

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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

FLORIDA FARM BUREAU CASUALTY
INSURANCE COMPANY

Appellant,

v.

THE ESTATE OF RANDALL LEE TAYLOR,
By and through its Personal Representative,
MARCIA TAYLOR

Appellee.

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant Florida Farm Bureau (FFB) was the homeowners insurer for Randall Taylor. Mr. Taylor died inside the insured home during the applicable Policy period, while the Policy was in full force and effect. He was found by his wife, Marcia Taylor, about 10 days after he died.

Over the 10-day period, Mr. Taylor's body decomposed in the house damaging the insured home.

Mrs. Taylor contracted with a remediation company to have Mr. Taylor's remains cleaned from the home. Mrs. Taylor submitted the remediation bill to FFB.

FFB denied the claim. FFB told Ms. Taylor the Policy contained a Pollution Exclusion, and her husband's remains were a pollutant. This lawsuit ensued.

The Trial Court determined that the Pollution Exclusion did not apply to Mr. Taylor's remains. The Trial Court also determined that Policy contained an endorsement which provided additional coverage for the loss ("Bacteria Endorsement").

FFB asserts the Trial Court committed reversible error by not finding human remains are a pollutant. To do so, FFB would have this Court construe an insurance policy's terms in an unprecedented manner and re-

write the language of the exclusion. FFB also says the Trial Court committed error by finding coverage under the Bacteria Endorsement.

FFB's arguments are without merit. The Trial Court's Order must be affirmed.

STATEMENT OF THE CASE AND FACTS

FFB insured Randy Taylor property with a standard HO3 all risks homeowners insurance policy (Policy) [R. 397-466]. The Policy had effective dates of June 16, 2018 to June 16, 2019 [R. 397]. The Policy insured Mr. Taylor's property for all risk of direct physical loss to property, unless the losses were excluded from coverage [R. 409-10]. The Policy contained a condition that in the event of Mr. Taylor's death, it would insure his legal representative [R. 421].

Mr. Taylor passed away on or around November 12, 2018 [R. 267; R. 369]. Mrs. Taylor discovered her husband's remains approximately 10 days later [R. 267; R. 369]. On November 28, 2018, Ms. Taylor contracted with Accident Cleaners & Restoration to remediate the property from her husband's remains [R. 344-46]. Mrs. Taylor notified FFB of the loss on or about December 4, 2018 [R. 11 at ¶ 26].

On January 8, 2019, FFB denied the claim for clean up and restoration of the insured property [R. 390-91]. FFB's told Mrs. Taylor its

sole reason for denying the claim was that her husband's remains were a pollutant, excluded from coverage:

Please allow this letter to follow up on the claim filed on December 4th, 2018 for clean up and restoration of the insured property after Mr. Taylor passed away in his dining room. Based on the evaluation of the facts available, Mr. Taylor passed in the dining room of his home. Further investigation showed this was not discovered for days later when Mr. Taylor's body was decomposing causing damage to his home. **Please be advised that loss due to pollutants is not covered on the above-referenced homeowners' policy.** Please refer to the homeowners' policy:

[R. 390].

The Policy's Pollution Exclusion provides:

SECTION I – PERILS INSURED AGAINST

Coverage A – Dwelling and Coverage B – Other Structures

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:

* * *

- (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;

* * *

Under items **1.** and **2.**, any ensuing loss to property described in Coverages **A** and **B** not excluded or excepted in this policy is covered.

[R. 409-10]. The Pollution Exclusion is not encumbered by an anti-concurring cause clause.

On May 11, 2020, Mrs. Taylor filed suit for FFB's failure to provide coverage for the claim [R. 8-90]. The Complaint contained two separate counts:

Count I "Breach of Contract Against Defendant" for compensatory damages, arising out of FFB's failure to provide coverage for the claim [R. 9-11]; and

Count II "Declaratory Relief Against Defendant" asking not only for a declaration that the pollutant exclusion did not apply to this loss, but also asking the Court to:

Declare that the policy of homeowner's insurance covering the insured provides coverage for the claim submitted by the insured

[R. 11-13].

On June 9, 2020, FFB filed its Answer and Affirmative Defenses [R. 110-13]. FFB denied allegations of breach of contract and the declaratory relief sought, and asserted two affirmative defenses: FFB stated coverage

was excluded due to the pollutant exclusion [R. 112]; and FFB challenged Ms. Taylor's standing to bring the claim¹ [R. 112-13].

On December 31, 2020, the Florida Supreme Court amended Fla. R. Civ. P. 1.510 to align with the Federal summary judgment standard, effective May 1, 2021. *In re: Amendments to Fla. R. Civ. P. 1.510*, 309 So. 3d 192 (Fla. 2020).

On March 2, 2021, FFB filed its Motion for Summary Judgment. FFB argued the claim for loss caused by Mr. Taylor's remains was excluded by the Policy's Pollution Exclusion [R. 266-353].

On April 30, 2021, FFB filed its disclosure of expert witnesses: a "Hazmat/biohazard expert to be named" and a "Pathology expert to be named" [R. 356-57]. Mrs. Taylor filed her expert witness disclosure which included "Andrew S. Bagg, M.D." [R. 358-61]. FFB did not ask to conduct any discovery into Dr. Bagg's opinions or conclusions concerning the case. FFB never disclosed its own experts [R. 513-21].

On April 31, 2021, the Florida Supreme Court further amended Rule 1.510. *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72 (Fla. 2021). Importantly, the Florida Supreme Court felt that the former five day

¹ The Trial Court determined on summary judgment that Mrs. Taylor had standing to pursue the claim. FFB does not appeal that issue. Initial Brief at p.5, n.2.

service / two business day delivery of responsive summary judgment evidence could encourage gamesmanship. The Florida Supreme Court extended the time for responding to summary judgment and submitting contrary summary judgment evidence to 20 days before the hearing:

Time for Filing and
Responding to Summary Judgment Motions.

The Attorney General and other commenters encouraged the Court to amend the timing-related aspects of rule 1.510 to reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions. Most commenters also told us that the deadlines for filing and responding to summary judgment motions should stay tied to a hearing date—a feature of Florida practice that contrasts with federal practice, where summary judgment hearings are much less frequent.

We believe that these comments have merit. New rule 1.510 therefore says that a summary judgment motion must be filed at least 40 days before the time fixed for a hearing. The new rule further says that the nonmovant must respond with its supporting factual position at least 20 days before the hearing.

Id. at 77.

In full compliance with the new Rule requiring the nonmovant to respond with a supporting factual position at least 20 days before the hearing, Mrs. Taylor responded to FFB's motion on June 1, 2021 [R. 368-469]. Mrs. Taylor argued that FFB failed to identify the specific substances it alleged was a "pollutant" subject to the exclusion [R. 370]. Mrs. Taylor argued the Pollutant Exclusion was ambiguous as applied to the facts of

this case [R. 372-76]; Mrs. Taylor distinguished FFB's case law [R. 376-80]; Mrs. Taylor argued that even if unambiguous, the Pollutant Exclusion did not apply [R. 380-82].

Mrs. Taylor also argued the Policy's "additional coverage" endorsement for bacteria – the Bacteria Endorsement – applied. Mrs. Taylor filed Dr. Bagg's Affidavit to support her argument. Dr. Bagg's Affidavit established that bacteria was present in the materials which caused the loss (Mr. Taylor's remains) [R. 382].

