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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO. 2D22-0267
L.T. CASE NO. 2020-CA-393

FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

Appellant,

v.

THE ESTATE OF RANDALL LEE TAYLOR, By and through it's Personal Representative, MARCIA TAYLOR,

Appellee.

INITIAL BRIEF OF FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY

(On appeal from the Circuit Court of the 20th Judicial Circuit in and for Charlotte County, Florida)

Respectfully submitted by,

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PREFACE

In this Brief, the Appellant FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY will be referred to as "FFB". The Appellee ESTATE OF RANDALL LEE TAYLOR will be referred to as "TAYLOR".

References to the record on appeal will be designated as (R.____). References to the Appendix will be designated as (A.____). [1]

[1] The Court granted FFB's Motion to Supplement the record to include the summary judgment hearing transcript on July 13, 2022. In an effort to avoid any further delay, we have taken the liberty of including the transcript in our Appendix.

POINTS ON APPEAL

I. THE TRIAL COURT ERRED IN DENYING FFB'S MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW, FINDING THAT FFB'S POLLUTION EXCLUSION DID NOT APPLY TO EXCLUDE COVERAGE FOR TAYLOR'S CLAIM FOR DAMAGES CAUSED BY A DEAD BODY ON THE INSURED PREMISES.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF TAYLOR ON FFB'S BACTERIA ENDORSEMENT BECAUSE IT WAS NOT WITHIN THE SCOPE OF THE PLEADINGS, TAYLOR'S OWN COUNSEL SPECIFICALLY STATED THAT HE WAS NOT PURSUING SUMMARY JUDGMENT ON THAT GROUND, AND THE COURT'S CONCLUSION THAT THE ENDORSEMENT "SUPERSEDED" THE POLLUTION EXCLUSION WAS LEGALLY UNSUPPORTED.

STATEMENT OF THE CASE AND FACTS

OVERVIEW

This case arose from a property damage claim made on behalf of the deceased insured TAYLOR seeking to recover the cost of remediating TAYLOR'S home after he was found dead and decomposing several days after he passed away. FFB denied the claim, which was brought by TAYLOR'S Personal Representative MARCIA TAYLOR, on the ground that the Pollution Exclusion in TAYLOR'S policy excluded coverage for the loss. TAYLOR filed suit for breach of contract and declaratory relief, specifically seeking a determination that the Pollution exclusion did not apply to the claim. TAYLOR did not cite any other policy language in her Complaint.

On FFB'S motion for summary judgment, the trial court found that it had not definitely proven, by record evidence, that the nature of the claim fell within the scope of its Pollution Exclusion because there was no evidence offered to establish that a decomposing dead body released "pollutants", as that term is defined by the policy, and because, if human remains were deemed pollutants, the policy would have so specified. Although TAYLOR had not filed a cross-motion for summary judgment seeking a summary judgment on coverage under FFB'S "Mold, Fungi and Bacteria" limited endorsement, which she raised for the first time in response to FFB'S

summary judgment motion, the trial court granted summary judgment in TAYLOR'S favor on the claim, finding that the Estate established by undisputed record evidence that the claim fell within the scope afforded by that endorsement.

FFB appeals the trial court's summary judgment in TAYLOR'S favor as well as the denial of FFB'S motion on the legal grounds set forth in the Court's summary judgment order. FFB does not challenge the trial court's finding that there was insufficient evidence of the nature of the remains to definitively establish that they constituted a "pollutant" but charges as error the trial court's legal interpretation of the exclusion and its order granting TAYLOR summary judgment on the Bacteria Endorsement.

THE RECORD

TAYLOR filed an Amended Complaint against FFB alleging that the named insured, Randy Taylor, passed away in his home on or about November 12, 2018. (R.169) TAYLOR alleged that she notified FFB of the loss on December 4, 2018. (R.169) In Count I, TAYLOR alleged that FFB breached its insurance policy by failing to pay TAYLOR'S claim for repairs necessitated by Randy Taylor's passing and Count II of TAYLOR'S complaint sought a declaration that FFB'S Pollution Exclusion did not apply to exclude the claim from coverage. (R.169-170) FFB responded by raising

its Pollution exclusion as an affirmative defense to coverage.[2] (R.112) TAYLOR did not file a Reply to that affirmative defense.

