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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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,

Plaintiffs/Appellants,

vs.

ZENITH INSURANCE COMPANY,

Defendant/Appellees.
_____/

CASE NO.: SC13-696

USCA Case No.: 12-11755

USDCT Case No.: 8:10-cv- 00733-T30-JSM-TGW

APPELLANTS' INITIAL BRIEF

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Plaintiffs/Appellants, LETICIA MORALES, Individually and as Personal Representative of the ESTATE OF SANTANA MORALES, JR., Deceased, as parent and natural guardian of Stephanie Morales and Rudy Morales, minors, as legal guardian for Santana Morales, III, and Marciela Morales, individually, (hereinafter collectively referred to as "the Morales survivors" or "Morales"), seek reversal of a summary judgment in favor of Defendant/Appellee Zenith Insurance Company in this action for insurance coverage.

This case is before this Court on certification of three questions of law from the 11th Circuit Court of Appeals: whether a tort plaintiff/judgment creditor has standing to sue the tortfeasor's liability insurer for coverage; whether a "worker's compensation" exclusion in an Employer Liability policy bars coverage for a tort judgment against the employer; and whether a lump sum settlement of the worker's compensation claim can be used by the liability insurer as a defense to coverage for the tort judgment.

THE UNDERLYING STATE COURT TORT CASE AND THE ZENITH POLICY

The Plaintiffs' husband and father, Santana Morales, Jr., was crushed to death while working as a landscaper for his employer, Lawns Nursery and

Irrigation Designs, Inc. (hereinafter "Lawns"). (Doc. 76-2, P.2).[1] Lawns was insured by Zenith under a policy of Workers Compensation and Employer's Liability Insurance. (Doc. 97-1). This policy contains two separate coverage parts: Part I or "A" is the Workers Compensation coverage, providing coverage for an employer's statutory liability under the workers compensation laws, Florida Statutes Chapter 440. (Doc. 97-1, P.1) Part II or "B" is the Employer's Liability Insurance, providing separate coverage for non-statutory (tort) bodily injury or death claims, with separate policy limits. (Doc. 97-1, P.1). This issue in this case is coverage under Part B, Employers' Liability Insurance

Part B, Employers' Liability Insurance, states that Zenith "will pay all sums you legally must pay as damages because of bodily injury to your employees" for "bodily injury that arises out of and in the course of the injured employee's employment by you." (Doc. 97-1, P.5). It also obligates Zenith to defend any lawsuits for such damages. (Doc. 97-1, P.6). The policy contains a number of standard exclusions, including an exclusion stating that "this insurance does not cover....any obligation imposed by a workers compensation [] or similar law." (Exclusion 4, Doc. 97-1, P.6). The policy specifically defines the term "workers compensation law," and states that "Workers Compensation Law means the

[1] All record citations are to the docket number in the federal district court, which the Eleventh Circuit forwarded to this Court, followed by the appropriate page or exhibit number from that docket item.

workers or workmen's compensation law and occupational disease law of each state or territory named in [the policy]." (Doc. 97-1, P.3). Florida was the only named state.

Zenith was timely notified of the Morales accident and within a week began voluntarily paying workers compensation benefits payments for the Morales Estate. (Doc. 97-9; 86, P.3; 85. P.2). There was no dispute regarding Morales' entitlement to workers compensation benefits. (Doc. 97-8, P. 1; Doc. 97-9, P. 1).

In December 1999, the Morales Estate and survivors filed a state court tort action against Lawns for the wrongful death of Santana Morales. (Doc. 76-2, P. 7-11). Lawns immediately tendered the defense of the underlying lawsuit to Zenith, and requested that Zenith provide a defense and indemnity under the Employer Liability Part B portion of the policy. (Doc. 97-11). Zenith accepted the tender of the claim and assumed the defense of the wrongful death case for Lawns. (Doc. 97-11, P. 2-3; Doc. 97-12). Defense counsel asserted in their initial pleadings (an answer, defenses, and motion to dismiss) that the tort case was barred by workers compensation immunity. (Doc. 76-2, P. 18-22). However, the defense attorneys hired by Zenith never actually obtained a dismissal, summary judgment, nor any other finding that the tort case against Lawns was barred by workers compensation immunity. (Doc. 76-10).

A few months after undertaking the defense, Zenith issued a "Reservation of

Rights" letter to its insured, Lawns, advising that the tort case sought damages "over and above what is provided for in the statutes related to Workers Compensation." (Doc. 97-13, P.1). The letter states that Zenith has "analyzed the coverage issues involved" and "decided to provide [Lawns] a defense and indemnification under Part Two –Employers Liability Insurance of your policy." (Doc. 97-13, P.1). The letter then states generally that Zenith reserves its rights to any and all defenses under the policy. (Doc. 97-13, P. 2). Zenith did not assert or reserve any specific provision in the policy, and did not identify the workers compensation exclusion as a potential basis for denying coverage in its Reservation of Rights letter. (Doc. 97-13).

In March of 2002, after defending the tort case for over two years, Zenith instructed the lawyers it had hired to defend Lawns to withdraw, based on Lawns' alleged lack of cooperation in its own defense. (Doc. 76-11, P. 1-2; 76-13, P.3-4; 76-16, P.1; 76-17, P. 1; 76-18, P.3; Doc. 97-14, P. 5-7, 10).

Three years after Zenith withdrew the defense, in February 2005, the state court trial judge entered a default on liability against Lawns as a sanction for not responding to discovery. (Doc. 76-25, P. 1-2; Doc. 97-15, P. 1-2). The case proceeded to trial on damages. The jury awarded $3,325,000 to Leticia Morales, $1,425,000 to Marciela Morales, $1,725,000 to Santana Morales III, $1,575,000 to Stephanie Morales, and $1,475,000 to Rudy Morales. (Doc. 76-27, P. 1-3). In

sum, the Morales survivors have a $9.525 million state court tort judgment against Lawns, (Doc. 76-28, P.2-3), the validity of which cannot be contested in this case.

THE CURRENT COVERAGE CASE: FEDERAL DISTRICT COURT PROCEEDINGS

The Morales survivors then filed this action against Zenith, seeking coverage for the state court tort judgment. (Doc 2, P. 1-4).[2] In response, Zenith claimed that the policy did not cover Lawns for the Morales claim, asserting Lawns' failure to cooperate as its primary defense. (Doc. 14).[3] Zenith did not raise the workers compensation policy exclusion as an affirmative defense. (Doc. 14).

The district court took judicial notice of the filings in the underlying state court case. (Doc. 76, P.1-4; Doc. 88). The parties filed cross motions for summary judgment, (Doc. 85, 97), at which point Zenith asserted, in addition to the cooperation issue, the policy exclusion for "any obligation imposed by a workers compensation [] law." (Doc. 85, P.15). Without a hearing, the district court entered an order granting Defendant, Zenith Insurance Company's Motion for Summary Judgment, solely on the basis of this workers compensation exclusion, and denying Morales' Motion for Summary Judgment. (Doc. 121).

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[2] The instant complaint asserts breach of contract and bad faith claims against Zenith. (Docs. 2, 12, 21). The bad faith claim was abated pending resolution of the breach of contract claim. (Doc. 21).

[3] Morales alleged that Zenith's cooperation defense was invalid because Zenith failed to comply with Florida's Claims Administration Statute, which creates certain procedural prerequisites for a carrier wishing to assert forfeiture conditions such as a failure to cooperate. (Doc. 2, P. 1-4).