After receiving the timely response and notice that Mrs. Taylor specifically relied on the Bacteria Endorsement for additional coverage, FFB didn't take any steps to conduct discovery into Dr. Bragg's opinions and conclusions set forth in his Affidavit. FFB did not identify any rebuttal witness regarding bacteria. FFB did not file a reply arguing against the Bacteria Endorsement. FFB didn't ask to continue the hearing on summary judgment to address the arguments and facts surrounding the Bacteria Endorsement.

The hearing proceeded on June 21, 2021 [R. 470-71; App. 3-36²]. For the first time, FFB identified a new supporting factual position: that §

² Appellee cites to Appellant's Appendix to Initial Brief. The Supplemental Record the Undersigned received from the Clerk of

381.0098, Fla. Stat., defined “biomedical waste” and FFB argued the Trial Court should apply the “biomedical waste” definition to FFB’s pollutant exclusion [R. 470; App. 9:20-11:17].

Counsel for Mrs. Taylor did not have a specific response to this new argument; however, in opposition to summary judgment, cited to rules of policy construction including giving policy terms their everyday meaning and understanding. Counsel also argued the lack of case law saying a human body or remains is a pollutant [App. 18:10-24].

The Trial Court queried counsel whether FFB could have issued an endorsement to exclude loss caused by dead bodies [R. 471; App. 18:25-20:9]. In response, FFB’s counsel deflected the question and directed the Trial Court’s attention to a federal trial judge’s order which interpreted a commercial general liability policy, and decided ejaculate contaminated a swimming pool and was therefore subject to the policy’s pollution exclusion [App. 20:10-21:2]. Mrs. Taylor’s counsel distinguished that case and responded that if FFB intended to have an endorsement excluding loss caused by dead bodies, FFB should have added it to the Policy [App. 21:4-25].

Court was for *Thomas v. State*, Case No.: 2D21-3992, rather than for this case.

Since the subject had turned to endorsements, Mrs. Taylor's counsel argued the Bacteria Endorsement affirmatively provided coverage in this case [App. 22:1-23:16]. The Trial Court directed its attention to Mrs. Taylor's summary judgment response, and counsel stated he wasn't "necessarily" looking for summary judgment on this issue at that time:

THE COURT: Oh, there is. I'm not sure I saw a motion. I saw your response. Let me see again. What I saw -- maybe I missed it, but I didn't see a summary judgment motion by the plaintiff. I saw your response to his motion.

MR. SPAHN: Your Honor, at this point in time, I'm capsulating the -- in my response, that argument. Not that I was looking necessarily for summary judgment this time, but definitely defeat them in their motion for summary judgment. There's absolute material facts. And I believe, by bringing it up in response, that's appropriate.

[App. 23:17-24:3].

The Trial Court recognized it had discretion under new Rule 1.510(f) to grant summary judgment for Mrs. Taylor on the Bacteria Endorsement [App. 24:4-21], but stated "And anyway, on the coverage under that endorsement, I don't think it's framed enough legally for me to act" [App. 25:2-4].

On July 12, 2021, the Trial Court issued its Order on Defendant's Motion for Summary Judgment ("Order") [R. 472-80]. The Order determined Mr. Taylor's body was not a pollutant and not an excluded

cause of loss under the Policy [R. 475-77]. The Order noted that FFB's § 391.0098 defining biomedical waste was not only untimely, but the statutory term "biomedical waste" did not control a homeowners insurance policy definition of "waste" including "materials to be recycled, reconditioned, or reclaimed" [R. 477].

The Order also determined FFB was not entitled to summary judgment because it had not identified any actual substances which triggered the Pollution Exclusion [R. 477-78]. FFB concedes this issue, and *does not appeal or dispute this finding*:

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.

Initial Brief at 4, emphasis added, and further states

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.

Initial Brief at 22, emphasis added.

Further, the Order held there was coverage under the Bacteria Endorsement. The Court recognized Dr. Bragg's affidavit was uncontested, and that FFB did not present any argument or evidence suggesting the

remediation services were not related to bacteria [R. 478]. The Order distinguished bacteria from materials described in the Pollution Exclusion, and noted that even if bacteria was otherwise excluded, the Bacteria endorsement would supersede the exclusion [R. 479].

Ultimately, the Trial Court denied FFB's motion for summary judgment, determined FFB did not conclusively establish the Pollution Exclusion applies to the damages complained of, and that "based on the uncontested evidence presented to date" the Bacterial Endorsement provided coverage for the claimed damages [R. 479-80].

FFB did not seek rehearing or reconsideration. FFB did not ask to reopen the proceedings to retain an expert to contest the unrebutted evidence of bacteria or application of the Bacteria Endorsement.

On September 3, 2021, FFB stipulated to a judgment against it and in favor of Mrs. Taylor [R. 566-57]. On January 11, 2022, the Trial Court entered its judgment in favor of Mrs. Taylor [R. 573-74]. This appeal followed.

SUMMARY OF THE ARGUMENT

FFB asserts the Trial Court committed error by concluding that human remains were not a pollutant. FFB has not provided a single opinion—from any court, anywhere in the country—that stated human

remains are a pollutant or are excluded from coverage under a homeowner insurance policy's pollution exclusion.

Terms in an insurance contract are construed by their plain and ordinary meaning. Terms in an insurance policy cannot be construed to reach an absurd result. The ordinary meaning of pollutants, irritants and contaminants, and waste is not a human's remains.

FFB had the burden of proving the cause of Mrs. Taylor's claimed loss was excluded from coverage. FFB did not meet that burden. The Trial Court did not err in granting summary judgment for Mrs. Taylor. Moreover, FFB's Bacteria Endorsement argument was timely, and FFB was on notice of the claim for coverage under the endorsement. The Trial Court did not err in granting summary judgment finding coverage under the endorsement.

FFB's arguments are without merit, and the Trial Court's judgment must be affirmed.

ARGUMENT

I. Standard of Review.

This appeal arises out of an order granting summary judgment and the subsequent judgment. The standard of review is de novo. *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 437 (Fla. 2013). The summary

judgment was based upon the Trial Court's interpretation of an insurance policy. The standard of review for interpretation of an insurance policy is also de novo. *Trinidad*.

II. Basic Principals of Insurance Policy Construction.

Mrs. Taylor understand this Court is well-versed in the principals of insurance policy construction. However, it is important to keep the following black-letter law in mind when reviewing FFB's arguments and its burden to prove human remains are a pollutant.

A. "All-Risks" Homeowners Insurance Policy and the Burden of Proof.

The Policy is an "HO3" (Home Owners 3) insurance policy. The Policy's table of contents and first page identifies the Policy as a "Homeowners HO 00 03 - Special Form" [R. 248-68] and on the bottom of each page identifies itself as a standardized Insurance Services Office "FHO 00 03" homeowners policy [R. 249-36].

An HO3 policy is an "all risk" policy, which means all risks are insured unless specifically excluded from the insurance coverage. *Am. Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 907 (Fla. 3d DCA 2019); *State Farm Florida Ins. Co. v. Dept. of Ins.*, 2003 WL 21312171 at 2, 3 (Fla.Div.Admin.Hrgs. June 5, 2003); Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. Chi. L. Rev. 1263, 1273 (2011).

Under an “all risks” policy, the burden is on Mrs. Taylor to show a physical loss to property while the Policy was in force. There is no dispute here. While the Policy was in force, the insured property was damaged by Mr. Taylor’s remains.