FFB'S Pollution Exclusion provides:

> **Section I – Perils Insured Against:**
>
> We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. **We do not insure, however, for loss**;
>
> . . .
>
> 2. Caused by:
>
> . . .
>
> e. Any of the following:
>
> . . .
>
> **(5) Discharge, dispersal, seepage, migration, release or escape of Pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against Under Coverage C of this policy. Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed . . . .**

(R.409-410)

[2] FFB also raised issues regarding Marcia Taylor's standing and the validity of the assignment of benefits she executed. Those issues are not the subject of this appeal.

Pursuant to the Court's Administrative Order governing civil cases, the parties filed their respective Statement of Facts and Issues of Law to be Decided by the Court. In TAYLOR'S statement, she set forth that she reported the claim to FFB on or about December 4, 2018, approximately 3 weeks after Randy Taylor died, and that FFB denied coverage for the claim on January 8, 2019. (R.257-258) No specific policy language was cited as an issue of law for the Court's decision, nor was there any mention of disputed issues of fact with respect to the substance(s) that were allegedly removed from Randy Taylor's home. (R.257-258) In FFB'S Identification of Issues of Law to be Decided by the Court, it listed the application of its Pollution Exclusion. (R.264)

In March of 2021, FFB filed its Motion for Summary Judgment arguing that its Pollution Exclusion excluded coverage for TAYLOR'S claim. (R.266-273) FFB argued that under the case law interpreting the Pollution Exclusion, natural bodily substances can be "pollutants" such that damages arising from their release were deemed excluded from coverage. (R.268-272)

In its response to the motion filed almost three months later and about 20 days before the hearing set for June 21, 2001, for the first time, TAYLOR raised issues of fact as to the nature of the substances emitted from Randy Taylor's decomposing body. (R.368-469) TAYLOR contended that FFB was

not entitled to summary judgment because it failed to identify the **specific** bodily substances found on the property. (R.368, 380-381)

In addition and also for the first time, TAYLOR argued that FFB'S policy provided coverage for the loss pursuant to the Mold/Fungus/Bacteria ["Bacteria] limited endorsement in its policy. (R.382) That endorsement reads, in pertinent part:

> **LIMITED FUNGI, WET OR DRY ROT, OR BACTERIA COVERAGE**
>
> **SECTION I – PROPERTY COVERAGES**
>
> **ADDITIONAL COVERAGES**
>
> The following Additional Coverage is added:
>
> 13. "Fungi", Wet or Dry Rot, Or Bacteria
>
> a. The amount shown in the Schedule above is the most we will pay for:
>
> . . .
>
> (2) The cost to remove "fungi", wet or dry rot, or bacteria from property covered under Section 1 – Property Coverages . . .
>
> . . .
>
> **b. The coverage described in 13.a only applies when such loss or costs are a result of a Peril Insured Against that occurs during the policy period** and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured Against occurred.

(R.442) On page 15 of its Response to FFB'S motion for summary judgment, the only argument raised by TAYLOR was that there was additional coverage for bacteria:

> As stated, *supra*, the Policy provides Additional Coverage for "Fungi", Wet or Dry Rot Or Bacteria . . . A human body, pre and postmortem, possesses bacteria. Further, bacteria is present in bodily fluids that depart a human body during decomposition. Bacteria was present in Mr. Taylor's body and his departed fluids following his passing at the Property. . . . Accordingly, the Policy provides coverage for this claim and Defendant's Motion must be denied.