The district court's order found that the underlying tort suit was for "only simple negligence," determined that it therefore "was subject to the exclusivity provisions of the [Workers Compensation] Act," and concluded that the workers compensation exclusion applied. (Doc. 121, P.7). The district court specifically found that Lawns should have been entitled to workers compensation immunity in the underlying tort case, and as a result the tort suit and resulting judgment triggered an "obligation to pay workers compensation benefits" and was an "obligation imposed by the Act." (Doc. 121, P.7). The district court emphasized its concern that allowing coverage for the underlying tort case would permit the Morales family to recover both workers compensation benefits and tort damages for the same accident, which the district court rejected as "double dipping." (Doc. 121, P. 7). The district court concluded that the workers compensation exclusion barred coverage as a matter of law. (Doc. 121, P. 15).

This finding resolved all claims in favor of Zenith and eliminated the need to decide any other issues in the case. (Doc. 123). The district court did not address the cooperation defense or any other claims or defenses. (Doc. 121, P. 15).[4] The court then entered a Final Summary Judgment in favor of Zenith. (Doc. 124, 125).

Morales filed a Motion for Reconsideration, and requested oral argument on

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[4] The district court did consider and reject the argument, not raised by Morales, that the failure to comply with the Claims Administration Statute precluded Zenith from asserting the workers compensation exclusion. (Doc. 121, P. 14-15).

the motion. (Doc. 126, 127). The district court denied the motion without hearing. (Docs. 133). Morales timely appealed to the Eleventh Circuit. (Doc.138).

THE 11TH CIRCUIT APPEAL

In its Answer Brief in the Eleventh Circuit appeal, Zenith raised two "tipsy coachman" arguments as alternative grounds for affirmance. First, Zenith contended that the Morales survivors do not have standing to bring a breach of contract claim against Zenith to determine that the Zenith policy covers the Morales' judgment against Zenith's insured. The district court did not rule on the standing issue. Factually, it is undisputed that Zenith issued a policy of liability insurance and that Morales has a tort judgment against a Zenith insured.

Second, Zenith claimed that a lump sum "wash out" settlement of the remaining workers' compensation benefits operated as an "election of remedies" barring this coverage claim for the tort judgment. (Dkt. 114, Ex. 9). Notably, Zenith never asserted the settlement, release, election of remedies, or any similar defense as a defense in the tort case for the benefit of its insured.

The other important facts relating to the settlement agreement are the scope of the agreement, the timing of the agreement, and the parties to the agreement. In terms of scope, throughout the document the agreement refers only to Workers' Compensation benefits. It does not refer to a settlement of the tort claim. In fact, the agreement never mentions the tort claim nor the Employer Liability coverage

whatsoever. The agreement is titled "SETTLEMENT AGREEMENT & GENERAL RELEASE PURSUANT TO FLORIDA STATUTES, SECTION 440.20(11)(c)(d) & (e) (2001)." (Dkt. 114, Ex.9. P.1). The first paragraph of the agreement states that it is "for the specific purpose of jointly discharging the employer/carrier from any further liability for all benefits under the Florida Workers' Compensation Act [] in exchange for the payment of a lump sum of money to the Claimant." (Dkt. 114, Ex. 9, P.1). The agreement further states that it is a "complete, entire and final release and waiver of any and all past, present and future benefits to which the Claimant [] is are or may be entitled under Chapter 440.F.S. (the Florida Workers' Compensation Act)." (P.2).

Zenith's argument focused on one provision of the settlement agreement, which does refer to election of remedies, but reading the provision as a whole, it still refers to chapter 440 and benefits payable under the Workers' Compensation Act. The paragraph in full states:

> ELECTION AND WAIVER: Pursuant to Florida Statutes, Section 440.20(11)(c)(2011), in exchange for the consideration described below, the Claimant hereby waives all right to any and all benefits under The Florida Workers' Compensation Act. Further, this settlement and agreement 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.

(Dkt. 114, Ex. 9, P.2).

In the very next paragraph, the agreement describes the claims to be settled and states that "it relates to benefits under Chapter 440 F.S." (P.2). The agreement

cautions that the Claimant is relinquishing the right to "any and all benefits available under the Workers' Compensation Law." (P.6). The agreement further states that "the Claimant waives any and all entitlement to any and all past, present and future death benefits available pursuant to Florida Statutes Chapter 440." (P.4). In fact, the agreement refers throughout to chapter 440, workers compensation claims, and claims for benefits against the "employer/carrier," all of which are terms limited to workers compensation cases. (Dkt. 114, Ex. 9).

The only consideration provided by Zenith for the settlement was the value of the remaining workers compensation benefits. (Dkt. 114, Ex. 9). No consideration was paid for a tort claim or tort damages. (Dkt. 114, Ex. 9). Zenith's own claim payout history log reflects that the entire settlement amount was paid as workers compensation benefits. (Dkt. 97, Ex. 9). The only coverage under which the settlement was paid was the workers' compensation policy, not the employer liability policy. (Dkt. 97-9, P.2-6). In the district court, Zenith referred to the settlement as a settlement of the worker's compensation claim, (Dkt. 85, P.2-3, Dkt. 86, P.4), and acknowledged that the full amount of the settlement was for worker's compensation benefits. (Dkt. 86, P.5).

The settlement involved claims by minor and disabled children, yet was submitted for court approval only in the workers compensation case and only to the Judge of Compensation Claims. (Dkt. 114, Ex. 9; Dkt. 98-29, P. 39-40). The

settlement agreement specified that it was conditioned on approval by the Judge of Compensation Claims and no other court. (P. 3,5). The settlement agreement required a dismissal of "petitions and claims for benefits against the employer/carrier," and did not require a dismissal of (or even mention) the pending tort claim. (Dkt. 114, Ex. 9, P.5).

There are two important timing facts regarding the workers compensation settlement, which occurred in August 2003. First, this was almost a year after Zenith stopped defending Lawns in, and disclaimed coverage for, the tort claim. Second, the workers compensation settlement was about a year and a half before Morales obtained the judgment against Lawns. Therefore, when the workers compensation claim was settled, Morales did not have a judgment against a Zenith insured.

Finally, the parties to the agreement are specifically identified. The only settling "Claimant" is "Leticia Morales, as natural parent and guardian of Maricela Morales, Santana Morales, Stephanie Morales, and Rudy Morales." Neither Leticia Morales individually nor Leticia Morales as personal representative of the Estate of Santana Morales is a party to the settlement. Zenith is identified only as a "Carrier/Servicing Agent." The attorney handling the workers' compensation claim is the only person who signed the agreement for Zenith. He is identified as counsel for the "employer/carrier."

THE 11TH CIRCUIT'S DECISION AND CERTIFIED QUESTIONS

After briefing and oral argument, the Eleventh Circuit issued its decision. The Eleventh Circuit outlined the facts and procedural history and the parties' various arguments, including Zenith's tipsy coachman arguments, and certified three questions of law to this Court. The questions as certified by the 11th Circuit are:

(1) DOES THE ESTATE HAVE STANDING TO BRING ITS BREACH OF CONTRACT CLAIM AGAINST ZENITH UNDER THE EMPLOYER LIABILITY POLICY?

(2) IF SO, DOES THE PROVISION IN THE EMPLOYER LIABILITY POLICY WHICH EXCLUDES FROM COVERAGE "ANY OBLIGATION IMPOSED BY WORKERS' COMPENSATION ... LAW" OPERATE TO EXCLUDE COVERAGE OF THE ESTATE'S CLAIM AGAINST ZENITH FOR THE TORT JUDGMENT?

