2019 WL 6894328 (C.A.11) (Appellate Brief)
United States Court of Appeals, Eleventh Circuit.

HUB CITY ENTERPRISES, INC. & Wall St. Enterprises of Orlando, Inc., Defendants-Appellants,

v.

PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, Plaintiff-Appellee.

No. 19-14193.
December 16, 2019.

Appeals from the United States District Court For the Middle District of Florida, In Case No. 6:18-cv-1608-Orl-41GJK, District Judge Carlos E. Mendoza

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I *CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 28-1(b), the undersigned counsel for Appellants, HUB CITY ENTERPRISES, INC. and WALL ST. ENTERPRISES OF ORLANDO, INC., hereby certifies the following:

1. The name of each trial judge(s), and all attorneys, persons, association of persons, firm, partnership, or corporation that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporations that own 10% or more of a party's stock, and all other identifiable legal entities related to a party:
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I hereby further certify that I am unaware of any actual or potential conflict of interest involving the district judge and magistrate judge assigned to this case, and will immediately notify the Court in writing on learning any such conflict.

*III *STATEMENT REGARDING ORAL ARGUMENT*

Appellants, HUB CITY ENTERPRISES, INC. and WALL ST. ENTERPRISES OF ORLANDO, INC., respectfully request oral argument in this matter based upon the unique policy construction of the 'exclusionary provision' at issue in this insurance coverage action, and the potential application of the limited exception to what is generally referred to as "the 8-corners rule".

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1** ***STATEMENT OF RELATED CASES

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Robert Hunt v. Hub City Enterprises, Inc. & Wall St. Enterprises of Orlando, Inc., Case No. 2018-CA-5683, currently pending in the State Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, initially filed on May 21, 2018. ("the Hunt Lawsuit")

2** ***STATEMENT OF JURISDICTION

The district court held diversity jurisdiction over this litigation, pursuant to 28 U.S.C. § 1332(a), for a matter in which a complaint for declaratory action concerning insurance coverage was filed involving an amount in controversy exceeding the value of $75,000 and parties who are citizens of diverse states.

This Court has jurisdiction under 28 U.S.C. § 1291. Defendants/Appellants' appeal was timely filed on October 22, 2019 (Doc. No. 39), within 30 days after entry of the final judgment or order appealed from. *See* Fed.R.App.Proc. 4(a)(1)(A). This appeal flows from the district court's Order entered on October 3, 2019, which granted in part and denied in part the Motion for Judgment on the Pleadings filed by Plaintiff/Appellee, and which denied the Motion for Summary Judgment filed by Defendants/ Appellants (Doc. No 37), and its corresponding entry of Final Judgment in a Civil Case on October 4, 2019 (Doc. No. 38).

3** ***STATEMENT OF THE ISSUES

1. Whether the district court erred in entering a judgment on the pleadings in favor of Plaintiff/Appellee, and holding that Plaintiff/Appellee does *not* owe its insureds a duty to defend ***or*** a duty to indemnify under the Commercial General Liability policy purchased by Defendants/Appellants, based on its determination that claims asserted against Defendants/Appellants in an underlying personal injury lawsuit currently pending in Florida State Court were excluded from coverage under the subject insurance policy, pursuant to a provision titled 'Exclusion -- Amusement Devices'.

2. Whether the district court likewise erred in denying the motion for summary judgment filed by Defendants/Appellants, based on its determination that the subject policy exclusion was not ambiguous and its concurrent conclusion that uncontroverted evidence could not and would not be considered in determining Appellee's duty to defend or duty to indemnify its insureds in the underlying personal injury lawsuit.

3. Whether the district court's Opinion and Order (Doc. No. 37) and subsequently entered Final Judgment (Doc. No. 38) should be reversed or vacated, and the case remanded with instructions that the district court enter an order which grants Defendants/ Appellants' motion for summary judgment (Doc. No. 30), in whole or in part.

4** ***STATEMENT OF THE CASE

This is an action for a declaratory judgment regarding the interpretation and application of a Commercial General Liability policy of insurance ("the Subject Policy") issued by Appellee, Princeton Excess & Surplus Lines Insurance Company ("PESLIC"), to its Named Insureds -- i.e. Defendants/Appellants, Hub City Enterprises, Inc. and Wall St. Enterprises of Orlando, Inc. ("Hub City" and "Wall Street", respectively, or "Appellants", collectively).