(R.382)[3]

In support of this argument, TAYLOR attached the affidavit of Andrew S. Bagg, M.D., who practices in the area of Allergy and Immunology. (R.468-469) Dr. Bagg attested that he reviewed Randy Taylor's death certificate and four photos taken of the home depicting still wet bodily fluids from Mr. Taylor's body and concluded that "Bacteria was present in Mr. Taylor's body both pre and postmortem; and Bacteria was present in the bodily fluids that departed Mr. Taylor's body postmortem." (R.468-469) Dr. Bagg did not

[3] TAYLOR did not quote or address the language in the Perils Insured Against section of the Policy, which expressly excluded coverage for damage caused by Pollutants. (R.382)

explain how he was able to reach this conclusion from the death certificate or photographs.

At the hearing on FFB'S motion for summary judgment, the trial court expressly recognized that neither party sought summary judgment under the Mold/Fungus/Bacteria endorsement and TAYLOR'S counsel responded that he was **not "looking necessarily for summary judgment this time, but [sic] definitely defeat [sic] them in their motion for summary judgment."** (A.23-24) The trial court noted that under the new summary judgment rule, the Court had the ability to grant summary judgment for the nonmoving party on reasonable notice, but the Court further noted that "on the coverage under that [Bacteria] endorsement, **I don't think it's framed enough legally for me to act**." (A.25) (emphasis added). The Court requested that each party submit a proposed order for the Court's review and consideration. (A.30)

Thereafter, the Court issued the order on appeal. In that order, the Court found that the Pollution Exclusion was ambiguous because a layperson would not reasonably understand the exclusion to preclude coverage for damage arising from decomposing remains. The Court further found that FFB did not provide by evidence that Mr. Taylor's remains were "pollutants" as defined by the Policy based on the court's determination as to what an "ordinary layperson" would conclude from the policy language.

(R.476, 478) The Court rejected FFB'S argument that TAYLOR'S remains were a "contaminant", finding that "practically all substances, including air and water, could be considered contaminants" and further opined that if FFB intended that human remains be included in the Pollution exclusion, it would have expressly stated that.[4] (R.476) The Court also noted that FFB did not provide evidence as to the specific items or substances removed the property, the state of the remains or the portions of the property that were allegedly contaminated. (R.478)

The Court further found that FFB "did not present evidence or argument suggesting that the mitigation services performed by Accident Cleaners and/or Biosweep did not remove bacteria from the property." (R.478) In addition, although TAYLOR had filed no cross-motion on the issue, the Court further found that the Mold/Fungus/Bacteria endorsement "superseded" the Pollution exclusion and that "[b]ased on the uncontested evidence presented to date, the Additional Coverage for "Fungi", Wet or Dry

[4] At the hearing, FFB cited the Court to Florida Statute 381.0098 which defines biomedical waste as including "solid or liquid waste which may present a threat of infection to humans". The Court rejected that argument, finding that the statute does not govern the interpretation of the term "waste" in the Pollution Exclusion and that, in any event, FFB did not present evidence demonstrating that Mr. Taylor's remains actually presented a threat of infection to humans. (R. 477, n. 1)

Rot, or Bacteria . . . provides coverage for damages claimed by Plaintiff." (R.479-480)

The parties stipulated to the amount of TAYLOR'S damages in the context of a Final Judgment in order to enable FFB to pursue an appeal on the trial court's order on coverage. (R.566-567) The judgment was timely appealed to this Court and this brief follows. (R.575-578)

SUMMARY OF ARGUMENT

The trial court erred in denying FFB'S motion for summary judgment as a matter of law after finding that the Pollution Exclusion did not apply to preclude coverage for Taylor's claim for damage allegedly caused by a decomposing body on the insured premises. Contrary to the Court's finding, the Pollution Exclusion is not ambiguous simply because an insured might not understand that this type of loss is excluded from coverage because the insured's "reasonable expectations" do not govern the Court's interpretation of otherwise policy unambiguous policy language.