(3) IF THE ESTATE'S CLAIM IS NOT BARRED BY THE WORKERS' COMPENSATION EXCLUSION, DOES THE RELEASE IN THE WORKERS' COMPENSATION SETTLEMENT AGREEMENT OTHERWISE PROHIBIT THE ESTATE'S COLLECTION OF THE TORT JUDGMENT?

STANDARD AND SCOPE OF REVIEW

The parties agree that this case is controlled by Florida state substantive law. Because the case involves review of a summary judgment based on the interpretation of an insurance contract, this Court is entitled to review the issues de novo. *See Chandler v. Geico Indem. Co.*, 78 So.3d 1293, 1296 (Fla.2011).

Morales respectfully suggests that while the 11th Circuit properly certified question #2, regarding the workers compensation exclusion, there is controlling precedent from this Court on the first and third questions, so those cases were not properly certified. *See* Art. V, s.3(b)(6), Florida Constitution; Florida Rule of Appellate Procedure 9.030(a)(2)(C); *Dewitt v. Duce*, 408 So.2d 216 (Fla. 1981); *Greene v. Massey*, 384 So.2d 24 (Fla. 1980).

However, this Court can and should resolve the entirety of the case in this proceeding. As this Court explained in *Savoie v. State*, 422 So.2d 308, 312 (Fla.1982), "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal." "Piecemeal determination of a cause in our appellate court should be avoided, and when a case is properly lodged here there is no reason why it should not then be terminated here." *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594, 596 (Fla.1961). *See also Savona v. Prudential Insurance Company*, 648 So.2d 705, 707 (Fla. 1995)(noting that this Court's

authority to determine issues other than the one on which jurisdiction is based applies equally in cases of certification from a federal appellate court).

SUMMARY OF THE ARGUMENT

This Court should answer all three certified questions in favor of Morales. First, the standing issue has long been resolved in Florida case law and by Florida statute. A third party tort victim has standing to sue the tortfeasor's liability insurer for coverage if the tort victim has a judgment against the insured. Morales has a judgment against Zenith's insured. This Court should find that Morales has standing to pursue this claim.

Second, this Court should determine that the workers compensation exclusion does not apply. The state court tort judgment is not an obligation "imposed by" workers compensation law. A tort judgment is, by definition, an obligation imposed outside of workers compensation law. Florida state law, which controls this case, has already addressed the same exclusion in the same factual situation, and held that the insurer was not entitled to summary judgment.

The district court improperly applied a tort defense (workers compensation immunity) to this insurance coverage case. It is well established that an insurer cannot assert a tort defense for its own benefit in a coverage case. Whether the underlying tort claim should have been barred by workers compensation immunity is simply irrelevant in this coverage case, where this Court must assume that the tort judgment is valid.

The district court mistakenly relied on case law interpreting Commercial

General Liability insurance policies. That case law is not applicable to the Employers' Liability insurance policy at issue here, which is a completely different type of policy having a completely different scope and purpose.

Moreover, the district court's order is based on its unfounded concern that finding Employers' Liability coverage would allow the Morales family to "double dip" from the Zenith policy issued to Lawns. This ignores the fact that Florida law has specifically rejected the same "double dipping" argument, and the fact that the policy provides two different and separate types of coverage (Part A statutory workers compensation; Part B tort), both of which are recoverable. It also ignores the fact that public policy concerns cannot be used as an excuse to rewrite the policy or expand the stated policy exclusions, which must be strictly construed in favor of coverage. This Court should find that the workers compensation exclusion does not apply.

Third, the lump sum settlement of the workers' compensation case does not bar Morales' coverage claim for the tort judgment for multiple reasons. First, election of remedies is a tort defense. Having failed to assert this defense in the tort case for the benefit of its insured, Zenith cannot use the defense to its own advantage in this coverage case. Second, the basic requirements for election of remedies under Florida law are not present in this case. The lump sum payment was not a conclusion on the merits of a disputed claim, and the settlement

agreement does not demonstrate a conscious intent to waive the already-pending tort claim.

Furthermore, the workers compensation settlement cannot be a release, settlement, or election of remedies of the claims against Zenith under the Employers' Liability part of the policy because of the scope, timing, and parties to that agreement. The settlement by its terms refers only to a settlement of the workers' compensation claim and benefits payable under Florida Statutes chapter 440. The settlement does not refer to the tort case or the liability coverage. The only consideration paid by Zenith was the remaining workers' compensation benefits, and all funds were paid under its workers' compensation policy. At the time of the settlement, Morales did not even have a judgment against Zenith's insured and could not have made (nor released) a claim against Zenith for liability insurance coverage. The workers compensation washout did not comply with the requirements for settling minors' or incompetent persons' tort claims. Therefore, this Court should find that the lump sum workers compensation settlement does not preclude this coverage claim.

Finally, the only party to the settlement is Leticia Morales "as natural parent and guardian" of her children. Even if this Court accepts all of Zenith's argument regarding the settlement, that defense potentially applies only to the claims of the actual parties to the settlement agreement.

ARGUMENT

(1) THE ESTATE HAS STANDING TO BRING ITS BREACH OF CONTRACT CLAIM AGAINST ZENITH UNDER THE EMPLOYER LIABILITY POLICY.

As a "tipsy coachman" argument in the 11th Circuit, Zenith contended that the Morales survivors do not have standing to bring a breach of contract claim against Zenith to determine that the Zenith policy covers the Morales' judgment against Zenith's insured. Zenith cited general intended third party beneficiary law, ignoring the fact that Florida law has already clearly resolved the specific issue here.

Under Florida law, a judgment creditor does have standing to sue a liability insurer that may have coverage for the judgment. By virtue of having obtained a judgment against Lawns, the Plaintiffs are authorized to bring direct actions against Zenith alleging both coverage and bad faith claims to recover that judgment. *See Macola v. Government Employees Ins. Co.*, 953 So.2d 451, 455 (Fla. 2006); *Universal Underwriters Ins. Co. v. Abe's Wrecker Service*, 2007 WL 1412954 (M.D. Fla 2007).

Florida law has long held that an injured plaintiff is a third party beneficiary of a liability insurance policy issued to the tort defendant. Contrary to Zenith's argument, this right need not be stated in the insurance policy nor expressly assigned; it arises by operation of law. *Shingleton v. Bussey*, 223 So. 2d 713, 715-

16 (Fla. 1969) ("We conclude a direct cause of action now inures to a third party beneficiary against an insurer in [] liability insurance coverage cases as a product of the prevailing public policy of Florida. . . . [W]e think there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus to render [] liability insurance amenable to the third party beneficiary doctrine.") (e.s.); *VanBibber v. Hartford Acc. & Indem. Ins. Co.*, 439 So.2d 880 (Fla. 1983); *Beta Eta House Corp., Inc. of Tallahassee v. Gregory*, 237 So.2d 163 (Fla. 1970) (reaffirming that this rule applies to all types of liability insurance).

The joinder procedure allowed in *Bussey* was later changed by the nonjoinder statute, to the extent that the plaintiff now must first obtain a judgment before suing the tortfeasor's insurer. However, the third party beneficiary analysis remains intact. *Progressive Exp. Ins. Co. v. Scoma*, 975 So.2d 461 (Fla.2d DCA 2007). In fact, Florida's nonjoinder statute now specifically allows a "cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract" by a person who "obtain(s) a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy." Florida Statutes § 627.4136(1). *See Hazen v. Allstate*, 952 So.2d 531 (Fla. 2d DCA 2007) (injured third party may file a direct action against liability insurer after obtaining verdict against the insured); *Williams v. Union Nat'l Ins. Co.*, 528 So.2d 454 (Fla. 1st DCA 1988) (recognizing

the right of a judgment creditor to proceed directly against a tortfeasor's insurance company for breach of contract); *Auto-Owners Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 547 So.2d 148, 151 (Fla. 2d DCA 1989) ("an injured plaintiff acquires an interest in an insurance policy at the time of the accident, thereby rendering the insurance company directly liable "). *See also Everhart v. Drake Mgmt. Inc.*, 627 F.2d 686, 689-90, n. 9 (5th Cir. 1980) (recognizing Florida's "strong public policy of upholding rights of third party beneficiaries to insurance contracts," and noting: "The Florida Supreme Court has held that policies permitting third-party beneficiary suits as in *Bussey* may be extended to other forms of liability insurance.").

