IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC02-1206

HUMANA WORKER'S COMPENSATION SERVICES,
FLORIDA BUILDERS & EMPLOYERS MUTUAL INS. CO.,

Petitioners,

v.

HOME EMERGENCY SERVICES, INC.,

Respondent.

On Appeal From the Third District Court of Appeal
Case Number: 3D00-2643
Reversing a Final Summary Judgment
in favor of the Petitioners
from the Eleventh Judicial Circuit Court
in and for Miami-Dade County, Florida
Case Number 99-8503, Hon. Eleanor Schockett

**PETITIONERS,
HUMANA WORKER'S COMPENSATION SERVICES, INC. and
FLORIDA BUILDERS AND EMPLOYERS MUTUAL INS. CO.'s,**

REPLY BRIEF ON THE MERITS

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STATEMENT OF FACTS

The Respondent, Home Emergency Services, erroneously suggests that the insurance carrier in this case seeks a declaration that it does not owe coverage for a tort (spoliation of evidence) allegedly committed by its own related entity. To clarify, the Milian's complaint alleges that PCA Solutions, Inc., advised Home Emergency Services to dispose of the ladder. PCA *Solutions, Inc.*, a separate party to the underlying lawsuit, is an entity distinct from the insurance carriers in this case (formerly PCA *Property & Casualty Insurance Company*).

THE POLICY

For the Court's ease of reference, the relevant policy language provides as follows:

> **A. How This Insurance Applies**
>
> This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
>
> 1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
>
> * * *
>
> **B. We Will Pay**
>
> We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.
>
> * * *

The damages we will pay, where recovery is permitted by law, include damages:

* * *

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

C. Exclusions

This insurance does not cover:

1. liability assumed under a contract.

* * *

4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law.

* * *

D. We Will Defend

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

ISSUE PRESENTED

WHETHER THE MILIANS' SPOLIATION CLAIMS AGAINST HOME EMERGENCY SERVICES FALL WITHIN THE TYPE OF COVERAGE AFFORDED BY THE APPLICABLE EMPLOYERS LIABILITY POLICY.

SUMMARY OF ARGUMENT

The Milians claim is one for spoliation of evidence. Otherwise stated, they have sued Home Emergency Services for the loss of an alleged ability to prove their asserted claims against the manufacturer and distributor of the discarded ladder. Such a claim is one for an *intangible* interest. Mr. Milian's claim does not, and cannot, allege that Home Emergency Services is in any way responsible for his bodily injuries. Moreover, Mr. Milian recovered for his bodily injuries in accordance with Florida law, i.e., by virtue of his worker's compensation claim.

This Court should agree with the rationale of the Fourth District based on the specific allegations of the complaint and the clear language of the applicable policy and hold that a spoliation claim does not state a claim for "bodily injuries" arising out an accident or a disease. Accordingly, this Court should disagree with the Third District, and affirm the trial court's entry of summary judgment in favor of Humana which was based on the same reasoning later adopted by the Fourth District in Norris v. Colony Ins. Co., 760 So. 2d 1010 (Fla. 4th DCA 2000). Specifically, this Court should reinstate the trial court's conclusion that "the underlying spoliation claim by Mr. Milian, for which coverage is sought by Home Emergency Services, Inc., is not a bodily injury or personal injury claim. Since the cause of action in the underlying case is one for spoliation of evidence which occurred after the personal injury itself, it

cannot and does not constitute a bodily injury or personal injury claim."

Additionally, or alternatively, this Court should hold that the express policy exclusions preclude coverage for the claims against Home Emergency Services, as those claims are stated in the Milians' complaint. The express policy exclusions bar coverage for the Milians' claims that Home Emergency Services' assumed a duty to maintain the ladder (1) by virtue of a contractual agreement; and (2) by virtue of Florida's workers compensation law, as set forth in §440.39, Fla. Stat.

ARGUMENT

THE MILIANS' SPOLIATION CLAIMS AGAINST HOME EMERGENCY SERVICES DO NOT FALL WITHIN THE TYPE OF COVERAGE AFFORDED BY THE APPLICABLE EMPLOYERS LIABILITY POLICY.