Courts in this and other jurisdictions have interpreted the Pollution exclusion to be unambiguous and have found that the term "waste" as used in the exclusion is broad enough to encompass bodily fluids, even though such substances are not mentioned in the exclusion. Likewise, courts have interpreted the term "contaminant" as used in the exclusion broad enough to encompass substances such as feces and ejaculate. The Court's order denying FFB summary judgment as a matter of law on the grounds that a reasonable insured would not understand the exclusion as excluding coverage for damage arising from decomposing human remains must be reversed and remanded for further proceedings.

The trial court's order granting TAYLOR summary judgment on its unplead legal theory that the Bacteria Endorsement in the policy must likewise be reversed for several reasons. First, that issue was not within the scope of TAYLOR'S pleadings, which only sought declaratory judgment on the issue of whether FFB'S Pollution Exclusion precluded coverage for TAYLOR'S loss. Second, TAYLOR'S own counsel disclaimed any intent to seek a summary judgment on the issue. Third, the trial court's conclusion that the Bacteria Endorsement "superseded" the Pollution Exclusion is legally insupportable and was never briefed or argued by either party. While a trial court is generally empowered under the new summary judgment rule to render a summary judgment in favor of the non-moving party, the Court does not have that power where, as here, that summary judgment is rendered on an issue entirely outside the scope of the pleadings. The trial court's order granting TAYLOR summary judgment was a denial of due process and the judgment must be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING FFB'S MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW, FINDING THAT FFB'S POLLUTION EXCLUSION DID NOT APPLY TO EXCLUDE COVERAGE FOR TAYLOR'S CLAIM FOR DAMAGES CAUSED BY A DEAD BODY ON THE INSURED PREMISES.

A. The Standard of Review

The standard of review of an order interpreting an insurance policy is de novo. Washington Nat. Ins. Corp. v. Ruderman, 117 So. 3d 943, 948 (Fla. 2013).

B. The Merits

The trial court erred in finding that the Pollution Exclusion did not apply to the TAYLOR'S claim as a matter of law. Florida law is abundantly clear that, contrary to the Court's conclusion, the Pollution Exclusion is **not** ambiguous. The weight of authority holds that the term "waste" in the pollution exclusion has broad meaning and includes human and animal bodily material, such as blood and feces. Similarly, the terms "irritant" and "contaminant" have been deemed by the Courts to have broad meaning, and are not limited to only defined substances expressly contained within the scope of the exclusion. The trial court's order determining, as a matter of law, that the pollution exclusion did not encompass TAYLOR'S claim must therefore be reversed and remanded for further proceedings to enable FFB

to support its motion for summary judgment with the record evidence as to the nature of the substance(s) removed from the premises, to the best of FFB'S ability.[5]

Principles of Policy Construction

Florida law is clear that "insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." Prudential Prop. & Cas. Ins. v. Swindal, 622 So. 2d 467, 470 (Fla. 1993). A policy is ambiguous only when the language is subject to "more than one reasonable interpretation, one providing coverage and the [sic] another limiting coverage." Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000). Where policy language is ambiguous, it is liberally construed in favor of the insured and strictly against the insurer. Flores v. Allstate Ins. Co., 819 So. 2d 740, 744 (Fla. 2002). However, just because a policy provision is complex and requires analysis does not render it ambiguous. See, Eagle American Ins. Co. v. Nichols, 814 So. 2d 1083, 1085 (Fla 4th DCA 2002). Nor is a policy provision ambiguous simply because it

[5] FFB was not notified of the loss until after TAYLOR had the remains removed from the premises by biohazard specialists. As a result, it will obviously be difficult, if not impossible, for FFB to obtain direct evidence of what was removed from the premises. However, since the evidentiary record has not been fully developed, FFB submits it should have the opportunity to obtain whatever information it can by way of discovery.

contains undefined terms. See, Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998) (rejecting the argument that because the words "irritant" and "contaminant" in the pollution exclusion are undefined, the exclusion is ambiguous). When a policy provision is clear and unambiguous, courts are not permitted to rewrite the policy, add meaning not present or otherwise construe the policy contrary to the intentions of the parties. State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986).