Morales' standing arises by operation of law and by entry of the judgment, without the need for an express agreement or assignment. Florida's nonjoinder statute is substantive, and therefore it controls federal court decisions in diversity cases. *See Allstate Ins. Co. v. Stanley*, 282 F.Supp.2d 1342 (M.D.Fla.2003). This Court should answer the first certified question in the affirmative, finding that the Estate, a judgment creditor, does have standing to bring its breach of contract claim against Zenith under the Employer Liability policy. This Court should further hold that Morales is entitled to judgment as matter of law on the standing issue.

(2) THE PROVISION IN THE EMPLOYER LIABILITY POLICY WHICH EXCLUDES FROM COVERAGE "ANY OBLIGATION IMPOSED BY WORKERS' COMPENSATION ... LAW" DOES NOT EXCLUDE COVERAGE OF THE ESTATE'S CLAIM AGAINST ZENITH FOR THE TORT JUDGMENT.

The sole basis for the district court's summary judgment order was the workers compensation exclusion, which precludes coverage for "any obligation imposed by workers compensation ... law." It is undisputed that Zenith's Employer Liability policy is a separate coverage, intended to cover Lawns' legal liability for the injury or death of its employees. It is further undisputed that the tort judgment establishes Lawns' legal liability to the Morales family, and that the validity of that judgment cannot be attacked in this case. By its plain language, the Zenith policy covers the Morales tort judgment unless it is an "obligation imposed by workers compensation [] law." It is undisputed that the judgment is a tort judgment, imposed by Florida's wrongful death law, and is not a judgment for workers compensation benefits. These undisputed facts require that this Court find that the exclusion does not apply.

A. <u>Exclusions Are The Insurer's Burden Of Proof And Are Strictly Construed</u>

The district court order violates Florida's established rules of construction in insurance cases. Florida law strictly construes exclusionary clauses in insurance contracts, so as to provide the broadest possible coverage. *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla.1979). Any

ambiguity in an insurance policy is construed against the insurer. *Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla.1998). "[E]xclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of [coverage]." *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla.1986).

Whether an exclusion applies to bar coverage is an affirmative defense and the insurer has the burden of proving that an exclusion applies. *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061, 1065 (Fla.1983). Florida has long followed the rule that tort law principles do not control judicial construction of insurance contracts. *Prudential Property & Cas. Ins. Co. v. Swindal*, 622 So.2d 467 (Fla.1993).

B. The Underlying Tort Judgment Is Not An "Obligation Imposed By Workers Compensation ... Law"

The term "obligation imposed by workers compensation...law" in the policy exclusion must be strictly construed, by its plain terms, to mean a duty to pay that is *imposed by* workers compensation law. It does not mean a duty to pay imposed by tort law, to which there may have been workers compensation defenses.

Florida "workers compensation law" is found in Chapter 440, Florida Statutes. That law creates a schedule of benefits recoverable *without* a tort claim. § 440.11, *Fla. Stat.* It is by definition outside the scope of Florida tort law. *Eller v. Shova*, 630 So.2d 537 (Fla.1993). It is undisputed that the underlying suit against Lawns was a tort claim, and was not a claim for workers compensation

benefits. In fact, Zenith's own policy specifically defines the term "Workers Compensation Law," and states that "Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in [the policy]." (Doc. 97-1, P.3). This clearly refers to the state's statutory compensation scheme.

This case is controlled by Florida law, and the controlling case is *Wright v. Hartford Underwriters Ins. Co.*, 823 So.2d 241 (Fla. 4th DCA 2002).[5] *Wright* held that an insurer that issued an Employer's Liability policy (like Zenith here) and failed to defend (like Zenith here), had a duty to cover a tort judgment in favor of an employee who had already claimed and settled his workers compensation benefits (like the Morales family here). Like the district court here, the trial court in *Wright* entered summary judgment for the carrier, finding that there was no coverage because the tort claim was barred by the exclusive remedy provisions of the Workers Compensation Act.

The court in *Wright* reversed the summary judgment, rejecting the same workers compensation exclusion at issue here, and holding that the exclusion does not apply because a judgment in a civil action is "not an 'obligation imposed by worker's compensation' law." 823 So.2d at 243. The *Wright* court explained that

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[5] While the second certified question can be answered by the *Wright* case and established Florida law, the certification is technically proper because *Wright* is a DCA case and this Court has not ruled on the specific issue presented.

the workers compensation exclusion in the insurance policy was different than the tort defense of workers compensation immunity, and the exclusion was "not designed to afford its insured with immunity from liability for a claim brought by its own employee." 823 So.2d at n.4. *See also Reliance Nat'l Ins. Co. v. Vitale*, 183 F.Supp. 2d 506, 511 (D.Conn. 2001) (also holding that the same exclusion did not preclude coverage for a tort claim brought against an employer).

Moreover, the plain meaning of the term "obligation" is a duty. Applying the plain language of Zenith's policy, an "obligation" "imposed by" workers compensation law must mean a duty to pay created by workers compensation law, not a tort defense created by workers compensation law. The exclusive remedy defense created by workers compensation law is just that – a defense. It eliminates liability. It does not impose an obligation. The exclusion clearly refers to an "obligation." The "obligation" is the judgment, *see Auto-Owners Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 547 So.2d 148, 152 (Fla. 2d DCA 1989), and the judgment was imposed by tort law. Whether workers compensation "law" would have afforded Lawns a tort defense is irrelevant, because workers compensation law did not "impose" the "obligation" for which coverage is sought.

Notably, the judgment here was entered by a Florida state circuit court, which does not even have jurisdiction to create "obligations" under workers compensation law. Claims for obligations imposed by workers compensation law

must be filed with a judge of compensation claims, and cannot be filed in the circuit court. *See* § 440.192(1), *Fla. Stat.* Florida circuit courts only have limited jurisdiction to *enforce* a final judgment that has already been entered by a judge of compensation claims; Florida's circuit courts may not determine entitlement to workers compensation benefits. *See Brown v. Clay County Bd. of County Com'rs*, 43 So.3d 782 (Fla. 1st DCA 2010); *Merritt v. Promo Graphics, Inc.*, 691 So.2d 632 (Fla. 5th DCA1997); *Benedict v. Executive Risk Consultants, Inc.*, 616 So.2d 525 (Fla. 4th DCA 1993); *Alvarez v. Kendall Assocs.*, 590 So.2d 518 (Fla. 3d DCA 1991); *Florida Statutes* section 440.24(1). Because it was entered by a state circuit court, the judgment here simply could not be an obligation "imposed by" workers compensation law.

The district court held that the underlying tort claim should have been barred by workers compensation immunity, and concluded that it therefore created an obligation under workers compensation law. (Doc. 121 P.6-7). However, contrary to the district court's holding, the tort suit did not (and could not) create a duty on the part of Lawns to pay workers compensation benefits. As the court explained in *Commerce & Indus. Ins. Co. v. Sandi Constr., Inc.*, 2011 WL 4738155, *3 (S.D. Fla. 2011), chapter 440 is the sole avenue for workers compensation claims, and it "does not apply to a tort claim which is not brought pursuant to the workers' compensation statute."

