the model code

which states that the restated provisions are intended to “reflect the original intent” of and to “duplicate” the substantive requirements of the original code provision. As Ms. Steck understands the argument, from this premise BCBSF argues that this Court should interpret the 1982 version of the exclusion just as though it actually used the language of the 1953 version, which excluded “any loss sustained or contracted in the consequence of the insured being intoxicated . . . .”

Not surprisingly, BCBSF cites no legal authority in support of this argument, which is flawed in several respects. First, BCBSF’s argument is contrary to established legal principles. There is a strong presumption that, when the legislature changes the language of a statute, it intends to alter its meaning. *Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 497 So. 2d 630, 633 (Fla. 1986); *Arnold v. Shumpert*, 217 So. 2d 116, 119 (Fla. 1968). BCBSF, however, asks this Court to presume exactly the opposite based on the NAIC commentary, even though there is nothing in the record to suggest that the legislature relied on this commentary when it amended this statute.

Second, there can be no question that Angela Steck had no knowledge of the NAIC commentary when this policy was purchased from BCBSF in 1993. She had the right to assume that the language in her policy was the language which would be

applied to her claims, and also to rely on a decision of the highest court of this state that the language used did not exclude accidental injuries due to intoxication.

Finally, BCBSF simply assumes that the 1953 version of the statute would eliminate coverage for Angela Steck's accidental injuries in this case. However, reported Florida decisions have not construed this specific formulation of the intoxication exclusion and the only foreign case cited by BCBSF which interprets this specific language does not support its position. BCBSF's brief cites *Interstate Life & Accident Ins. Co. v. Gammons*, 408 S.W.2d 397 (Tenn.App. 1966) ("*Interstate Life*"), a Tennessee intermediate appellate decision which construed an intoxication exclusion worded identically to the 1953 NAIC model code. *Interstate Life* involved a claim for an accidental death benefit on behalf of a driver who was killed when the car he was driving left the road, careened into a ditch and hit a telephone pole. The driver's blood was subsequently determined to contain a high level of alcohol.

The trial court found in favor of the insured on the ground that the insurer had to prove that the insured's death had actually been caused by his ingestion of alcohol. While the *Interstate Life* court disagreed with the lower court's reasoning, it held that, in order to avoid coverage, the insurer had to prove that intoxication was the sole proximate cause of the insured's death, not merely a factor to be considered. The *Interstate Life* court then went on to affirm the final judgment in favor of the insured,

holding that the insured's death could have been the result of several factors other than intoxication, including driving at high speed, passing on a curve, a hogbacked road, and the presence of gravel on the roadway.

In this case, of course, there are also other factors which could have been a cause of Ms. Steck's injuries. Two which have already been specifically identified in the record are Ms. Steck's 20/400 vision and her Moebius syndrome. Thus, the *Interstate Life* analysis would result in a holding in Ms. Steck's favor, not BCBSF's, under the facts of this case.

**D. Non-Florida Authority Does Not Undermine the *Mason* Decisions.**

The final ground advanced by BCBSF to support its claim that *Mason II* is "bad law"<sup>8</sup> is the claim that this decision is at odds with non-Florida authority interpreting intoxication exclusions. After stating that it has located no non-Florida decision which has reached the result in *Mason II*, BCBSF purports to cite a handful of out-of-state decisions which it contends supports its proposed interpretation of the BCBSF intoxication exclusion.

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<sup>8</sup> BCBSF's brief also contains a section arguing that public policy considerations support its position. Public policy considerations are addressed in Point IIB, *supra*, and Point III, *infra*.

Initially, Angela Steck would submit that a canvass of foreign law is neither necessary nor appropriate given the significant body of relevant Florida authority and the fact that this Court has already spoken directly to the controlling issue. Moreover, none of the foreign decisions cited by BCBSF involves an intoxication exclusion with the same wording used in the BCBSF Policy or in *Mason II*, even though policy language is the controlling factor in the interpretation of an intoxication exclusion. *See Couch, supra*, at §143.81. Finally, only one of the foreign decisions BCBSF cites, which presumably represents the “cream” of BCBSF’s research, even supports BCBSF’s position.