The burden then shifts to FFB to prove all the claimed loss was the result of an excluded cause of loss. The cases dictating FFB’s burden to prove the cause of loss solely fits within its exclusion are innumerable. This Court is well acquainted with the nature of all-risk policies:

Generally, an insured seeking coverage pursuant to an “all risks” policy must prove that a loss occurred to the property during the policy period. If the insured meets this initial burden, the burden shifts to the insurer to show that the loss resulted from an excluded cause. The insured does not need to disprove any excluded causes.

Citizens Prop. Ins. Corp. v. Munoz, 158 So. 3d 671, 674 (Fla. 2d DCA 2014), citation omitted; *also Mejia v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. 2d DCA 2014); *Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2nd DCA 1984).

C. FFB’s Pollution Exclusion Is Narrowly Construed Against FFB and Broadly in Favor of Coverage.

Insurance policies are broadly construed in favor of coverage and strictly against the insurer. Exclusions are very narrowly and *more* strictly construed against the insurer:

The language of insurance policies must be construed liberally in favor of the insured and strictly against the insurer who prepared the policy, and exclusionary clauses must be construed more strictly than coverage clauses.

Blue Cross and Blue Shield of Florida, Inc. v. Steck, 778 So. 2d 374, 376 (Fla. 2nd DCA 2001).

The Pollution Exclusion FFB drafted attempts to avoid or limit the all risks coverage. The Pollution Exclusion must be strictly construed against FFB:

In construing insurance contracts, the courts generally apply a liberal interpretation to coverage provisions. On the other hand, exclusion clauses are considered contrary to the fundamental protective purposes of insurance. Thus courts give a strict interpretation to exclusion clauses.

FCCI Ins. Co. v. Horne, 890 So. 2d 1141, 1143 (Fla. 5th DCA 2004); also *Hrynkiw v. Allstate Floridian Ins. Co.*, 844 So. 2d 739, 741 (Fla. 5th DCA 2003) (“Exclusion clauses... are generally considered contrary to the fundamental protective purposes of insurance. Thus, the courts give a strict interpretation to exclusion clauses, as opposed to the liberal interpretation accorded coverage provisions”).

The Florida Supreme Court states:

Policy provisions that tend to limit or avoid liability are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy, and exclusions to coverage are construed even more strictly against the insurer than coverage clauses.

Flores v. Allstate Ins. Co., 819 So. 2d 740, 744 (Fla. 2002); also *Demshar v. AAACon Auto Transport, Inc.*, 337 So. 2d 963, 965 (Fla. 1976) (“Exclusionary clauses in liability insurance policies are always strictly construed.”).

D. The Terms in FFB’s Pollution Exclusion Must Be Given their Ordinary, Everyday, Meaning as Understood by the “Man on the Street.”

In *State Farm Fire & Cas. Ins. Co. v. Wilson*, 330 So. 3d 67, 72 (Fla. 2d DCA 2021), this Court recognized “In reviewing the insurance policy, we begin with the principle that an insurance contract is construed ‘in accordance with its plain language as bargained for by the parties.’ ” Citation omitted. This Court also noted it was not empowered to rewrite an insurance policy, and “insurance policies ‘will not be construed to reach an absurd result.’ ” Citations omitted.

In plain language, human remains are not a pollutant. A cause of action for intentional infliction of emotional distress—the tort of outrage—exists for mishandling human remains. *Smith v. Telophase Nat. Cremation Soc., Inc.*, 471 So. 2d 163 (Fla. 2nd DCA 1985). No similar cause of action exists for mishandling pollutants, irritants and contaminants, and waste. That would reach an absurd result, as does construing the Policy the way FFB urges.

Everyday, average, ordinary people would *never* think their remains were a pollutant, irritant, contaminant, or waste. In *Mason v. Florida Sheriffs' Self-Ins. Fund*, 699 So. 2d 268 (Fla. 5th DCA 1997), the Court held:

Insurance contracts must be read in light of the skill and experience of ordinary people, and be given their everyday meaning as understood by the “man on the street”. *Thomas v. Prudential Property and Cas.*, 673 So. 2d 141 (Fla. 5th DCA 1996). Since the everyday meaning of battery does not mean rape, the policy should not be construed to cover it.

Mason at 270. This Court agrees. *St. Paul Fire & Marine Ins. Co. v. Tingley Sys., Inc.*, 722 So. 2d 849 (Fla. 2d DCA 1998) (citing *Thomas v. Prudential* for the proposition “insurance contracts must be read in light of skill and experience of ordinary people and given their everyday meaning as understood by the ‘man on the street’”); *Beneficial Standard Life Ins. Co. v. Forsyth*, 447 So. 2d 459, 461 (Fla. 2d DCA 1984) (applying “man on the street” test when the term is not defined in an insurance policy); *Braley v. Am. Home Assur. Co.*, 354 So. 2d 904, 905 (Fla. 2d DCA 1978) (“The courts have repeatedly held that the term ‘accident,’ as all other terms in an insurance policy not defined in the policy, should be given its everyday ‘man-on-the-street’ meaning.”).

Additionally, Courts frequently apply dictionary definitions to determine the accepted meanings of words in insurance policies:

When interpreting insurance contracts, we may consult references commonly relied upon to supply the accepted meanings of words. See *Gov't Employees Ins. Co. v. Novak*, 453 So. 2d 1116, 1118 (Fla. 1984) (citing *Webster's Third New International Dictionary* 11 (1966) to define "accident"); *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999) ("One looks to the dictionary for the plain and ordinary meaning of words.").

Garcia v. Fed. Ins. Co., 969 So. 2d 288, 291-92 (Fla. 2007);

The everyday, man on the street meaning of the terms used in FFB's Pollution exclusion—"Pollutant," "Irritant," "Contaminant," and "Waste"—is *not* human remains. Neither is the dictionary definition. This is the well-reasoned analysis the Trial Court utilized:

Defendant asks this Court to enter an Order finding that Mr. Randell Lee Taylor's remains are pollutants. This is an issue of first impression for the Court. The **dictionary definition** of the term pollutant is: "(1) something that pollutes. (2) any substance, as certain chemicals or waste products, that renders the air, soil, water or other natural resource harmful or unsuitable for a specific purpose." Dictionary.com/browse/pollutant. **An ordinary reasonable person likely would not understand his or her bodily remains to be a pollutant under this definition.** Defendant has not proffered any cases or evidence to demonstrate otherwise.

In its Motion, Defendant argued that the Policy's definition of Pollutant means an irritant or contaminant. The Policy states: 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;

(Policy at Form FHO 00 03 04 91 pg. 8 of 20; Exhibit "D")
"[P]olicy terms 'should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'" *Harrington v. Citizens Property Ins. Com.*, 54 So. 3d 999, 1001 (Fla. 4th DCA 2010), *citing State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. 3d DCA 2002).

Defendant further asked the Court to construe the undefined term "contaminant" as "a substance that can harm living organisms." If the Court accepted Defendant's definition, practically all substances, including air and water, could be considered contaminants. This finding would open the flood gates to the denial of countless meritorious claims.