Even if a tort suit is subject to workers compensation immunity, as the district court found here, dismissal of the tort suit does not automatically trigger workers compensation payments. It creates no judgment for or entitlement to workers compensation benefits, and does not convert tort damages into workers compensation payments. The claimant must still follow a separate procedure in a separate venue to obtain workers compensation benefits and to create an obligation "imposed by" workers compensation law. Here, the judgment is for tort damages under Florida tort law, and was not imposed by workers compensation law.

C. **Tort Defenses Cannot Be Raised As Coverage Defenses**

The key error in the district court's order is the failure to recognize that defenses to tort liability are different than defenses to coverage. In this coverage case, Zenith can assert defenses to coverage under the contract, such as policy exclusions. However, a carrier that refuses to defend its insured may not assert defenses to the insured's tort liability – defenses that were or should have been raised in the underlying case to benefit the insured - in defense of its own duties in a coverage claim. This rule is well established and undisputed. (Doc. 121, p. 12). *Sinni v. Scottsdale Ins. Co.*, 676 F.Supp. 2d 1319, 1322 (M.D. Fla. 2009) ("Having wrongfully failed to defend its insured, the insurer has waived any [liability] defenses and the underlying tort obligation has been established.") (emphasis added); *Arnett v. Mid Continent Cas. Co.*, 2019 WL 2821981, *7 (M.D. Fla. July

16, 2010) ("Generally, an insurer cannot relitigate fact issues in a subsequent coverage action because it was in privity with the insured in the underlying case"). See *also Wright v. Hartford Underwriters Ins. Co.*, 823 So. 2d 241 (Fla. 4th DCA 2002); *Gallagher v. DuPont*, 918 So. 2d 342, 347 (Fla. 5th DCA 2005) (once insurer refused to defend, it lost the right to raise any defense it could have raised in the underlying litigation); *Indep. Fire Ins. Co. v. Paulekas*, 633 So.2d 1111, 1114 (Fla. 3d DCA 1994) (in coverage litigation, holding that insurance company "was not permitted to assert all of the defenses which could have been asserted in the underlying cause of action"). *Kopelowitz v. Home Ins. Co.*, 977 F.Supp. 1179, 1187, n.3 (S.D. Fla. 1997) (recognizing that under Florida law, an insurer's failure to honor its duty to defend the insured estops the insurer from later relitigating fact and legal issues determined in the underlying case); *Monticello Ins. Co. v. City of Miami Beach*, 2009 WL 667454, *13 (S.D. Fla. March 11, 2009) (recognizing principle that an insurer that wrongfully refuses to defend the insured is bound by the final judgment and may not relitigate the issue of liability).

As this Court explained in *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779, 787 (Fla. 2004), "Florida has long followed the general rule that tort law principles do not control judicial construction of insurance contracts." Therefore, Zenith may not relitigate any of the liability defenses that were or could have been raised on behalf of Lawns in the underlying case. Zenith is bound by the verdict and

judgment against its insured as they currently stand, not as they might have been had Zenith properly defended the underlying case.

D. Workers Compensation Immunity Is A Tort Defense, Not A Coverage Exclusion

The district court acknowledged, but then failed to apply, this established principle of law. Whether the claim against the insured employer is subject to workers compensation immunity is a tort defense. As this Court explained in *Mandico v. Taos Constr., Inc.*, 605 So.2d 850, 854 (Fla.1992), "[t]he assertion that the plaintiff's exclusive remedy is under the worker's compensation law is an affirmative defense, and its validity can only be determined in the course of [the tort claim]." Workers compensation immunity is an "issue[] of liability bearing on the right of recovery from the tortfeasor, not on the issue of coverage under the policy." *Allstate Ins. Co v. Candreva*, 497 So. 2d 980, 981 (Fla. 4th DCA 1986).

Therefore, the affirmative defense of Lawns' workers compensation immunity is properly raised only as a tort defense in the underlying case, and cannot be raised by Zenith as a bar to coverage. The court in *Wright* specifically applied this rule to the same exclusion and the same facts as are at issue here. 823 So.2d at 242.

The underlying judgment created a fixed liability. The district court erred in revisiting the substantive basis for that liability in this coverage case. Whether the underlying case should have been dismissed on the grounds of workers

compensation immunity is simply irrelevant to this coverage case, and was not for the district court here to decide.

Yet, it is clear that is exactly what the district court did. The district court's ruling that there was no coverage was based on its finding that workers compensation law should have afforded Lawns a tort defense to the underlying judgment. The district court first analyzed Florida substantive tort law on the scope of the workers compensation exclusive remedy defense, compared the allegations of the underlying complaint to the elements of the defense, and concluded that the underlying complaint should have been barred by workers compensation immunity. (Doc. 121, P. 6-7). This is patently a decision based on a substantive tort defense as opposed to the terms of the policy.

The district court refused to follow *Wright*, dismissing its discussion of the workers' compensation exclusion as dicta. However, as the 11th Circuit correctly explained before certifying the question to this Court, the *Wright* court's statement that the workers compensation exclusion did not bar coverage for a tort judgment is an actual holding, and simply not dicta. The *Wright* court expressly held that "that the workers compensation exclusion in the employer's liability coverage in part II, relied upon by the trial court below, does not apply to *Wright's* civil action because the settlement judgment was not an "obligation imposed by worker's compensation" law. Rather, the judgment arose from the claims in the civil action

and the [resulting] settlement agreement [], neither of which involve obligations imposed by workers compensation law." The district court erred in dismissing this holding as dicta.

The district court also avoided *Wright* by claiming that *Sinni v. Scottsdale Insurance*, 676 F.Supp. 2d 1319 (M.D.Fla. 2009), "rejected Plaintiff's interpretation of *Wright*." (Doc.121, P.10). However, this is a misstatement of both the *Sinni* case and Morales's argument here. *Sinni* did not reject the relevant holding in *Wright*, nor any argument made by the Plaintiffs in this case. To the contrary, *Sinni* reaffirmed *Wright's* holding that an insurer cannot avoid its coverage duties by raising tort defenses after the insurer refuses to defend its insured. 676 F.Supp. 2d at 1331-32. Therefore, *Sinni* actually approved the relevant holding from the *Wright* case.

Sinni did reject the argument, made there but not here, that *Wright* also precludes an insurer from raising policy exclusions based on its failure to defend its insured. Id. at 1332. The federal court in *Sinni* also did question whether this Court would accept that extension of *Wright*, but Plaintiffs here never challenged Zenith's right to assert policy exclusions. This Court can and should clarify the confusion caused by *Sinni*, expressly approve *Wright*, and clarify that *Wright* properly applies the longstanding Florida rule that a carrier cannot assert tort defenses that it failed to raise in the underlying case.

Notably, the Morales survivors were adverse to Zenith and its insured in the underlying case. Therefore, any obligation to raise a defense to the Morales claims below fell on Zenith as the carrier. The lawyers hired by Zenith never obtained a dismissal or summary judgment for Lawns based on the workers compensation (or any other) defense. Ultimately, the state court trial court entered a tort judgment, which remains valid and in effect, and which impliedly rejects all defenses, including workers compensation immunity. As the court explained in *Wright*, workers compensation immunity is a defense that Zenith could have asserted for the benefit of the insured in the underlying tort case, and having failed to do so, Florida law precludes Zenith from using that defense to its own benefit in this coverage case. The district court erroneously gave Zenith the benefit of a tort defense in this coverage case.