This brief has already discussed *Interstate Life, supra*, pointing out that this decision expressly rejects BCBSF’s position that intoxication need only be a contributing cause to the injury or death, and holding that intoxication must be the sole proximate cause in order for such an exclusion to be effective. *Bankers Life and Casualty Co. v. Jenkins*, 547 S.W.2d 237 (Tenn. 1977), another Tennessee decision cited by BCBSF, expressly relies on *Interstate Life*. Also to like effect is *Cummings v. Pacific Standard Life Ins. Co.*, 516 P.2d 1077 (Wash.Ct.Ap. 1973), which affirmed a trial court holding that its exclusion was inapplicable because the insurer had failed to exclude all other possible causes of death.

Conversely, *Flannagan v. Provident Life & Accident Ins. Co.*, 22 F.2d 136 (4th Cir. 1927), and *Order of United Commercial Travelers of America v. Greer*, 43 F.2d 499 (10th Cir. 1930), applied an intoxication exclusion which merely required that the insured be intoxicated, an interpretation specifically rejected by this Court in *Harris* regardless of the language used in the exclusion. Similarly, *Old Equity Life Ins. Co. v. Combs*, 437 S.W.2d 173 (Ky.App. 1969), holds that an insurer merely must show that the insured was intoxicated to a degree that his judgment and coordination were impaired, again a legally insufficient showing under Florida law. The only decision which appears to support BCBSF's position is *Landry v. J. C. Penney Life Ins. Co.*, 920 F.Supp. 99 (W.D.La. 1995). In sum, the foreign decisions cited by BCBSF demonstrate little, except perhaps that BCBSF has been able to locate almost no support for its position even outside of Florida.

### **III. PUBLIC POLICY CONSIDERATIONS SUPPORT THE DECISION BELOW.**

BCBSF also argues in its brief that the *Mason II* case should be reversed on public policy grounds. According to BCBSF, while the cost to insure against medical and hospital expenses may not have been a significant consideration in 1949, it is

today,<sup>9</sup> and the intoxication and “illegal occupation” exclusions represent decisions by the Florida legislature to impose the high economic cost of illegal and personally destructive behavior on the persons who engage in it rather than health insurers and ultimately health insurance consumers.

Initially, it should be noted that BCBSF’s public policy arguments do not require reversal of the holding of the Second District below. Under the opinion of the Second District majority, BCBSF may prospectively take advantage of this asserted public policy at any time simply by amending its exclusion to expressly provide that the policy does not provide coverage for injuries caused either “directly or indirectly” by alcohol or drug abuse.

BCBSF’s public policy arguments in no way detract from the Second District’s conclusion that an insurer wishing to exclude both the direct and indirect effects of intoxication from coverage must draft an exclusion which expressly so provides. This holding is particularly appropriate given the existence of a decision of this Court specifically informing BCBSF that the language currently used in its exclusion was insufficient to extend the exclusion to the indirect effects of alcohol abuse, as well as

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<sup>9</sup> This is a curious analogy, given that the *Mason* cases involved a claim for accidental death benefits, not health benefits. Presumably, the relative cost of paying death benefits under a life insurance policy would have been about the same both in 1949 and 1997.

the fact that other Florida insurers after *Mason* have had no difficulty drafting adequately-worded intoxication exclusions.

BCBSF's invocation of public policy is significant, however, in that there are important public policy considerations which militate against BCBSF's proposed interpretation of its intoxication exclusion. Some of these policy considerations are addressed in a special concurring opinion authored by Judge Altenbernd in the Second District below. For example, Judge Altenbernd observed that, while there is a statutory maximum permissible blood alcohol level for operating a motor vehicle which constitutes a crime if that level is exceeded, there is no statutory authorization for an alcohol exclusion in a Florida no-fault automobile PIP policy. He also noted that the legislature had permitted such an exclusion in PIP policies when the no-fault laws were originally enacted, but that the legislature had withdrawn this authorization in 1982. *Steck, supra*, 778 So. 2d at 377.