In Deni, 711 So. 2d 1135, the Supreme Court addressed the question of whether the exclusion applied to indoor contamination from an ammonia spill and insecticide accidentally sprayed on bystanders. Id. The trial court found that the exclusion was ambiguous and therefore, there was coverage for the insured's claim. Id. On appeal, the Fourth District reversed, and certified the question to the Florida Supreme Court on the issue of whether, where a policy provision is ambiguous, the doctrine of the insured's reasonable expectations should apply to resolve any ambiguity. Id. at 1136. Although the certified question assumed that there **was** an ambiguity in the pollution exclusion, the Supreme Court, citing the weight of authority throughout the country, held that the exclusion was **not** ambiguous in the first instance. Id. at 1137-1138. As a result, the Court concluded that the

doctrine of reasonable expectations, which determines the scope of coverage based on the insured's subjective, albeit reasonable, understanding of the coverage, did not apply and "[t]o apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged." Id. at 1140. Accordingly, the Court found that a loss resulting from chemical fumes from an ammonia spill was excluded under the pollution exclusion even though that exclusion did not expressly list ammonia as a pollutant. Id.

In this case, the trial court did just that when it concluded that the absence of reference to human remains in the pollution exclusion rendered it ambiguous because the policyholder would not know that such substances are deemed pollutants. As Deni made clear, the doctrine of "reasonable expectations" has been rejected as a rule of policy construction where, as here, the policy language is clear and unambiguous.

The term "waste" in the Pollution Exclusion

The trial court found it significant that the term "waste" as used in the pollution exclusion listed certain items, specifically "materials to be recycled, reconditioned or reclaimed". The Court concluded that the specific mention of these types of items signified that others were outside the scope of the exclusion.

That assertion was expressly rejected by the Wisconsin Supreme Court in Hirschhorn v. Auto-Owners Ins. Co., 338 Wis. 2d 781 (Wis. 2012). In Hirschhorn, the Court was called upon to determine whether a pollution exclusion identical to the one in this case excluded coverage for damages caused by bat guano (excrement) that had accumulated between the insured's home's siding and walls. The Court carefully analyzed the exclusion, including the term "waste", and found that that term unambiguously included feces and urine and declined to rewrite the policy to hold otherwise. In response to the Hirschhorns' argument that the term "waste" should only include the enumerated "materials to be recycled, reconditioned or reclaimed", the Court noted that the exclusion did not limit the term to only those materials, but merely listed materials to be **included** in that term. Thus, it is of no moment that the term "waste" in the pollution exclusion lists certain items as "included" because, as the Wisconsin Supreme Court so found, there is no language in the exclusion limiting that term to the enumerated items.

In addition to the foregoing case law, FFB cited the Court to Florida Statute 381.0098 in the Public Health section of the statutes, as support for its contention that human remains should be deemed "waste" as defined by

the pollution exclusion. That section is concerned with "biomedical waste", defined as:

> (2) (a) "**Biomedical waste"** means any **solid waste or liquid waste which may present a threat of infection to humans. The term includes, but is not limited to, nonliquid human tissue and body parts; laboratory and veterinary waste that contains human-disease-causing agents**; discarded disposable sharps; **human blood, blood products, and bodily fluids**; **and other materials that in the opinion of the department [of Health] represent a significant risk of infection to persons outside the generating facility**. **The term does not include human remains that are disposed of by persons licensed under chapter 497.**[6]

Id. (emphasis added). The trial court rejected FFB'S argument that these definitions supported its contention that human remains fall within the definition of "waste" as that term is used in the Pollution Exclusion, reasoning that because the policy did not specifically cite to these statutes, or specifically mention human remains in the pollution exclusion, those substances were not within the scope of the exclusion.