E. Cases Construing CGL Policies Are Not Applicable To This Employer's Liability Policy

As the 11th Circuit noted, the district court, having rejected the Wright case as dicta, relied on Comprehensive General Liability (CGL) policies, not Employer's Liability policies. This was incorrect. Different types of policies are not subject to the same law and the case law is not interchangeable. *See Paul Revere Life Ins. Co. v. McPhee*, 144 F.Supp.2d 137, n.3 (S.D.Fla.2001); *Progressive American Ins. Co. v. Rural/Metro Corp. of Florida*, 994 So.2d 1202 (Fla. 5th DCA 2008); *Government Employees Ins. Co. v. Sweet*, 186 So.2d 95

(Fla.4th DCA 1966). Therefore, *Sinni v. Scottsdale Ins. Co.*, 676 F.Supp. 2d 1319 (M.D.Fla. 2009), *XL Ins. Am., Inc. v. Ortiz*, 73 F.Supp. 2d 1331 (S.D. Fla. 2009), *Indian Harbor Ins. Co. v. Williams*, 998 So. 2d 677 (Fla. 4th DCA 2009), and *Fla. Ins. Guar. Ass'n, Inc. v. Revoredo*, 698 So. 2d 890 (Fla. 3d DCA 1997), all cited by the district court and dealing with CGL policies, are entirely inapplicable to this case.

CGL policies and Employer's Liability policies have completely different scopes and purposes. CGL policies are meant to insure claims by third parties, and do not insure claims by employees. *See Indian Harbor Ins. Co. v. Williams*, 998 So.2d 677 (Fla. 4th DCA 2009); *Florida Insurance Guaranty Ass'n v. Revoredo*, 698 So.2d 890, 892 (Fla. 3d DCA 1997). Any claims by employees are by definition excluded from coverage under a CGL policy. *See Amerisure Ins. Co. v. Walker*, 2011 WL 5597325 at *3 (S.D.Fla.2011); *Sinni* 676 F.Supp.2d at 1322. Therefore, it is meaningless that CGL case law holds that claims for which workers compensation benefits have been paid are excluded from CGL coverage, because those claims would by definition be made by employees and would not be covered in any event.

In direct contrast, Employer's Liability Coverage applies only where an employer is sued for injuries *to an employee*. Under Zenith's theory, any tort claim based on an underlying event, accident or injury for which any damages may

potentially be payable under workers compensation is excluded from coverage. This interpretation would render the coverage entirely illusory in the case of an Employers Liability policy, because, as this Court has explained, an Employers Liability policy applies only to claims by employees, and all claims by employees are potentially compensable under workers compensation. *See Travelers Indemnity Co. v. PCR Inc.*, 889 So.2d 779, 784-85, n.7 (Fla.2004).

In *Travelers v. PCR*, this Court specifically rejected the argument that Zenith makes here, and refused to "interpret[] terms in the policy language identically to the way those terms have been interpreted in different contexts. This is especially so where, as here, such interpretations would actually undermine what was most likely the parties' intent in making the contract," i.e., to cover claims by injured employees. Zenith's theory is an overbroad interpretation which allows the exclusion to completely obliterate the coverage, contrary to Florida law.

In short, the district court erred in relying on case law construing CGL policies, instead of case law interpreting Employer's Liability policies. The applicable case law construing the relevant types of policies holds that a tort judgment is not an "obligation imposed by" workers compensation law.

F. Employers Liability Insurance Can Cover Accidents For Which Workers Compensation Benefits Have Been Paid; This Is Not Double Dipping, And Furthermore Double Dipping Is Not A Basis For Rewriting The Contract Of Insurance

The district court's order was based in part on policy concerns about double

recoveries. By the district court's reasoning, if the accident was compensable under workers compensation, the same accident should not also be compensable under the Employer Liability Coverage part. That result is incorrect under Florida law and misconstrues the purposes of the two parts of the policy.

Part B of the Zenith policy is a standard Employers' Liability Coverage form, requiring Zenith to defend and indemnify Lawns against tort claims for injuries sustained by employees in the course and scope of employment. The insuring agreement for Employers' Liability Coverage is therefore precisely coextensive with workers compensation benefits: it covers claims by employees for injuries arising in the course and scope of their employment. By definition, then, Employers Liability Insurance exists because employers will be exposed to tort claims by employees that are made *despite* the existence of workers compensation immunity. In fact, Zenith stated in its Reservation of Rights letter that the claim was for damages "over and above" the workers compensation benefits already being paid, and that as such, the claim would be covered under Part B.

As this Court has noted, it is common for employers to purchase this type of dual coverage, Part A for workers compensation claims and Part B for tort claims, so that the employer has protection for both workers compensation claims and tort claims by employees:

> [A] workers' compensation insurance policy often is issued together with an employer's liability insurance policy, with the latter intended to serve 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....despite the provisions of the Workers' Compensation Law, a risk still remained that [the employer] could be held liable in tort for damages to its injured employees. To address this risk, [the employer] purchased the employer's liability insurance policy.

Travelers Indem. Co. v. PCR Inc., 889 So.2d 779, 784 n.7 (Fla.2004). *See also Bros. Co., Inc. v. Mohammed*, 918 So.2d 425, 429 (Fla. 4th DCA 2006) (Part II Employer's Liability Insurance provides coverage "for injuries to employees during their employment under circumstances where [the insured] would be obligated to pay damages other than the statutorily mandated workers' compensation benefits. ... the Employer's Liability Insurance provides 'gap' insurance to the employer in situations where the employee may maintain a tort action against the employer despite the exclusive remedy provisions of the Workers' Compensation Act."). Therefore, this dual coverage is necessary precisely because employees can recover both in workers compensation and in tort.

Contrary to the district court's ruling, Florida law holds that an Employer's Liability policy can provide liability coverage even if the same carrier has already provided workers compensation benefits for the same accident. *See FCCI Ins. Co. v. Horne*, 890 So.2d 1141 (Fla. 5th DCA 2004). Even where workers compensation benefits are paid, the employer may still have tort liability, and Employer's

Liability Coverage covers damages that are not compensable under the workers compensation coverage. *See Jones v. Martin Electronics, Inc.*, 932 So.2d 1100, 1108 (Fla.2006).

This Court has also made clear that the receipt of workers compensation benefits does not preclude an injured employee or his estate from suing the employer in tort. *Jones*, 932 So.2d at 1107. This Court has specifically rejected the "double" recovery argument accepted by the district court here, noting that the workers compensation statute already protects against double recovery by allowing a right of reimbursement by the workers compensation carrier against any tort recovery. 932 So.2d at 1108; *see also* Fla. Stat. § 440.39. In any event, preventing double recovery is a matter to be raised in the underlying tort claim, *see Jones* 932 So.2d at 1107, not as a defense to coverage. As with other tort defenses, *see supra*, it cannot be raised here by Zenith.

Notably, the workers compensation exclusion upon which the district court based its ruling does not anywhere refer to double recovery. The exclusion, which must be strictly construed in favor of coverage, does not state that Employer's Liability Coverage will be unavailable for a tort judgment if workers compensation benefits have been paid for the same accident. If Zenith meant for the exclusion to bar liability coverage for any accident for which compensation benefits have been paid, it should have written the exclusion to clearly state that premise. Instead, it

refers only to an obligation "imposed by" workers compensation law. Zenith's policy, like all liability policies, states that coverage applies if the insured has a legal obligation to pay. The judgment against Lawns is a legal obligation to pay.