While cleaning up a body may be distasteful, **human remains are not reasonably thought of as an irritant or contaminant as described in the Pollution Exclusion. A reasonable reading of the Pollution Exclusion by an ordinary lay person would be to eliminate coverage typically for inorganic substances such as those expressly enumerated in the Policy definition; ie. solid, liquid gaseous or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.** (see generally *Westport Ins. Com. v. VN Hotel Group, LLC*, 761 F.Supp.2d 1337 (M.D. Fla. 2010)). Indeed, **these expressly enumerated items are those that an ordinary lay person would reasonably associate with the Policy term "Pollutants."** On the other hand, an ordinary lay person would not reasonably associate organic substances such as human remains with the term "Pollutants." Hence, if the Defendant truly intended human remains to be included, it would have expressly enumerated the same in the Policy definition as it did with the logically associated inorganic substances

[R. 475-77, emphasis added].

FFB complains that the Trial Court impermissibly applied the "doctrine of reasonable expectations," which is not used in Florida. Shown

above, the Trial Court did not. The Florida Supreme Court explained the “reasonable expectations” doctrine is where “the insured's expectations as to the scope of coverage is upheld provided that such expectations are objectively reasonable.” *Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998). The Trial Court used the man-on-the-street and dictionary standards of interpretation for FFB’s undefined terms.

E. The Doctrine of *Ejusdem Generis*, the Maxim of *Noscitur a Sociis*.

The Policy must be read as a whole. The Court must afford the words “pollutants,” “irritant or contaminant,” and “waste include[ing] materials to be recycled, reconditioned or reclaimed” their plain meaning as understood by the ordinary man-on-the-street.

FFB has not met its burden to show it was talking about human remains when it used these words. If that is what it meant, FFB could have simply added the term “human remains” or, as the Trial Court suggested, endorsed the Policy with such an exclusion. Instead, FFB has introduced *no* evidence to suggest it ever meant human remains was a pollutant subject to this exclusion. One method of determining whether FFB intended “pollutants” to include human remains is by looking to the specific words FFB used:

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;

“Pollutants means any... irritant or contaminant....” FFB then showed what it meant by an irritant or contaminant by “including” several examples of inorganic irritants and contaminants: smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste—not human remains. FFB then explained what it meant by waste by including several examples of materials it deemed “waste”: materials to be recycled, reconditioned or reclaimed—again, not human remains.

FFB’s use of the word “including” illustrates what it meant when it said “irritant or contaminant” and “waste”:

[T]he phrase ‘shall include’ is frequently, if not generally, used as a word of extension or enlargement rather than one of limitation or enumeration. It is not a phrase of all embracing definition, but connotes simply an **illustrative application of the general principle**. Webster's dictionary also notes that “include suggests the containment of something as a constituent, component, or subordinate part of the larger whole.

Pottsburg Utilities, Inc. v. Daugharty, 309 So. 2d 199, 201 (Fla. 1st DCA 1975).

FFB illustrated what it meant by the general principal of “irritants or contaminants” when it said irritants and contaminants included “smoke,

vapor, soot, fumes, acids, alkalis, chemicals and waste”—*not* human remains, or even organic materials. FFB illustrated what it meant by the general principal of “waste” when it said waste included “materials to be recycled, reconditioned or reclaimed.” These specific materials are nothing like human remains. No ordinary, man-on-the-street would interpret as being human remains as being “materials to be recycled, reconditioned or reclaimed.”

The doctrine of doctrine of *ejusdem generis* and maxim of *noscitur a sociis* apply to FFB’s decision to explain the general terms “irritant and contaminant” and “waste” with more specific terms.

“*Ejusdem generis*” means “of the same kind.” The Florida Supreme Court explained that *ejusdem generis* “provides that where general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned.” *Fayad*, 899 So. 2d at 1089. In *Fayad*, the Florida Supreme Court applied *ejusdem generis* to an insurance policy’s earth movement exclusion. *Id.* at 1088-89.

The doctrine of *ejusdem generis* was explained by author Charles L. Black, Jr., in his work made famous in the Nixon-era concerning impeachment:

Thus if I said, “Bring me some ice cream, or some candy, or something else good,” I would think you had understood me well if you brought me a piece of good angel food cake, I would boggle a little, perhaps, if you brought me a good baked potato, and I would think you crazy or stupid or willful if you brought me a good book of sermons or a good bicycle pump.”

Black Jr., Charles L., *Impeachment: A Handbook*, Yale University (1974). In

this case, *blood is to waste including materials to be recycled, reconditioned or reclaimed as a good bicycle pump is to ice cream or candy.*

In *Transcon Trailers, Inc. v. Northland Ins. Co.*, 436 So. 2d 380 (Fla. 5th DCA 1983), the Court applied *ejusdem generis* to determine the effect of an insurer’s coverage exclusion:

If the driver had possession of the trailer under a “bailment lease, conditional sale, purchase agreement, mortgage, or other encumbrance” between Fuller and Transcon, then the loss was excluded from coverage.

On appeal, Transcon argues that its lease agreement with Fuller was not a “conditional sale, purchase agreement” or “mortgage.” Northland agrees and further concedes that the lease agreement was not a “bailment lease.” Thus, the only issue presented for our consideration is whether the phrase “or other encumbrance” in the exclusion includes the lease agreement.

Since the exclusion contains an enumeration of specific items followed by a more general phrase, the rule of “ejusdem generis” is applicable. Under the doctrine of “ejusdem generis”, when an enumeration of specific things is followed by some more general word or phrase, then the general word or phrase will usually be construed to refer to things of the same kind or species as those specifically

enumerated. *Halifax Area Council v. City of Daytona Beach*, 385 So. 2d 184 (Fla. 5th DCA 1980). **This doctrine is actually an application of the broader maxim “noscitur a sociis” which means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the specific words.** *State ex rel. Wedgworth Farms, Inc. v. Thompson*, 101 So. 2d 381 (Fla. 1958).

Transcon Trailers at 381. The Court applied the doctrine and determined a lease was not subject to the exclusion for “other encumbrance.” *Id.* at 382.

Similarly, in *Aerothrust Corp. v. Granada Ins. Co.*, 904 So. 2d 470 (Fla. 3rd DCA 2005), the court explained the maxim of *noscitur a sociis*:

Under the doctrine of *noscitur a sociis*, **a word is known by the company it keeps, and one must examine the other words used in a string of concepts to derive the drafters’ intent.** See *Nehme v. Smithkline Beecham Clinical Laboratories*, 863 So. 2d 201, 205 (Fla. 2003). It is apparent from the types of services listed that the services which are meant to be excluded as professional are those which require specialized training. This is consistent with the general definition of “professional.” See *Black’s Law Dictionary* 1246 (8th ed. 2004) (defining “professional” as “[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency.”) Therefore, in accordance with the doctrine of *noscitur a sociis*, although the exclusionary list includes “inspection ... services,” only those inspection services which require specialized training should be considered professional services.

Aerothrust at 472.

It is quite apparent FFB was *not* talking about human remains when it described pollution as irritant or contaminant, and described an irritant or

contaminant as “waste,” and described “waste” as “materials to be recycled, reconditioned or reclaimed.”

F. Ambiguity

In *Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998), the Florida Supreme Court analyzed a commercial general liability insurance policy’s pollution exclusion as it related to an ammonia spill. In its companion case, *Fogg v. Florida Farm Bureau Mut. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998), the Court reviewed FFB’s pollution exclusion as it related to insecticide used on citrus groves, again in a commercial general liability insurance policy.