The trial court erred in declining to find that human remains can constitute "waste", as a matter of law. Hirschhorn, which is admittedly not binding but is certainly persuasive in its reasoning, makes it clear that simply because a particular substance is not specifically listed as "waste" and is not a substance that can be recycled, does not mean that it is excepted from the

[6] Chapter 497 regulates Funeral, Cemetery, and Consumer Services.

exclusion, since the definition of "waste" **includes** certain substances, but does not **exclude** others. Thus, the trial court's finding that human remains are not "waste" as that term is used in the pollution exclusion was in error.

The term "Contaminant"

The Court also rejected FFB'S counsel's argument that the term "contaminant" as used in the Pollution Exclusion should be deemed to encompass "a substance that can harm living organisms." (R.476) The Court determined that such a broad reading of this term was unwarranted because "practically all substances, including air and water, could be considered contaminants." (R.476) While there is no Florida case addressing the specific issue of whether human remains are deemed "contaminants" in the context of the exclusion, several cases have found that natural bodily substances, such as feces and ejaculate, can constitute an "irritant" or "contaminant" under Florida law and therefore, it follows that remains should likewise be considered to fall within these terms.

In Chesnut Assoc., Inc, v, Assur. Co. of America, 17 F. Supp. 3d 1203 (M.D. Fla. 2014), for example, the District Court addressed the issue of whether the pollution exclusion excluded coverage for the homeowners' claims for policy benefits for damages sustained when a pool company's employee masturbated in their pool. The Court noted that under Florida law,

natural bodily substances have been deemed "pollutants" under identical policy language. Id. at 1214. A similar result was reached in WPC Indus. Contractors Ltd. v. Amerisure Mut. Ins. Co., 720 F. Supp. 2d 1377 (S.D. Fla. 2009), in which that court found that raw sewage was a "contaminant" under the pollution exclusion and Philadelphia Indem. Ins. Co. v. Yachtsman's Inn Condo Assoc., Inc., 595 F. Supp. 2d 1319 (S.D. Fla. 2009), in which that court found that feces, raw sewage and battery acid were "irritant[s] or contaminant[s]" under the pollution exclusion. These Courts implicitly rejected the concern, raised by the trial court in this case, that there is no specific reference to any specific bodily fluid or material in the context of the pollution exclusion.

As for the trial court's observation that a broad reading of the term "contaminant" could encompass virtually all substances, including air and water, that would only be true if the substance was proven to potentially contaminate people. Both the Legislature and Department of Health have deemed blood and bodily fluids to be "biomedical waste" capable of transmitting disease to other people and there is no evidence or law to the contrary. If the Court believed that it was necessary for FFB to demonstrate that Mr. Taylor's remains were capable to contaminating others, the Court should have simply denied FFB'S motion on the grounds that there were

questions of fact remaining to be determined, but it should not have denied the motion as a matter of law.

We do not dispute the trial court's finding that FFB did not offer testimony or evidence establishing the nature and scope of the substances removed from TAYLOR'S home. By this appeal, we only seek reversal of that portion of the summary judgment order denying FFB'S motion as a matter of law and a remand in order to afford FFB the opportunity to establish the nature of the substances removed from TAYLOR'S home and how they constitute "pollutants" as defined by the Pollution Exclusion.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF TAYLOR ON FFB'S BACTERIA ENDORSEMENT BECAUSE IT WAS NOT WITHIN THE SCOPE OF THE PLEADINGS, TAYLOR'S OWN COUNSEL SPECIFICALLY STATED THAT HE WAS NOT PURSUING SUMMARY JUDGMENT ON THAT GROUND, AND THE COURT'S CONCLUSION THAT THE ENDORSEMENT "SUPERSEDED" THE POLLUTION EXCLUSION WAS LEGALLY UNSUPPORTED.

A. The Standard of Review

The standard of review of a summary judgment is de novo. Joy v. Oaks Club Corp., 2022 WL 2541701 (Fla. 2d DCA, July 8, 2022).