Specifically, PESLIC filed the instant action in the United States District Court for the Middle District of Florida seeking a declaration that it has neither a duty to defend nor a duty to indemnify Hub City and Wall Street, with respect to a personal injury lawsuit that is currently pending in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, styled as *Robert Hunt v. Hub City Enterprises, Inc. & Wall St. Enterprises of Orlando, Inc.*, Case No. 2018-CA-5683 ("the Hunt Lawsuit").

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A. The Hunt Lawsuit

The Hunt Lawsuit asserts identical tort claims of simple negligence against Wall Street and Hub City. Specifically, the plaintiff, Robert Hunt, allegedly sustained serious bodily injuries to his shoulder and elbow while he was attending a "street party" event in downtown Orlando on July 18, 2017 promoted as 'RumFest 2017'. The complaint filed in the Hunt Lawsuit sets forth several, ***5** identical theories of negligence against Wall Street and Hub City, including: i) that they failed to maintain their premises in a reasonably safe condition; ii) that they negligently provided an extra-large, inflatable beach ball, ***or*** allowed the extra-large beach ball to be thrown into the RumFest crowd for people to push it around in the air; ii) that the negligently failed to supervise or monitor the use of the extra-large beach ball; iii) that they negligently failed to warn Mr. Hunt of the "dangerous condition" of the extra-large beach ball, when they knew or should have known of this "dangerous condition"; iii) that they negligently failed to correct or adequately correct this dangerous condition, and; iv) that they negligently failed to train or supervise their agents and employees so that these agents and employees would prevent the crowd from using the extra-large beach ball.

Ultimately, the underlying complaint further alleges that Mr. Hunt "used his outstretched arms and hands to push the extra-large beach ball away from him to prevent it from hitting him in the head"; and, as a result of Mr. Hunt deflecting the beach ball away from him, it is alleged that he sustained the aforementioned injuries to his shoulder and elbow.

B. PESLIC's Declaratory Action

The sole basis for this declaratory action is PESLIC's reliance on an endorsement to the Subject Policy titled 'Exclusion -- Amusement Devices' ("the ***6** Amusement Device Exclusion" or "the Exclusion"), and PESLIC's corresponding assertion that, if the subject beach ball qualifies as an "amusement device" under the Exclusion, it has neither a duty to defend nor a duty to indemnify its insureds in the Hunt Lawsuit based on this exclusionary clause.

While PESLIC contends that the Subject Policy does not provide coverage for the negligence claims asserted in the Hunt Lawsuit, Hub City and Wall Street assert that the negligence claims Mr. Hunt is currently pursuing against them are not only covered under the Subject Policy, but represent *precisely* the type of situation for which they purchased commercial general liability coverage, and paid a sizable premium to PESLIC. Hub City and Wall Street further assert that, not only do the allegations and negligence theories raised in the Hunt Lawsuit trigger PESLIC's broad duty to defend, but the *actual, uncontroverted facts* which underlie the Hunt Lawsuit further establish PESLIC's broad duty to defend and duty to indemnify its insureds for their allegedly negligent acts or omissions. These unrefuted facts, which have been known to PESLIC *well before* it filed its motion for summary judgment establish that the subject beach ball was purposely placed into a fountain pond to serve as a thematic decoration for the Caribbean-themed RumFest event, and was removed from the fountain pond by an unknown event attendee without Appellants' knowledge or consent. The uncontroverted facts known to PESLIC further establish that, at no time, was the subject beach intended ***7** to be thrown, struck, punched or otherwise batted around by the RumFest crowd, and Appellants neither invited nor encouraged its guests to do so. The subject beach ball was a decorative prop, intended to float in a fountain pond outside the reach of the RumFest attendees; and, therefore, Wall Street and Hub City maintain that the beach ball referenced in the Hunt Lawsuit is not an "amusement device" under the Amusement Device Exclusion.

Additionally or alternatively, Hub City and Wall Street assert that the Amusement Device Exclusion relied upon by PESLIC is ambiguous and subject to multiple interpretations; and, therefore, must be strictly construed to provide coverage, against PESLIC as the drafter of the Subject Policy.