The Court held “the pollution exclusion clause is clear and unambiguous.” *Id.* at 1138. The Court then applied the plain language of the exclusion to the specific facts of each case. *Id.* at 1141. With regard to ammonia, the Court noted:

The Federal Clean Air Act categorizes ammonia as an extremely hazardous substance, the release of which is known to have serious adverse effects to human health. 42 U.S.C. § 7412(r)(3) (1994). There is no doubt that the incident involved in the Deni case was excluded from coverage under the CGL policy. Other jurisdictions have also held that the pollution exclusion is applicable to ammonia leaks and spills which cause respiratory injuries to persons exposed to the ammonia fumes.

Id. In its findings as to FFB, the Court held:

In the Fogg case, the injuries resulted from the spraying of Ethion 4 Miscible used to control mites and other pests. Ethion is recognized as a “pollutant” in regulations promulgated under Florida’s “Pollutant Discharge Prevention and Control Act” and is regulated under the “Florida Pesticide Law.” We reject Land–O–Sun’s premise that when used properly Ethion causes no harm and is not a pollutant. It can obviously cause harm when it is not used properly. Thus, the pollution exclusion of the Florida Farm Bureau policy clearly precludes coverage for the incident in the Land–O– Sun case. We also note that other jurisdictions have reached the same conclusions involving pesticide sprays similar to Ethion.

Id., footnotes omitted.

Aside from analyzing the exclusion in the context of pollution control statutes, the Florida Supreme Court also relied on precedent from other jurisdictions. Both analyses require this Court to affirm. The pollution control statutes do not support a finding that human remains are a pollutant, nor does precedent from other jurisdictions.

While in *Deni* and *Fogg*, the Florida Supreme Court determined the pollution exclusion was not ambiguous, context is key. The Florida Supreme Court made this statement in the context of a commercial general liability policy when analyzing for ammonia fumes and pesticide. Mrs. Taylor states the Pollution Exclusion is crystal clear when it excludes loss caused by ammonia and pesticide, materials that are statutory “pollutants.” Mrs. Taylor states the Pollution Exclusion is also crystal clear that it does

not apply to loss caused by human remains, because it applies to pollutants like ammonia and pesticide.

However, if the Court determines it is not clear whether or not the terms “pollutant,” “irritant and contaminant”, and “waste includ[ing] materials to be recycled, reconditioned or reclaimed” include “human remains” is at best ambiguous. Even if that was a reasonable construction of the terms, it is also reasonable to determine that since FFB did not refer to human tissue, body parts, human disease-causing agents, human blood products, or bodily fluids anywhere in the Policy, the parties did not intend the exclusion to include human remains.

That is, as used in a liability policy and applied to ammonia and pesticide, the pollution exclusion is not ambiguous. However, as used in a homeowners insurance policy and as applied to human remains, *at a minimum* the exclusion is subject to differing reasonable interpretations and the Court must find in favor of coverage. This Court states:

Courts generally construe an insurance policy in accordance with its plain language as bargained for by the parties. In doing so, “courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.” But “[i]f the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous.” If ambiguous, “[t]he court interprets ambiguous provisions ‘liberally in favor of the insured and strictly against the drafter.’ ” When the

ambiguity arises regarding an exclusion clause, courts construe them “even more strictly against the insurer than coverage clauses.”

State Farm Auto. Ins. Co. v. Lyde, 267 So. 3d 453, 458 (Fla. 2d DCA 2018), citations omitted, emphasis added.

III. Case Law, Insurance Treatises, and Legal Treatises do not Include Human Remains in Insurance Policies’ Pollution Exclusions.

FFB had the burden to prove that the Pollution Exclusion encompasses direct physical loss caused by human remains. FFB did not meet this burden. FFB has not cited a single case for the proposition that human remains are a pollutant, or that they may be excluded under an all risk homeowners insurance policy’s pollution exclusion. The Florida Supreme Court looked to precedent affirming its application of the Pollution Exclusion to ammonia and pesticide. FFB has no precedent applying the Pollution Exclusion to human remains.

Couch on Insurance is instructive. The treatise’s identification of particular substances subject to pollution exclusions does not mention human remains, or anything remotely similar to human remains:

The definition of a pollutant under the pollution exclusion clauses has been addressed by several courts. The concept of a “pollutant” has been found to include—

- Asbestos
- Fuel oil

- Gasoline
- Natural gas
- The chemical heptachlor
- Sewage

Observation:

Because lead paint has generally been held not to be a pollutant within the context of the pollution exclusion, most insurers now include a specific lead paint exclusion in their policies.

§ 155:90. Particular substances as “Pollutants”, 11 *Couch on Ins.* § 155:90.

The American Law Reports (“ALR”) conducted a survey of what constitutes a pollutant, contaminant, irritant, or waste within the meaning of pollution exclusions. Of the myriad substances listed, “human remains” is not one of them. 98 A.L.R.5th 193, *What Constitutes "Pollutant," "Contaminant," "Irritant," or "Waste" Within Meaning of Absolute or Total Pollution Exclusion in Liability Insurance Policy.*

IV. Section 381.0098, Fla. Stat., Does Not Change the Outcome.

With no prior notice, and for the first time at the summary judgment hearing, FFB argued that § 381.0098, Fla. Stat.’s definition of “Biomedical Waste” supported its argument. FFB continues this argument on appeal. The Trial Court summarily dismissed this argument not only because it was untimely, but also because the statutory definition enacted for public health

does not define the term “waste” in a homeowners insurance policy [R. 477]. The Trial Court was correct.

Section 381.0098, Fla. Stat., clearly states its legislative intent is for the Department of Health to “regulate the packing, transport, storage, and treatment of biomedical waste,” not to govern the definition of “pollutant” in homeowners insurance policies. Application of § 381.0098 to the homeowners insurance policy would render absurd and ambiguous results.

Section 381.0098 states, in pertinent part:

(2) As used in this section, the term:

* * *

(a) “Biomedical waste” means any solid 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 which contains human-disease-causing agents; discarded disposable sharps; human blood, blood products, and body fluids; and other materials which in the opinion of the department 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.

There are many reasons why § 381.0098’s definitions don’t apply to a homeowner’s insurance policy. The statute governs the Department of Health’s packaging, transport, storage, and treatment of biomedical waste. Section 381.0098(1), Fla. Stat., “Legislative Intent.” The preamble to the definition of “Biomedical waste” states: “*As used in this section*, the term

‘Biomedical waste’ means....” The definition is not “as used in all risks homeowners insurance policies” or any other application, or even any other statutes.

Moreover, in a clear signal this statute does not apply to homeowners insurance or residential situations, § 381.0098 states that “biomedical waste” includes material “which in the opinion of the Department of Health represent a significant risk of infection to persons *outside the generating facility.*” There is no “generating facility” here.

The statute does not define the Policy’s actual terms, “pollutant,” “irritant,” “contaminant,” or “waste.” But, those are terms which FFB chose to use in its Policy, although it easily could have added the term “biomedical waste” or a citation to the statute. It did not.

This Court would have to re-write the insurance policy in order to include “human remains” or “biomedical waste” in the Pollution Exclusion. That is forbidden.