B. The Merits

The trial court erred in granting summary judgment in TAYLOR'S favor on its argument that FFB'S policy provided coverage for the loss under the Limited Endorsement for Mold/Fungi/Bacteria. This issue was not framed by the pleadings, which **only** sought a declaration that the policy provided coverage for TAYLOR'S claim because the Pollution Exclusion, which was the sole basis of FFB'S denial, did not apply to damage caused by the decomposition of Randy Taylor's dead body, nor was it the subject of a cross-motion for summary judgment. While under the amended summary judgment rule, 1.510(f)(1), the trial court may be empowered to grant summary judgment to the non-moving party, where, as here, the non-moving party has raised an issue outside the scope of the pleadings, we submit that

the trial court does not have the power to grant a summary judgment on that issue without permitting the party seeking summary judgment a reasonable opportunity to address the issue after the non-moving party has properly framed its pleadings to encompass the issue. See, Imaging Business Machines, LLC v. Banctec, Inc., 459 F. 3d 1186, 1191 (11th Cir. 2006) (reversing a summary judgment granted by the District Court, *sua sponte*, on issues not directly raised by the moving party, finding that the Court did not provide the non-moving party with adequate notice and the opportunity to respond).

FFB raised its Pollution Exclusion as an affirmative defense to TAYLOR'S breach of contract claim and TAYLOR sought a declaratory judgment that the Pollution Exclusion did not apply to exclude its claim. TAYLOR never raised the Bacteria Endorsement until it opposed summary judgment on the Pollution exclusion. As a result, and as the trial court so noted, the application of the endorsement had not been properly framed for purposes of summary judgment.

In order for TAYLOR to have properly raised the Bacteria Endorsement as potentially covering the claim, it should have filed a Reply to FFB'S affirmative defense because it was implicit in TAYLOR'S position that the Endorsement somehow "trumped" the Exclusion, which rendered TAYLOR'S

theory an "avoidance", rather than a simple denial. See, Kitchen v. Kitchen, 404 So. 2d 203, 205 (Fla. 2d DCA 1981) (when a new matter is sought to be asserted to avoid an affirmative defense, a reply is required). Any matter raised as an avoidance **must** be plead in order to be considered by the Court. See, Fla. R. Civ. P. 1.100(a); Frisbie v. Carolina Cas. Ins. Co., 162 So. 3d 1079, 1080-1081 (Fla. 5th DCA 2015) (where the Plaintiff sought to avoid the Defendant's affirmative defense by raising the issue of unclean hands, the Plaintiff should have plead that avoidance in its Reply and having failed to do so, the Plaintiff could not raise the issue in a motion for summary judgment); Lazar v. Allen, 347 So. 2d 457, 458-459 (Fla. 2d DCA 1977) (reversing summary judgment where plaintiff failed to file a Reply to defendant's affirmative defense). Having failed to file a proper and timely Reply, TAYLOR was not entitled to avoid the Exclusion by raising the Endorsement, and was certainly not entitled to a summary judgment in its favor on that ground.

Even if, for the sake of argument, the Bacteria Endorsement was not required to have been raised in a Reply to FFB'S affirmative defense, the trial court was nevertheless correct that the issue was not properly framed and therefore, the Court erred in thereafter inconsistently granting summary judgment in TAYLOR'S favor. TAYLOR sought declaratory judgment only

on FFB'S Pollution Exclusion. No other section of the policy was cited in its pleadings as an issue for the Court's consideration. "A judgment entered upon a matter entirely outside of the issues made by the pleadings cannot stand, and where an issue is neither presented by the pleadings, or litigated by the parties, a decree adjudicating such issue is, at least, voidable on appeal." Brady v. Jones, 491 So. 2d 1272, 1273 (Fla. 2d DCA 1986) (citations omitted). See also, Clemente v. B & B Chemical Co., Inc., 480 So. 2d 257, 258 (Fla. 3d DCA 1985) (reversing *sua sponte* orders entered outside the scope of the pleadings and without the benefit of a properly noticed final hearing as of no force and effect).