There is no question that the applicable insurance policy provides coverage only for bodily injury by accident or bodily injury by disease. The scope and extent of the coverage provided is defined by the language and terms of the policy. *See* Union Am. Ins. Co. v. Maynard, 752 So. 2d 1266 (Fla. 4th DCA 2000); United States Fire Ins. Co. v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1975). Despite the Respondents' attempt to create some ambiguity, the terms of the policy are clear and unambiguous and the coverage determination presents a question of law for the Court. Where the language of the policy is plain and unambiguous, "there is no need for judicial

construction and the contract must be enforced as written." Florida Power & Light Co. v. Penn Am. Ins. Co., 654 So. 2d 276 (Fla. 4th DCA 1995).

Bodily injury means just that: bodily injury. It has a plain and ordinary meaning to be applied – physical injury to the body of a person. The Milians' claims against Home Emergency Services in the underlying lawsuit are for spoliation of evidence, not bodily injury, and, as such, no coverage is afforded under the policy.

The nature of the underlying spoliation claim against the insured, Home Emergency Services, involves an attempt to recover damages because of the loss or destruction of a critical piece of evidence, the ladder, which is alleged to have caused the Plaintiffs, the Milians, to be unable to prove a products liability claim against the manufacturer of the ladder, Keller Ladders . The liability of the product manufacturer and the liability of the spoliation defendant arise from two separate injuries. Keller Ladders, the manufacturer of the ladder, is liable to the Milians only if the Milians can prove that the product was unreasonably dangerous or negligently manufactured; whereas Home Emergency Services, the spoliation defendant, is liable only if the Milians can demonstrate that the loss of the product caused them to be unable to prove the products liability claim.

Florida courts, in discussing claims for spoliation of evidence, have characterized the injury sustained in a spoliation claim as separate and distinct from the

bodily injury claim. *See, e.g.,* Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d DCA 1990); Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3d DCA 1984). The Third District has categorized a spoliation claim as a "tort cause of action for negligent failure to preserve evidence needed for civil litigation." Miller, 573 So. 2d at 26. Similarly, the Fourth District has described the cause of action as "an intangible and beneficial interest in the preservation of the evidence." DiGuilio v. Prudential Property and Cas. Ins. Co., 710 So. 2d 3 (Fla. 4th DCA 1998). As such, the spoliation claims against Home Emergency Services at issue here cannot be "because of" bodily injury. Rather, the claim against Home Emergency Services is "because of" the loss of the ladder and the Milians' alleged inability to prove their products liability claim. The purpose of the cause of action is to compensate the plaintiff for the loss of recovery in the underlying case because of the missing evidence, not for the bodily injury actually sustained.

Simply put, the Milians are seeking to recover from Home Emergency Services "because" the ladder was misplaced or destroyed. The injury suffered is the inability to prove a claim against Keller Ladders (or, alternatively, the distributor, Home Depot). Although Mr. Milian suffered a bodily injury when the ladder collapsed, he suffered a different injury when the ladder disappeared, an alleged inability to prove his product-related claim. This is a distinction clearly recognized in the law. The only references to bodily injury in the underlying claims relate to the conduct of the ladder

manufacturer (and distributor), not Home Emergency Services. Mr. Milian does not claim that the bodily injuries he sustained were because of the loss of the ladder and he cannot make such a claim. The ladder was lost, giving rise to the spoliation claim, long after the alleged bodily injuries were sustained. *See, generally,* Yoder v. Kuvin, 785 So. 2d 679 (Fla. 3d DCA 2001). Without the subsequent loss of the ladder, the spoliation claim would be non-existent.

Thus, where the spoliation claim arose because of the loss of the ladder, not because of bodily injury, there is no coverage under the employers liability portion of the policy. As such, the carrier owes no duty to defend or indemnify Home Emergency Services for the spoliation claims alleged by the Milians.