Also, it is especially telling that FFB cited to a statute regulating the Department of Health’s packaging, transport, storage, and treatment of biomedical waste instead of a statute regulating “pollution.” FFB had to ignore the very pollution statutes the Florida Supreme Court relied on when it decided *Fogg v. Florida Farm Bureau Mut. Ins. Co.*, 711 So. 2d 1135

(Fla. 1998), the companion case to *Deni, supra*. In *Fogg*, the Florida Supreme Court looked to the Pollution Discharge Prevention and Control Act, Chapter 376, Fla. Stat., to determine whether the cause of loss was subject to FFB's pollution exclusion. 711 So. 2d at 1141 and n.5.

The resource the Florida Supreme Court relied on to interpret FFB's Pollution Exclusion makes it clear that human remains are *not* a pollutant: "Pollutants' includes oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas." Section 376.031(16), Fla. Stat.

V. FFB's Proffered Case Law Falls Short.

Noted above, FFB has not provided this Court with any case law, treatise, or other legal analysis that states an insurance policy's pollution exclusion applies to exclude coverage for loss caused by human remains. None. FFB's arguments are literally without precedent.

FFB provides several citations where courts have applied pollution exclusions to varying substances. None of these cases involve human remains. FFB hopes this Court will be the first to broaden its exclusion to include human remains, rather than follow general rules of policy interpretation which require strict, narrow construction of the Pollution

Exclusion against FFB, and prevent the Court from re-writing the terms of the Policy.

Even so, all of FFB's cases are easily distinguishable because *not one of them finds human remains are a pollutant*:

- *Deni, supra*: *Deni* involved an ammonia spill, and the Florida Supreme Court stated: "Ammonia is a colorless, gaseous alkaline compound which is extremely pungent in smell." *Deni* at 1141. *Deni* also recognized:

The Federal Clean Air Act categorizes ammonia as an extremely hazardous substance, the release of which is known to have serious adverse effects to human health.

Id. FFB provided no evidence the Federal Clean Air Act categorizes human remains "as an extremely hazardous substance."

- *Fogg, supra*: In FFB's *Fogg* case, the Florida Supreme Court stated:

Ethion is recognized as a 'pollutant' in regulations promulgated under Florida's 'Pollutant Discharge Prevention and Control Act' and is regulated under the 'Florida Pesticide Law.'

Id., footnotes omitted. Human remains is *not* defined as a pollutant under the Pollutant Discharge Prevention and Control Act. The act defines "pollutants" as "oil..., gasoline, pesticides, ammonia, chlorine, and

derivatives thereof, excluding liquefied petroleum gas.” Section 376.031(16), Fla. Stat.

- *Hirschhorn v. Auto-Owners Ins. Co.*, 338 Wis. 2d 781 (Wis. 2012): In *Hirschhorn*, the Wisconsin court determined **bat guano** fit within the pollution exclusion because “bat guano, like lead present in paint, is a unique and largely undesirable substance that is commonly understood to be harmful.”

- *Chestnut Assoc., Inc, v, Assurance Co. of America*, 17 F. Supp. 3d 1203 (M.D. Fla. 2014): In *Chestnut*, the federal trial judge analyzed the insurer’s duty to defend an intentional infliction of emotional distress claim against a liability insurance policy. The insured’s employee masturbated and ejaculated in a client’s swimming pool, and the trial judge analyzed a property damage claim that was never pled. The judge determined the ejaculate was a pollutant. The judge said:

Defendant argues that the Jansens allege damages that were caused by the contamination of their swimming pool by a ‘pollutant,’ the pool service technician’s ejaculate. Courts have held that, under Florida law, natural bodily substances can be ‘pollutants’ where they satisfy the definition in an insurance policy. See *Gen. Fidel. Ins. Co. v. Foster*, 808 F.Supp.2d 1315, 1321 n. 6 (S.D.Fla. 2011); *WPC Indus. Contractors Ltd. v. Amerisure Mut. Ins. Co.*, 660 F.Supp.2d 1341, 1346 (S.D.Fla. 2009).

The damages the Jansens allege in the underlying complaint arise out of the release of a “pollutant” in the

Jansens' swimming pool. The Court notes that the only damages alleged in the underlying complaint are economic losses from the alleged diminution of the value of the subject property (“conduct caused [the Jansens] to suffer damages including, but not limited to: [l]oss of or diminution in the value of the subject property.”) Plaintiff argues that the above allegations are allegations establishing a claim for loss of use of tangible property such that the Jansens are asserting a claim for property damage for purposes of coverage under the Policy. After consideration, the Court finds that there are no allegations asserting a claim for loss of use in the underlying complaint.

Chestnut at 1214, docket citation omitted.

Chestnut did not involve human remains, it involved the intentional act of masturbating an ejaculating into a swimming pool. *Chestnut* is a perfect example of why cases with such disparate facts should not be used to reverse this case. Under FFB’s policy, this cause of loss would likely be covered under the Pollution Exclusion’s qualifier that loss caused by pollutants is not covered “unless the discharge ... is itself caused by a Peril Insured Against under Coverage C of this policy” [R. 256]. Malicious mischief is a peril insured against under Coverage C [R. 256].

Moreover, the *Chestnut* judge’s reliance on *Gen. Fidel. Ins. Co. v. Foster* is misplaced. *Foster* did not involve a natural bodily substance, it involved Chinese Drywall.

- *WPC Indus. Contractors Ltd. v. Amerisure Mut. Ins. Co.*, 660 F.Supp.2d 1341 (S.D.Fla. 2009) involved a sewage backup and overflow, not involve human remains.

- *Philadelphia Indem. Ins. Co. v. Yachtsman’s Inn Condo Assoc., Inc.*, 595 F. Supp. 2d 1319 (S.D. Fla. 2009): this case involved a duty to defend under a Commercial General Liability policy for personal injuries caused by feces, raw sewage, and battery acid. The trial judge found that feces, raw sewage, and battery acid were an irritant and contaminant. To fully understand the opinion, Mrs. Taylor refers this Court to *Castillo v. State Farm Florida Ins. Co.*, 971 So. 2d 820, 824 (Fla. 2nd DCA 2007), where the court held:

[I]n Florida, “[w]hen an insurer relies on an exclusion to deny coverage, it has the burden of demonstrating that the allegations of the complaint are cast solely and entirely within the policy exclusion and are subject to no other reasonable interpretation.”

In *Philadelphia Indem. v. Yachtsman’s Inn*, the insurer met that exact burden:

First, the substances at issue—feces, raw sewage, and battery acid—fall within the policy pollutant definition of “any solid, liquid, gaseous or thermal *irritant or contaminant.*” (emphasis added). **In determining whether a substance is an irritant or contaminant, “the court should look to see if the disputed substance is alleged to have had a *particular effect commonly thought of as ‘irritation’ or ‘contamination.’*”** *Nova Casualty Co.*, 424 F.Supp.2d at 1334

(citing Deni, 711 So. 2d at 1139). **Here, the underlying complaint alleges that when Mr. Boone was exposed to the substances, he encountered a “dangerous health risk” and a “hazardous condition.” As a result of his exposure, he suffered “severe dermatological injuries.” Such allegations fit the ordinary meaning of an “irritant or contaminant.”**

Philadelphia Indem. v. Yachtman's Inn at 1324, docket citations omitted, alterations (italics) in original, emphasis (boldface) added. By stark contrast, in this case, as a matter of law FFB has not met this burden. The trial court determined FFB produced no evidence of the substances that allegedly triggered the Pollution Exclusion [R. 477-78], and FFB expressly stated it does not challenge this determination. Initial Brief at 4, 22.