The parties stipulated at the outset of the action that the aforementioned coverage issues could be resolved by way of dispositive motions; and, to that end, PESLIC filed a Motion for Judgment on the Pleadings and Supporting Memorandum of Law on April 1, 2019 (Doc. No. 27). Appellants filed their Motion for Summary Judgment and Supporting Memorandum of Law on April

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24, 2019 (Doc. No. 30), [1] and PESLIC filed its Response to Appellants' Motion for Summary Judgment on May 15, 2019 (Doc. No. 31). Lastly, Appellants filed their Reply Memorandum on May 29, 2019 (Doc. No. 34).

8** ***C. The District Court's Order

On October 3, 2019, the district court entered its Order which granted in part and denied [2] in part PESLIC's Motion for Judgment on the Pleadings, and denied Appellants' Motion for Summary Judgment. The district court found that the Amusement Device Exclusion operated to preclude all coverage for the negligence claims raised in the Hunt Lawsuit; and, in that regard, PESLIC had neither a duty to defend nor a duty to indemnify under the Subject Policy. In reaching its conclusion, the district court stated that it "disagreed" with *both* PESLIC and Appellants regarding their respective interpretations of the Amusement Device Exclusion; and, instead, arrived at its own (third) interpretation regarding the subject Exclusion, along with its finding that the policy language at issue was not ambiguous. (Doc. No. 37, at pp. 8-9).

Additionally, the district court's order reflects its apparent finding that "[c]learly, the extra-large beach ball was provided for the amusement of the crowd -- to be pushed around in the air". (Doc. No. 37, p.10). Aside from the fact that the Hunt Lawsuit is devoid of any allegation that the subject beach ball was provided for the amusement of the crowd or to be pushed in the air, the district court's finding to the contrary was made only *after* it expressly declined to consider the ***9** uncontroverted evidence presented by Appellants *and known to PESLIC* establishing that the subject beach ball was purposely placed into a fountain pond to serve as a thematic decorative prop for the RumFest event and was apparently removed from the pond during the course of the event by an unknown attendee without Appellants' knowledge or consent. The district court not only declined to consider these uncontroverted facts, but, implicit in its ultimate conclusion, the district court also rejected Appellants' assertion that the underlying complaint in the Hunt Lawsuit could be reasonably interpreted as alleging facts and theories which might 'fairly and potentially' bring the negligence claims against Appellants within coverage under the Subject Policy, thereby triggering PESLIC's broad duty to defend.

Finally, having determined that PESLIC owes no duty to defend Appellants in the underlying Hunt Lawsuit, the district court further concluded that PESLIC, therefore, has no duty to indemnify its insureds for the injuries and damages sustained by Robert Hunt as a result of Appellants' alleged negligence.

In light of the district court's ruling, Appellants currently find themselves in an unfortunate position where they are entirely without liability coverage for simple negligence claims brought by one of their customers who was allegedly ***10** injured after another unknown customer(s) first removed a decorative prop from a fountain pond without Appellants' knowledge or consent, and then introduced this decorative prop into the crowd where it was apparently passed around among the event attendees, absent any intent, invitation or encouragement from Appellants.

As further discussed herein, Appellants strongly disagree with this result, and assert the district court's ruling subverts several well-established principles of Florida insurance law to ultimately arrive at a patently inequitable outcome. Accordingly, Appellants are respectfully requesting this Court to enter an Order which reverses the district court's Order (Doc. No. 37) and the Final Judgment in a Civil Case entered the following day (Doc. No. 38). Appellants are further requesting that the Court remand this action with instructions for the district court to enter an order finding that PESLIC has both a duty to defend and a duty to indemnify Appellants in the underlying Hunt Lawsuit; or, at a minimum, with instruction that PESLIC has a duty to defend its insureds in the Hunt Lawsuit, and that a determination on PESLIC's duty to indemnify should be stayed until a factual

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finding has been rendered on the evidence regarding whether the subject beach ball referenced in the Hunt Lawsuit constitutes an "amusement device" under the Amusement Device Exclusion.