Likewise, the risk of double recovery does not allow the district court to rewrite an insurance contract to preclude coverage that is otherwise provided. *See Gulf Ins. Co. v. Dolan, Fertig and Curtis*, 433 So.2d 512, 515 (Fla.1983) (courts should exercise "extreme caution" when finding public policy defenses to coverage, and "should refuse" to rewrite contracts "unless it be made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties sui juris.") (*quoting Bituminous Casualty Corp. v. Williams*, 154 Fla. 191, 197, 17 So.2d 98, 101 (1944) (citations omitted)). *See, e.g., Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1009 (Fla.1989); *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061 (Fla.1983). The district court improperly rewrote the contract to accommodate its public policy concerns. Notably, these are concerns that could have been raised by Zenith in the tort case had it properly and fully defended its insured.

If Zenith's argument is accepted, any liability insurer could avoid coverage for a judgment – one that remains valid and binding against the insured - simply by claiming after the fact that some defense to the claim should have been asserted, or

that some defense that was asserted should have succeeded. Zenith's argument would require the court in each coverage case to retry all possible liability defenses in the coverage action. This would risk inconsistent results, waste judicial resources, and potentially leave insureds exposed to judgments for which the carrier avoids coverage by doing a better job asserting tort defenses on its own behalf than it did on behalf of the insured. This is contrary to Florida law, which holds that an insurer is bound by the determinations in the tort case against the insured. *Sentry Ins. v. FCCI Mut. Life Ins. Co,* 745 So.2d 349 (Fla. 4th DCA 1999). If these are valid defenses, they should have been asserted in the underlying case for the benefit of the insured. *See Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980) (insurer has a duty to protect the insured's exposure in a tort case as if it were its own).

The judgment against Lawns is a judicial determination that these tort defenses did not apply. The fact that this determination was by default instead of by contested trial is irrelevant. A default admits all the allegations of the complaint, and rejects any defenses. *Phadael v. Deutsche Bank Trust Co. Americas*, 83 So.3d 893 (Fla. 4th DCA 2012). This court should reject Zenith's efforts to create a procedure allowing tort defenses to be retried in a coverage case.

For the above reasons, this Court should answer the certified question in the negative, and hold that the workers compensation exclusion does not bar coverage

for the tort judgment. This Court should also find that Morales is entitled to summary judgment on the workers compensation exclusion. There is no fact issue, the exclusion does not apply, and Morales is entitled to judgment as a matter of law.

(3) THE RELEASE IN THE WORKERS' COMPENSATION SETTLEMENT AGREEMENT DOES NOT PROHIBIT THE ESTATE'S COLLECTION OF THE TORT JUDGMENT.

The third and final certified question relates to Zenith's "tipsy coachman" argument that a lump sum worker's compensation settlement prohibits Morales from pursuing this claim for insurance coverage of the tort judgment. This argument fails for multiple reasons.

A. <u>Election Of Remedies Is A Tort Defense That Cannot Be Asserted In This Coverage Case.</u>

Zenith's argument in the district court and the 11th Circuit was that the worker's compensation settlement was an election of remedies that "should have precluded" the judgment against Lawns. (See Doc. 85; Zenith's 11th Circuit Answer Brief, P. 22). As Zenith admitted, election of remedies is a tort defense. Id; *see, e.g., Williams v. Gaffin Indus. Services, Inc.*, 88 So.3d 1027 (Fla. 2d DCA 2012); Fla.R.Civ.P. 1.110(d). However, as established in point II above, acknowledged by both the 11th Circuit and the district court, and conceded by Zenith, an insurer cannot assert tort defenses as a defense to a coverage claim. Therefore, whether the workers compensation settlement agreement "should have

precluded" the judgment against Lawns in the tort case is simply irrelevant in this coverage case. Having done nothing to assert this defense in the underlying case to "preclude" the judgment from being entered against its insured, Zenith cannot assert the same defense for its own benefit in this coverage case.

This Court should reject Zenith's continued attempts to raise tort defenses in this coverage case, and should find as a matter of law that the election of remedies defense does not preclude coverage.

B. The Settlement Agreement Is Limited By Its Terms To The Workers' Compensation Claim.

Even if Zenith could raise this defense here, Zenith's argument is contrary to the clear terms of the settlement agreement. The agreement, including its title, repeatedly states that it is made pursuant to Florida Statutes section 440.20(11). Section 440.20(11), in turn, authorizes only a waiver and release of the worker's compensation claim: "a workers' compensation claimant [] may waive any and all rights under Florida's Workers' Compensation Act by entering into a settlement agreement releasing the employer and the insurance carrier from liability for workers' compensation benefits in exchange for a lump-sum payment." (e.s.). Lump sum settlements under section 440.20 are intended to "releas[e] the employer/carrier from responsibility for any further or future benefits of any nature under the Workmen's Compensation Act." In re *Lupola*, 293 So.2d 354, 357 (Fla. 1974).

Zenith's entire argument is based on one sentence in the agreement, which does refer to an "election of remedies." However, Zenith's argument misreads the settlement document. Read as a whole and in context, it is apparent that the "election and waiver" applies only to workers compensation benefits:

> ELECTION AND WAIVER: Pursuant to Florida Statutes, Section 440.20(11)(c)(2011), in exchange for the consideration described below, the Claimant hereby waives all right to any and all benefits under The Florida Workers' Compensation Act. Further, this settlement and agreement 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.
>
> (Dkt. 114, Ex. 9, P.2).

This paragraph expressly begins with a reference to section 440.20. It states that the agreement is a waiver of "benefits under The Florida Workers' Compensation Act" and does not refer to a waiver of the tort claim. It limits the "election of remedies" to "the employer and the carrier as to the coverage provided to the employer." The only coverage referred to in the agreement is workers' compensation coverage and not Employer's Liability coverage.

The rest of the document likewise confirms that the intent was to settle and release only the workers compensation claim. The settlement agreement repeatedly and exclusively states that it is for benefits under the Workers' Compensation Act. It does not refer to the tort case, which was already pending. The settlement was submitted for court approval only in the workers compensation case and only to the Judge of Compensation Claims. The settlement agreement required a dismissal of

the workers compensation claim but did not require a dismissal of the pending tort claim.

Furthermore, the only consideration provided by Zenith for the settlement was the exact value of the remaining workers compensation benefits. Zenith's own claim payout history log reflects that the entire settlement amount was paid as workers compensation benefits. No consideration was paid for a tort claim or tort damages. The 11th Circuit noted that the settlement was paid "pursuant to the Florida Workers' Compensation Act and part I of the policy." At *3.

As the court explained in *Borque v. Trugreen, Inc.,* 389 F.3d 1354 (11th Cir. 2004), where a lump sum settlement under section 440.20(11) refers to a waiver or release of claims or liability for "benefits," this is a narrow term referring only to the worker's compensation claim and does not operate as a release from all claims of liability.

This Court has long held that the language appearing in a release and settlement document is the best indicator of the intent of the parties, and unless a particular claim is unambiguously released in the document, it will not be barred. *See Hurt v. Leatherby Ins. Co.*, 380 So.2d 432, 434 (Fla.1980). The language throughout this settlement agreement, including the title, refers only to the workers compensation claim and benefits under chapter 440. Zenith has failed to demonstrate that the statutory lump sum payout of the remaining workers

compensation benefits operates as a bar to the claim for coverage under the Employers Liability policy.

C. Even If Election Of Remedies Could Be Asserted In This Coverage Case, The Settlement Agreement Does Not Meet The Requirements For An Election Of Remedies Under Florida Law.