VI. The Bacteria Endorsement.

A. The Bacteria Endorsement Was Not Outside the Scope of the Pleadings.

FFB makes several misstatements in its argument that the Trial Court erred when finding coverage under the Bacteria endorsement. FFB states the Bacteria Endorsement’s additional coverage was outside the scope of the pleadings. It was not.

Mrs. Taylor filed a two count Complaint. In Count 1, Mrs. Taylor sued for breach of contract for FFB’s failure to pay insurance proceeds for coverages afforded under the Policy. The Bacteria Endorsement states Bacteria is an “Additional Coverage” added to the Policy, providing \$10,000 in coverage for “the cost to remove... bacteria from property covered under

Section I – Property Coverages” [R. 442-43]. In Count 2, for Declaratory Relief, Mrs. Taylor asked the Trial Court to “Declare that the policy of homeowner’s insurance covering the insured provides coverage for the claim submitted by the insured” among other relief [R. 13].

FFB erroneously states Mrs. Taylor *only* brought a declaratory judgment on the pollution exclusion, saying things like:

[T]hat 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.

Initial Brief at page 13; and:

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.

Initial Brief at page 23, alteration (boldface) in original.

The Bacteria Endorsement was not outside the scope of the proceedings. The *entire* Policy and *all* coverages were brought before the Trial Court.

B. The Trial Court Properly Granted Summary Judgment for a Non-Moving Party.

It is longstanding law in Florida that a court may enter summary judgment for a non-moving party:

[T]here can be no sound reason why, when one party has moved for a summary judgment, the court, in the absence of a timely and meritorious objection, cannot dispose of the whole matter by granting a judgment to either party if it finds that the facts as properly construed against the prevailing party show that he is entitled to a summary final judgment as a matter of law, even though it may be better practice to file a cross-motion.

Carpineta v. Shields, 70 So. 2d 573, 574 (Fla. 1974).

This Court agrees:

A trial court may, under certain circumstances, enter a summary judgment in favor of a nonmoving party. Nevertheless, the better practice is to require a timely motion. The entry of a summary judgment for the nonmoving party is not appropriate if the party against whom the summary judgment is entered has not had an opportunity to rebut the asserted factual or legal basis for the judgment

Thomas v. Smith, 882 So. 2d 1037, 1042 (Fla. 2nd DCA 2004), citations omitted. The new Fla. R. Civ. P. 1.510 expressly grants the ability to enter summary judgment for a nonmovant. Rule 1.510(f) states, in pertinent part:

Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant.

FFB was on notice of Mrs. Taylor's intent to argue coverage under the Bacteria Endorsement at the hearing (unlike FFB's surprise invocation of § 381.0098, Fla. Stat.). Mrs. Taylor gave notice of Dr. Bagg on her

expert witness disclosure. Mrs. Taylor timely filed her response in accordance with the new rule. Mrs. Taylor's timely response gave notice of argument as to coverage under the Bacteria Endorsement. Mrs. Taylor's response gave notice of her reliance on Dr. Bagg's affidavit, which attested to bacteria in Mr. Taylor's post-mortem body and bodily fluids that departed his body.

After this notice, FFB had the time to respond which the Florida Supreme Court gave to eliminate gamesmanship, which was reasonable. FFB had the full 20 days afforded by the Florida Supreme Court's new Rule 1.510, and did not take the opportunity to rebut or otherwise challenge coverage under the Bacteria Endorsement, or even continue the hearing to do so. FFB did nothing.

The Trial Court was within its discretion to grant summary judgment to a non-moving party. For an all risks insurance policy, where the only affirmative defense was a single exclusion and the facts were not in dispute, the denial of summary judgment on that exclusion is, by default, the finding of coverage for the claim. It was a final resolution of the only defense to coverage.

C. A Reply to FFB's Affirmative Defenses Was Not Allowed.

FFB states Mrs. Taylor had to file a Reply to properly argue the Bacteria Endorsement covered her claim. A Reply was not only required, it was not allowed.

Mrs. Taylor claimed FFB breached the Policy by not providing coverage, and asked for a declaration that the policy provides coverage for her claim. FFB denied her claims and asserted an affirmative defense that the Pollution Exclusion prevented coverage. That was the proper end to pleadings. Mrs. Taylor did not then need to confess that the Pollution Exclusion applied to bar her claim, but that FFB breached the Policy by not providing coverage under the Bacteria Exclusion.

An affirmative defense is a confession and avoidance: “An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability.” *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) (quoting *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002)). In simpler terms, an affirmative defense is “Yes, I did it, but I had a good reason.” *State v. Cohen*, 568 So. 2d 49, 51-52 (Fla. 1990).

“[A] reply pleads an affirmative defense to an affirmative defense.” *Hertz Commercial Leasing Corp. v. Seebeck*, 399 So. 2d 1110, 1111 (Fla.

5th DCA 1981), quoting Trawick, *Florida Practice and Procedure*, § 11-6 (1979).

Fla. R. Civ. P. 1.110(a) states, in pertinent part:

If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance. No other pleadings will be allowed.

The Rule was amended to provide this language nearly 50 years ago, back in 1973. Shortly after, the Florida Supreme Court (quoting from Professor Trawick, who was Chairman of the Rules Committee that implemented the change), explained the differences between a “traverse” or mere denial of the allegation, and a confession and avoidance. The Court established the circumstances under which a litigant was required to file a reply—only when there was an avoidance. *Moore Meats, Inc. v. Strawn in & for Seminole County*, 313 So. 2d 660, 661–62 (Fla. 1975). The Court further explained:

Avoid means ‘to make legally void; to prevent the . . . effectiveness of.’ In pleading, avoidance means ‘an **allegation of new matter** in opposition to a former pleading that **admits the facts alleged** in the former pleading and shows cause why they should not have their ordinary legal effect.’

Id. at 661, quoting Professor Trawick. The Bacteria Endorsement is coverage. There was no new matter to plead, no admission of the facts FFB alleged that the claim was excluded.

A party cannot file a reply that doesn't contain such an avoidance.

This Court holds:

For all practical purposes, a document entitled "reply" which does not contain any additional facts in the nature of avoidance is not a pleading.

Buss Aluminum Products, Inc. v. Crown Window Co., 651 So. 2d 694, 695 (Fla. 2nd DCA 1995). This Court also states that if the plaintiff merely denies the answer and affirmative defense, and does not confess the affirmative defense and seek an avoidance, the plaintiff is "precluded" from filing a reply:

Under the holding in *Moore*, it is **only when 'new matter'** is sought to be asserted to avoid the affirmative defense that a reply is required. Consequently, **where, as here, the plaintiff does not seek to avoid the substantive allegation of the defendant's affirmative defense, he need not file, indeed, is precluded by the rules from filing, a reply.**"

Kitchen v. Kitchen, 404 So. 2d 203, 205 (Fla. 2d DCA 1981), emphasis added.

D. The Bacteria Endorsement Superseded All Contrary Provisions in the Policy.

FFB lastly addresses the merits and claims the Trial Court's finding that the Bacteria Endorsement superseded the Pollution Exclusion is "legally insupportable."