Accordingly, the application of an intoxication exclusion in a policy such as BCBSF's could result in the anomalous circumstance in which intoxicated drivers subject to criminal prosecution are entitled to reimbursement of their medical expenses under PIP coverage, while persons who lawfully consume the same amount of alcohol in the privacy of their own home and then suffer an accidental injury can be denied coverage under their health insurance policies. Judge Altenbernd concluded that "to

place this exclusion into a typical health insurance policy would create more problems than it would solve.” *Steck, supra*, 778 So. 2d at 377-378.

Another public policy concern associated with a holding that intoxication exclusions apply to injuries resulting indirectly from intoxication involves how “indirect” the connection between intoxication and the injury may be. While an event usually has only one, or at most a very small number, of direct causes, the number of indirect causes which may have in some way to have contributed to that event is often virtually limitless. A colloquial example is the old poem “for want of a nail the shoe is lost, for want of a shoe the horse is lost, for want of a horse the rider is lost,”<sup>10</sup> which ultimately traces the loss of a kingdom back to the lack of a horseshoe nail. Although this may be an exaggeration, the concern that there will be substantial disputes over whether a particular injury is an “indirect result” of intoxication is far from fanciful.

For example, in *Continental Casualty Company v. Meadows*, 7 So. 2d 29 (Ala. 1942) (“*Meadows*”), the Alabama Supreme Court held the intoxication exclusion applicable to a scenario in which the insured was killed by being shot three times in the back by the husband of his married lover. After engaging in what the court referred

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<sup>10</sup> George Herbert, *Jacula Prudentum* 499 (1651).

to as “an afternoon of debauchery” in which “intoxicating liquor played its part,” the insured telephoned his lover after she had returned home and insisted on coming over to her house even though she warned him her husband was at home. When the insured arrived, he got into an argument with the husband and was shot to death. The Alabama Supreme Court found that, though it considered it unnecessary, a causal connection between intoxication and the fatal shooting had been shown because “[n]o normal man would have thought for a moment of courting death in such a reckless manner.” *Meadows, supra*, 7 So. 2d at 31.

Angela Steck submits that public policy supports the decision of the Second District below. As Judge Altenbernd noted, allowing an intoxication exclusion in a standard health policy creates more problems than it solves. At a minimum, public policy does not support extending the scope of the exclusion beyond the parameters outlined in existing case law, including the *Mason* decisions.

**IV. EVEN IF THE MASON DECISIONS DID NOT EXIST, THE BCBSF POLICY STILL WOULD NOT EXCLUDE COVERAGE FOR ANGELA STECK’S ACCIDENTAL INJURIES.**

While Ms. Steck believes the squarely on-point *Mason* decisions are dispositive, the BCBSF intoxication exclusion would still not exclude coverage for Ms. Steck’s injuries even if these decisions did not exist. As noted, BCBSF’s statement of facts

takes great care to inform this Court that BCBSF's intoxication exclusion incorporates the defined term "condition," and that this term is expansively defined by the BCBSF Policy to include "any covered disease, illness, ailment, injury or bodily malfunction of an insured" (IB, at p. 4).

The reason is that BCBSF recognizes that, without this expansive definition of the word "condition," the BCBSF intoxication exclusion would not be understood to exclude medical expenses attributable to traumatic accidental injuries, such as those sustained by Angela Steck. This is because bodily injury caused by external trauma, such as the loss of a leg from being hit by a car, is normally considered or referred to as an "injury," not a "condition."