Even if election of remedies were a possible defense to this coverage case, Zenith simply cannot prove the elements of that defense. This Court has "established that an election of remedies presupposes a right to elect. It is a choice shown by an overt act." *Jones v. Martin Elecs., Inc.*, 932 So.2d 1100, 1105 (Fla.2006), quoting *Williams v. Robineau*, 124 Fla. 422, 168 So. 644, 646 (1936). Therefore, the "mere acceptance by a claimant of some compensation benefits is not enough to constitute an election. There must be evidence of a conscious intent by the claimant to elect the compensation remedy and to waive his other rights." *Lowry v. Logan*, 650 So.2d 653, 657 (Fla. 1DCA 1995). *See also Velez v. Oxford Dev. Co.*, 457 So.2d 1388, 1390 (Fla. 3d DCA 1984). Election of remedies applies only if the claimant "evince(s) a conscious intent [] to reject any potential tort claim." *Jones*, 932 So.2d at 1107.

Here, the claimant merely accepted benefits and did not "evince a conscious intent" to waive other rights or "reject" the tort claim. In fact, the tort claim here was not merely a "potential" - it was already pending - yet the settlement agreement called only for dismissal of the compensation claim and only for

approval by the Judge of Compensation Claims. The settlement language refers repeatedly and solely to the worker's compensation claim. The settlement facially does not evince a "conscious intent [] to reject" the tort claim.

Furthermore, as the 11th Circuit acknowledged, this Court has clearly stated that the election of remedies defense applies only where the worker's compensation remedy has been "pursued to a determination or conclusion on the merits." *Jones*, 932 So.2d at 1105 (Fla.2006). In *Jones*, this Court explained that election of remedies does not apply unless the claimant has actually litigated an entitlement issue in the worker's compensation forum. 932 So.2d at 1107. If the carrier voluntarily makes payments, the remedy was not "pursued" and there is no election. *See Wheeled Coach Industries, Inc. v. Annulis*, 852 So.2d 430 (Fla. 5th DCA 2003), approved, *Jones*, 932 So.2d 1105-07.

As this Court expressly held in *Jones*, merely agreeing to change or accelerate the timing of workers' compensation payments to which entitlement has already been agreed is not a claim that has been "pursued" to a determination "on the merits." 932 So.2d at 1107. A lump sum settlement under section 440.20(11)(a) is simply a way for the carrier to "expediently" conclude its handling of a compensation claim, and is not a resolution on the merits. *See Hernandez v. United Contractors Corp.*, 766 So.2d 1249, 1253 (Fla. 3d DCA 2000).

Here, Zenith voluntarily paid the workers compensation benefits for death of Santana Morales. There was no dispute about whether he was an employee or in the course of employment or otherwise entitled to workers compensation benefits. The Morales estate never pursued a disputed issue of entitlement in the workers compensation proceeding. The lump sum settlement was merely a change in the timing of payments that were already being voluntarily made, and merely an "expedient" way to conclude the undisputed workers compensation claim. Pursuant to this Court's holding in *Jones*, Morales' worker's compensation remedy was not "pursued to a determination or conclusion on the merits," and it cannot constitute an election of remedies.

D. The Agreement Cannot Be An Election Of Remedies As To The Coverage Case Because Morales Did Not Have A Coverage Claim At The Time Of The Settlement.

In addition to the above, the workers' compensation settlement cannot be an election of remedies as to the coverage claim, because the coverage claim had not even accrued at the time of the settlement. Election of remedies applies only to suits that could have been brought at the time of the alleged election. *See Mena v. J.I.L. Const. Group Corp.*, 79 So.3d 219, 224 (Fla. 4th DCA 2012); *Marta v. Continental Mfg. Co., Inc.*, 400 So.2d 181(Fla. 4th DCA 1981). "The doctrine of election of remedies presupposes the right to elect between two available remedies, each of which is equally available to the claimant." *Vasquez v. Sorrells Grove*

Care, Inc., 962 So.2d 411 (Fla. 2d DCA 2007), citing *Jones v. Martin Elecs., Inc.*, 932 So.2d 1100, 1105 (Fla.2006). As explained in point I above on the standing issue, the Morales family had no right to bring a claim against Zenith for liability coverage until they had a judgment against Zenith's insured. Election of remedies does not apply to this coverage claim.

E. Any Potential Settlement Defense is Limited to the Parties to the Settlement, and Zenith Cannot Demonstrate that the Settlement Complied with the Requirements for Settling Minors' Tort Claims.

A workers compensation settlement may preclude a tort claim only if there is mutuality of parties. *Zeeuw v. BFI Waste Systems of North America, Inc.*, 997 So.2d 1218, 1221 (Fla. 2d DCA 2008). In a death case involving both a surviving spouse and minor children, the workers compensation settlement potentially operates as an election of remedies only as to those claimants actually participating in the workers compensation settlement. In *Hernandez v. United Contractors Corp.*, 766 So.2d 1249 (Fla. 3d DCA 2000), a lump sum settlement pursuant to section 440.20(11)(a) was brought only in the name of the surviving spouse and did not include the minor children. The court held that even if election of remedies could apply, it would at most bar the claim by the spouse, and that the children's tort actions would remain unaffected because they were not parties to the workers compensation settlement.

Here, the same type of lump sum settlement named Ms. Morales only as parent and guardian of the children, and not as surviving spouse or personal representative of her husband's estate. Even if this Court accepts all of Zenith's arguments, the election of remedies defense only potentially applies to the children's claims.

Furthermore, a lump sum settlement of workers' compensation claims does not bind the claims of minor children unless the settlement is approved by the probate court and compliant with the normal statutory and guardianship requirements for minor settlements. *See Hernandez v. United Contractors Corp.*, 766 So.2d 1249, 1253-54 (Fla. 3d DCA 2000). The settlement here was approved only by the Judge of Compensation Claims and only pursuant to Florida Statutes 440.20(11)(c). There is no showing in this record that the Morales children's claims were settled in compliance with the guardianship and probate requirements. Zenith has therefore failed to demonstrate that the settlement was effective to bar the tort claims of the named parties, and Zenith cannot use this defense to avoid coverage as a matter of law.

For the foregoing reasons, this Court should answer the third certified question in the negative, and hold that the workers compensation settlement did not operate as a release or election of remedies as to this coverage case.

CONCLUSION

This Court should answer the first certified question in the affirmative, and find that the Estate does have standing to bring a coverage claim against Zenith. This Court should answer the second certified question in the negative, and find that the exclusion for "any objection imposed by workers compensation [] law" does not bar coverage for the tort judgment against Zenith's insured. This Court should answer the third certified question in the negative and find that the workers' compensation settlement does not operate as an election of remedies or release of this coverage claim against Zenith.

This Court should find that Morales is entitled to judgment as a matter of law on the standing issue, the workers compensation exclusion issue, and the settlement/election of remedies issue.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and is formatted using Times New Roman 14-point font.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was SERVED BY EMAIL on May 29, 2013 to the following: I. William Spivey, Esq., Greenberg Traurig, P.A., 450 South Orange Avenue, Suite #650, Orlando, FL 32801 spiveyw@gtlaw.com; Richard S. Maselli, Esq., Ogden & Sullivan, P.A., 113 South Armenia Avenue, Tampa, FL 33609-3307 rmaselli@ogdensullivan.com; Julissa Rodriguez, Esq., Greenberg Traurig, P.A., 333 S.E. Second Avenue, Suite #4400, Miami, FL 33131 rodriguezju@gtlaw.com

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