First, it is without question that an endorsement to an insurance policy supersedes the initial terms of a policy. In *Geovera Specialty Ins. Co.*

v. Glasser, 337 So. 3d 8 (Fla. 4th DCA 2022), the court mentioned this fact several times:

- “The policy consisted of its initial terms and a Master Endorsement, which **superseded the initial terms** where applicable”;
- “the endorsement—**which supersedes the initial terms of the policy**—is broader...”; and
- “Although the policy’s ‘Exception [t]o c.(6)’ expressly covers accidental discharges of water from a plumbing system, **it is superseded** by the endorsement....”

Id. at 9-12, emphasis added. Further:

“The law in Florida is clear that to the extent an endorsement is inconsistent with the body of the policy, the endorsement controls.” *Allstate Fire & Cas. Ins. Co. v. Hradecky*, 208 So. 3d 184, 187 (Fla. 3d DCA 2016); see *Fam. Care Ctr., P.A. v. Truck Ins. Exch.*, 875 So. 2d 750, 752 (Fla. 4th DCA 2004) (“Even if there were an ambiguity between the endorsement and the body of the policy, the endorsement, which is clear, controls.”); *Fireman’s Fund Ins. Co. v. Levine & Partners, P.A.*, 848 So. 2d 1186, 1187 (Fla. 3d DCA 2003) (“[T]he terms of an endorsement such as the one sued upon control over anything purportedly to the contrary in any other insuring agreement”); *Steuart Petroleum Co., Inc. v. Certain Underwriters at Lloyd’s London*, 696 So. 2d 376, 379 (Fla. 1st DCA 1997) (“[I]n general, to the extent an endorsement is inconsistent with the body of the policy, the endorsement controls.”).

Certain Underwriters at Lloyd's, London v. Jimenez, 319 So. 3d 93, 94 (Fla. 4th DCA 2021).

FFB cites the Bacteria Endorsement's provision that the coverage "only applies when such loss or costs are a result of a Peril Insured Against" [R. 442], and argues the Bacteria Endorsement and Pollution Exclusion are "entirely consistent with one another." Initial Brief at 27. FFB then argues: "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."

FFB's ignores two important facts: Dr. Bagg's unrebutted affidavit that bacteria was present in Mr. Taylor's body (both pre and post mortem) and in the bodily fluids that departed his body; and FFB issued an all risks insurance policy.

Loss from bacteria is always covered under Coverage A. FFB has introduced *no* evidence or argument that bacteria, alone, is a pollutant. The Trial Court's Order determined "Defendant has not identified the "disputed substance" it claims triggers the Pollution Exclusion" [R. 533-34] and FFB concedes this point.

FFB's argument would apply to Coverage C personal property named peril losses. But under Coverage A and B property coverages, *all risks* are

perils insured against if they cause direct physical loss to property. The Bacteria Endorsement applies to all risks. Then the exclusions apply.

Coverage A Step 1

At trial, the burden of proving a direct physical loss³ during the policy period is on the insured. In an all-risk policy the burden is never on the insured to prove the cause of the loss, or that the loss is covered

Is this a direct physical loss to property?

Yes

The loss is a peril insured against. Proceed to Coverage A Step 2

No

The loss is not a peril insured against. The analysis is concluded, and there is no coverage for any losses.

Coverage A Step 2

If there is a direct physical loss during the policy period, then the burden is on the insurer to prove that the cause of the direct physical loss is excluded or not covered by the terms of the Policy.

Is the cause of the direct physical loss excluded or not covered?

³ “Direct Physical Loss” means the diminution in value of something, and that the damage be actual. *Homeowners Choice Prop. & Cas. Ins. Co. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3rd DCA 2017) (“A ‘loss’ is the diminution of value of something, and in this case, the ‘something’ is the insureds’ house or personal property. Loss, *Black’s Law Dictionary* (10th ed. 2014). ‘Direct’ and ‘physical’ modify loss and impose the requirement that the damage be actual.”)

Yes

The Bacteria Endorsement applies with a sub-limit of \$10,000.

No

The loss is covered and full Coverage A limits apply to the loss.

In arguing that the Bacteria Endorsement does not apply, FFB ignores the distinction between Steps 1 and 2. The “Peril Insured Against” mentioned in the Bacteria Endorsement is “risk of direct loss to property described in Coverages A [the home] or B [other structures] only if that loss is a physical loss to property.”

If there is no direct physical loss to property, then coverage is not triggered under an all-risks policy. If there is a direct physical loss to property, then the next question is whether the insurer can prove the cause of that loss is not covered or excluded.

The Coverage A “Perils Insured Against” described above can be contrasted with the Coverage C “Perils Insured Against” which states: “We insure for direct physical loss to the property described in Coverage C caused by a peril listed below [17 specific perils identified]. This is the difference between the all-risks coverage under Coverage A [the home], and Coverage C [personal property]. Clearly there was a direct physical loss at the insured home in this case. The only issue is whether that direct physical loss was not covered or excluded. FFB claims that the direct

physical loss was not covered as a pollutant. But, even if it was, that direct physical loss was covered under the Bacteria Endorsement up to the sub-limit of \$10,000.

Under FFB's Policy, Bacteria cannot be a "pollutant." If it were, there would *never* be additional coverage for bacteria, since under FFB's rationale there never be a peril insured against triggering the Bacteria Endorsement. The additional coverage would be illusory. Bacteria, therefore, is not a pollutant.

Dr. Bagg's affidavit established that bacteria existed in Mr. Taylor's body before he died. Even if Mr. Taylor's remains could be considered pollution, bacteria was a concurrent cause of the loss. That is, if the loss was caused by both bacteria and human remains, even if human remains were a pollutant, there is coverage for the loss.

The coverage analysis is governed by the Concurrent Cause Doctrine (CCD). In *Sebo v. American Home Assurance Co., Inc.*, 208 So. 3d 694 (Fla. 2016), the Florida Supreme Court described the CCD as follows:

We conclude that when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine.

* * *

Concurrent Cause Doctrine (CCD)

The CCD provides that **coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause.** See *Wallach*, 527 So. 2d 1386; *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123, 133 (1973).

Sebo at 697-98. See also *Hrynkiw*, 844 So. 2d at 745; *Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So. 3d 486, 487 n.1 (Fla. 5th DCA 2015); *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3rd DCA 1988).

The Pollution Exclusion is contained within the “Section I - Perils Insured Against” part of the Policy, and is not subject to an anti-concurring cause clause (ACCC) [R. 255-56]. By stark contrast, FFB drafted certain exclusions that contain an ACCC:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is **excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.**

[R. 256]. The Pollution Exclusion is not within this section of the Policy. Since there was no ACCC for pollutants, even if loss caused by human remains was excluded, loss caused in any part by bacteria, irrespective of pollutants, was covered.

CONCLUSION

The Policy’s Pollution Exclusion does not eliminate all risk coverage for loss caused by human remains. FFB had failed to meet its burden to

show that human remains are a pollutant as that term is used in the policy, defined by the dictionary, and understood by the man on the street. The Trial Court did not commit error, and its judgment must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Hinda Klein, Esq. (eservicehwdappl@conroysimberg.com; hlkein@conroysimberg.com), Conroy Simberg, 3440 Hollywood Blvd., Second Floor, Hollywood, FL 33021, this 11th day of October, 2022.



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CERTIFICATE OF COMPLIANCE

In compliance with the Fla. R. App. P. 9.045 and 9.210, counsel for Appellee certifies that this Answer Brief complies with the applicable font and word count limit requirements.

Respectfully submitted,



Mark A. Nation, Esquire