Unless a term is specifically defined in an insurance policy, it is interpreted according to its ordinary meaning and common usage. *See, e.g., Airmanship v. U.S. Aviation Underwriters*, 559 So. 2d 89, 91 (Fla. 3d DCA), *rev. denied*, 576 So. 2d 294 (Fla. 1990) ("Words in an insurance contract are normally defined in terms of their common usage, and any ambiguous term is to be construed against the insurer as drafter of the policy"). The word "condition" is a term not ordinarily or commonly used to describe bodily injury from external trauma, but rather is generally used to describe a disease or ailment. For example, *Webster's New World Dictionary*, 3rd

College Edition, p. 290 (1988), defines a “condition” as “a state of health,” and colloquially as “an illness; ailment.”

The common and ordinary meaning of “condition” is significant in this case because the Steck’s were never furnished a copy of the BCBSF Policy which contained its expansive definition. Rather, the Steck’s received only a nine-page policy summary, titled “Introducing Conversion Option III” (App., Tab 10, Ex. A). While this policy summary contained the intoxication exclusion, it included no definition of the term “condition” nor even any indication that the term was defined in the BCBSF Policy.

Under Florida law, an insurer may not rely on a policy provision which is not disclosed in the insurance materials provided to the insured, regardless of the fact that it may be a part of the actual policy. This principle was established in *Rucks v. Old Republic Life Ins. Co.*, 345 So. 2d 795 (Fla. 4th DCA 1977) (“*Rucks*”). In *Rucks*, the insured had purchased credit life insurance under a certificate which stated that the maximum amount of insurance available under that certificate was \$35,000. The plaintiff purchased two certificates of credit life insurance at different times on different loans which totaled more than \$35,000. Unbeknownst to the insureds, the master policy under which the certificates were issued stated that the maximum amount of insurance available under all certificates combined was \$35,000. Accordingly, when

the insured died, the insurer refused to pay on the second certificate but merely returned the premium.

On appeal, the *Rucks* court reversed a final judgment in favor of the insurer and directed that judgment be entered as a matter of law for the insured on both certificates, stating that “under group life insurance policies there is a contract between the insurer and the individual insured, that the contract consists of both the master policy and the certificate of insurance construed together, and that ambiguities or conflicts between the two must be resolved so as to provide the broadest coverage” (345 So. 2d at 796).

*Davis v. Crown Life Ins. Company*, 696 F.2d 1343 (11th Cir. 1983) (“*Davis*”), applied the *Rucks* holding to find a policy ambiguous under circumstances virtually identical to those in this case, namely where the certificate provided to the insured failed to inform the insured of a controlling provision of the policy. *Davis* specifically held that, under Florida law, the failure to recite in a certificate of insurance a controlling provision of the master policy not furnished to the insured also created an ambiguity that must be resolved in the manner that provides the broadest coverage.

The *Davis* court observed:

The failure to state a controlling provision in a certificate of insurance is equally as egregious as stating conflicting dates in the master policy and the certificate of insurance. Where the certificate of insurance is silent on

a controlling provision, the certificate does not merely mislead and confuse; it does not inform at all. Thus, the insured is never alerted to the omitted subject matter.

696 F.2d at 1346.

*Rucks* and *Davis* require that the BCBSF intoxication exclusion be interpreted without reference to the policy definition of the word “condition.” This means that the BCBSF exclusion would not extend to the traumatic injuries suffered by Angela Steck even if the exclusion were deemed to include the "indirect results" of intoxication. Accordingly, even if the *Mason* decisions did not exist or were reversed, the BCBSF intoxication exclusion would still not exclude coverage for Angela Steck's medical expenses.

### **CONCLUSION**

For the reasons stated, Appellee, Angela Steck, respectfully submits that the holding of the Second District Court of Appeal affirming a summary judgment in her favor should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this \_\_\_\_\_ day of October, 2001, a true and correct copy of the foregoing Respondent's Answer Brief on the Merits , has been furnished via U.S. Mail to:

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**CERTIFICATE OF COMPLIANCE**

Respondent's Answer Brief on the Merits has been typed in Times New Roman 14-point font.

\_\_\_\_\_  
—  
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