Two of the courts that have directly considered this issue have agreed with such an interpretation. First, in Norris v. Colony Ins. Co., 760 So. 2d 1010 (Fla. 4th DCA 2000), when addressing a similar coverage issue, the Fourth District readily concluded that the "occurrence" allegedly giving rise to coverage under the applicable policy was "the destruction of evidence" and that such an "occurrence" did not give rise to "bodily injury." Id. at 1012.

In the sole dissenting opinion in Lincoln Ins. Co. v. Home Emergency Services, 812 So. 2d 433, 441 (Fla. 3d DCA 2002), a case related to the present coverage action, Judge Levy wholeheartedly agrees with the Fourth District's holding in Norris.

Judge Levy notes that, "[w]hen faced with the question of whether coverage should be afforded under an insurance policy, it is important to first consider who the insured party is and what the claim is against the insured party for which coverage, is sought." Id. at 441 (Levy, J., *concurring in part and dissenting in part)*(citations omitted). Here, notes Judge Levy, "the insured party is H[ome] E[mergency] S[ervices] and the claim against it is for spoliation of evidence. Therefore, the occurrence giving rise to the spoliation claim is the *loss of the ladder* [not the fall from the ladder]." Id. (emphasis in original).

Second, an Illinois appellate court has addressed exactly the same issue presented in the present case, i.e., whether an employer's liability policy provides coverage for claims against a plaintiff/employee's former employer for the spoliation of a ladder following a personal injury. *See* Fremont Cas. Ins. Co. v. Ace-Chicago Great Dane Corp., 739 N.E.2d 85 (Ill. App. 2000). In Illinois, as in Florida, a claim for spoliation is predicated upon the breach of a duty to preserve evidence, and the damage suffered therefrom is a resulting inability to prove a cause of action (i.e., products liability) in the absence of such evidence. Id. at 91, *citing,* Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995). The court recognized, as should this Court, that the injured worker's claim sought damages from his employer resulting from his inability to prove his causes of action against the manufacturer of the ladder, and that

"the inability to prove a cause of action against a third party does not fall within the plain and ordinary meaning of the term 'bodily injury.'" Id. at 91 (emphasis supplied). The Illinois court further recognized that the measure of damages in the spoliation of evidence action might well be the amount of money the injured plaintiff could have recovered against the manufacturer for the personal injuries but the court nevertheless concluded that the *amount* of the damages was "of little consequence" where the *nature of and basis for* those damages was quite different in a products liability versus a spoliation of evidence claim. The Illinois court concluded, as should this Court, that the allegations of the counts of the complaint against the former employer "d[id] not even bring the action even potentially within the coverage provisions of the policy... ." Id. at 92.

A more recent decision out of Illinois also supports Humana's contention that there is no coverage here. In Schusse v. Pace Suburban Bus Div. of the Reg'l Transp. Auth., 2002 WL 1832230 (Ill. App. 2002), an employee brought an action against his employer for spoliation of evidence that concerned the employee's potential products liability claim. Although insurance coverage was not at issue in this case, the Illinois appellate court specifically addressed whether the spoliation of evidence claim "arose out of" the employee's employment and concluded that it did not. Rather, the court noted, although the employee's products liability claim may have involved an injury

suffered in the course of his employment, the spoliation of evidence related to that claim did not occur while the employee was acting under the direction of the employer and was not related to the employee's performance of work duties. Applied to the facts of the present case, Mr. Milian's spoliation claim against Home Emergency Services does not "arise out of and in the course of" his employment by Home Emergency Services, thus falling outside of the afforded coverage.

In addition to falling outside of the stated coverage of this policy, the Milians' claims against Home Emergency Services, as worded in the underlying complaint, are also excluded from coverage by the two applicable policy exclusions. The claims against Home Emergency Services are based upon (1) a contractual agreement, and (2) §440.39, a specific provision of the workers' compensation law. This policy expressly excludes coverage for liability assumed under a contract (Exclusion 1) and liability imposed pursuant to the worker's compensation law (Exclusion 4).