The trial court itself recognized that neither party sought summary judgment on the Bacteria Endorsement and that the issue was not sufficiently framed to enable to the Court to act on that argument. The trial court's subsequent order granting TAYLOR summary judgment on this issue, which was first raised 20 days before the summary judgment hearing and which was not the subject of a properly filed summary judgment motion, deprived FFB of its due process right to reasonable notice and an opportunity to be heard. This is especially true in light of the fact that TAYLOR **expressly** disclaimed any intent to seek a summary judgment on the application of the Bacteria Endorsement.

Finally, on the merits, the trial court's order finding, as a matter of law, that the Bacteria Endorsement "superseded" the Pollution Exclusion is legally insupportable. TAYLOR never made that argument and there is no law supporting it. Indeed, even a cursory review of the policy demonstrates the fallacy of the Court's conclusion. The Bacteria Endorsement expressly provides that **"[t]he coverage described in 13.a only applies when such loss or costs are a result of a Peril Insured Against**" and damage arising from pollutants is expressly excluded as a "Peril Insured Against". It therefore follows that the two provisions are entirely consistent with one another and neither "supersedes" the other because if damage caused by a pollutant is not covered under the policy, then it is not a "peril insured against" rendering damage caused by bacteria likewise excluded. Thus, even if, for the sake of argument, the trial court was somehow empowered to have granted TAYLOR summary judgment on the application of the Bacteria Endorsement, if the Pollution Exclusion could apply as a matter of law if the facts supported its application, any summary judgment interpreting and applying the Endorsement was necessarily premature.

TAYLOR brought suit alleging that FFB breached its policy and that the Pollution Exclusion FFB relied on in its denial letter did not apply to preclude coverage under the policy. At no time did TAYLOR move to amend

its pleadings to seek a declaration that the Mold/Fungi/ Bacteria Endorsement provided coverage for the claim regardless of the Pollution Exclusion and TAYLOR'S very brief "argument" to that effect, which her counsel admittedly raised only as a defense to FFB'S summary judgment, simply did not frame the issue sufficiently to warrant a summary judgment in TAYLOR'S favor on that argument.

For all of these reasons, the trial court's summary judgment in TAYLOR'S favor must be reversed and the case remanded to the trial court for further proceedings.

CONCLUSION

The trial court clearly erred in denying FFB'S summary judgment motion on the misinterpretation of the Pollution exclusion as being ambiguous, in light of an insured's expectations. The court also erred in granting summary judgment in TAYLOR'S favor on an issue outside the scope of the pleadings and on the mistaken view that the Bacteria Endorsement "superseded" the Pollution Exclusion. We respectfully submit that this Court should reverse the final judgment and remand the case to the trial court for further proceedings to enable to the parties to more fully develop the record both legally and factually.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Gary Joseph Spahn, Jr., Malik Law, P.A., 1061 Maitland Center Commons Boulevard, Maitland, FL 32751-7435, Attorney for Plaintiff, gspahn@imaliklaw.com, pleadings@imaliklaw.com, alexandria@imaliklaw.com; Virgil William Wright, III, Esquire, Cameron, Hodges, Coleman, LaPointe & Wright, P.A., 1820 SE 18th Avenue, Ocala, FL 34471, Attorney for Defendant; Paul W. Pritchard, Esq., The Nation Law Firm, 570 Crown Oak Centre Drive, Longwood, FL 32750, Counsel for Appellee, ppritchard@nationlaw.com; Mark A. Nation, Esquire, The Nation Law Firm, 570 Crown Oak Centre Drive, Longwood, FL 32750, Counsel for

Appellee, bhirt@nationlaw.com; mnation@nationlaw.com by electronic mail on this 13th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rules 9.045 and 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in Arial 14-point font and contains 5225 words.

By: /s/ Hinda Klein
Hinda Klein, Esquire
Florida Bar No. 510815