Though Home Emergency Services suggests that it had some other distinct duty to preserve the ladder for use by Milian in his products liability case, this is misplaced for two reasons. First, this Court is not asked to address theoretical claims against Home Emergency Services in this declaratory judgment action. Quite to the contrary, this Court's review is limited to the language utilized by the Milians in their underlying complaint against Home Emergency Services — a complaint which is based on

contractual and worker's compensation-related claims. Nowhere in that complaint do the Milians assert some common law duty on the part of Home Emergency Services to preserve that ladder. Nor could they, which brings us to the second point.

Contrary to Home Emergency Services' suggestion here, the duty to preserve evidence can only arise through an agreement, expressed or implied, by statute, or by some other "special circumstances." *See, e.g.,* Torres v. Matsushita Electric Corp., 762 So. 2d 1014, 1019 (Fla. 5th DCA 2000)(Harris, J., *concurring and concurring specially*)(internal citations omitted). *See also,* Nance v. Crowley American Transport, Inc., 2000 WL 33179287 (Fla. Cir. Ct. 2000)(noting plaintiff's failure to satisfy the element of the cause of action requiring the existence of a legal or contractual duty to preserve evidence); Sponco Mfg., Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1995)(rejecting the contention that some common law duty to preserve evidence exists absent notice of legal action or a specific request to maintain the evidence). In their complaint, the Milians have not suggested some "special circumstances" that might apply here, other than the contractual obligation allegedly entered into by Home Emergency Services and the statutory obligation imposed by Chapter 440 of the Florida Statutes, the worker's compensation law, both of which are excluded from coverage by virtue of the policy language itself.

Other than argument of counsel, Home Emergency Services also offers nothing

of record to suggest that the language of this insurance policy is in any way ambiguous. Instead, it suggests to this Court that public policy requires a finding that the policy is ambiguous because different courts have reached different conclusions. This argument is misplaced. This case presents a question of law to be determined by this Court reviewing, *de novo*, the conflicting decisions of two intermediate appellate courts. *See, e.g.,* Allstate Ins. Co. v. Rush, 777 So. 2d 1027 (Fla. 4th DCA 2000). A review of those conflicting decisions shows no ambiguity in the policy language itself. Indeed, both the Third and Fourth Districts' conclusions are based on a legal view of the underlying claim of spoliation of evidence, not the specific policy language as applied to the spoliation claims.

Home Emergency Services further suggests that public policy somehow mandates coverage, in favor of insureds, for all possible claims that might be judicially created or recognized after the policy becomes applicable. Quite to the contrary, public policy mandates that the courts enforce insurance policies, as with any other contract, based on the intent of the parties. *See, generally,* Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 736 (Fla. 2002), *quoting,* General Accident Fire & Life Assurance Corp. v. Liberty Mutual Ins. Co., 260 So. 2d 249 (Fla. 4th DCA 1972)(noting that the "terms of an insurance policy should be taken and understood in their ordinary sense and the polisy should receive a reasonable, practical and

sensible interpretation consistent with the intent of the parties - not a strained, forced or unrealistic construction"). In this case, there is nothing in this policy to suggest that the parties intended to provide coverage for a claim for spoliation of evidence which arises after, and separate from, a bodily injury claim. In addition, the policy expressly provides that it was the intent of the parties to exclude coverage for liability assumed under a contract (as asserted in the Milians' first count against Home Emergency Services), and for liability imposed by the worker's compensation law (as asserted in the Milians' second, and final, claim against Home Emergency Services). As such, the employers' liability policy expressly precludes coverage for the two claims against Home Emergency Services.

CONCLUSION

Because the spoliation claims, as set forth in the underlying complaint, are not claims for "bodily injuries," this Court should conclude that the employers liability policy at issue does not provide coverage for those claims. Additionally, or alternatively, this Court should hold that the express policy exclusions preclude coverage for the Milians' claims, as stated in the underlying complaint.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief on the Merits was served by regular U.S. Mail this 10th day of September, 2002, to all counsel on the attached Mailing List.

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DEBRA POTTER KLAUBER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief on the Merits was prepared in 14-point Times New Roman Font.

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