11 *STATEMENT OF THE FACTS

The underlying Hunt Lawsuit arises out an alleged incident that occurred during a "street party" event held in downtown Orlando on July 18, 2017, hosted by Hub City and Wall Street and promoted as 'RumFest 2017'. (Doc. No. 30; Exhibit "B" at ¶ 10). Wall Street and Hub City are the owners/operators of a complex of bars, restaurants and night clubs located within one city block of each other in downtown Orlando, commonly known as the Wall Street Plaza. (Doc. No. 30; Exhibit "A" at ¶ 2). RumFest is an annual event that takes place in and around the Wall Street Plaza and the adjacent Heritage Square Park, and is promoted as an outdoor "celebration of rum and reggae", featuring live reggae music and performances on an outdoor stage. *Id.*, at ¶ 3. The event has continued to grow in size and popularity over the last decade, and RumFest currently entertains several thousand attendees each year. *Id.*

Robert Hunt claims to have sustained "severe ligament and tendon injuries" to his shoulder and elbow while attending the RumFest event in July of 2017. (Doc. No. 30; Exhibit "B" at ¶ 10). As further set forth in the underlying complaint filed in the Hunt Lawsuit, Mr. Hunt alleges that Wall Street and Hub City either "provided an extra-large, heavy inflatable beach ball for, ***or*** allowed the extra-large beach ball to be thrown into the crowd for people to push it around in the air". *Id.* at ¶ 8 (bold italics added). According to Mr. Hunt's complaint, he ***12** "used his outstretched arms and hands to push the extra-large beach ball away from him to prevent it from hitting him in the head"; and, as a result of Plaintiff deflecting the beach ball away from him, he allegedly sustained the aforementioned injuries to his shoulder and elbow. *Id.* at ¶ 8.

The underlying complaint in the Hunt Lawsuit sets forth identical negligence claims against Wall Street and Hub City, asserting they "owed a duty to guests at RumFest, including Plaintiff, to correct or warn of known dangerous conditions...and to maintain the premises in a reasonably safe condition." *Id.* at ¶ 13. The underlying complaint further alleges that Wall Street and Hub City breached this duty in one or more of the following manners:

i) By negligently providing the subject beach ball to, or allowing the use of the beach ball by, the crowd of guests at RumFest;

ii) By negligently failing to adequately supervise or monitor the use of the subject beach ball by the crowd of guests at RumFest;

iii) By negligently failing to warn or adequately warn Mr. Hunt of the dangerous condition of the subject beach ball when Wall Street and Hub City, knew or should have known, of the existence of the dangerous condition;

iv) By negligently failing to correct or adequately correct the dangerous condition when Wall Street and Hub City knew or should have known of its existence, and;

v) By negligently failing to train and/or or adequately supervise their agents, servants or employees concerning the dangerous condition created by the crowd's use of the subject beach ball so that they would prevent its use by the crowd.

***13** *Id.* at ¶ 14.

The Hunt Lawsuit was filed on May 21, 2018 and remains pending in Florida State Court. Upon service of the summons and complaint, Wall Street and Hub City promptly notified their liability carrier, and sought to have PESLIC defend and indemnify them for the negligence claims raised in the Hunt Lawsuit. Until the district court's recent ruling, PESLIC provided Wall Street and Hub City with a defense in the Hunt Lawsuit, subject to a complete reservation of its rights under the Subject Policy.

In that regard, well before filing its Motion for Judgment on the Pleadings in the instant action, PESLIC was fully aware that the subject beach ball was *not* something that was intended to be thrown, pushed, batted around or otherwise introduced into the crowd for their amusement. Rather, the sworn Interrogatory Answers prepared by the defense counsel retained by PESLIC to represent Wall Street and Hub City in the Hunt Lawsuit clearly indicate that **"[t]he beach ball was placed in a fountain/ pond for decoration. The beach ball was in standing water away from any persons reach"**. (Doc. No. 30; Exhibit "C" at Interrogatory No. 6). [3] Moreover, these Interrogatory Answers prepared by PESLIC's chosen counsel further state that the subject beach ball **"was not *14 intended to be thrown"** and that **"the crowd placed the beach ball in the crowd".** *Id.*, at Interrogatory Nos. 4 and 6. [4] In other words, before it sought the relief that was ultimately granted by the district court, PESLIC knew that the subject beach ball referenced in the Hunt Lawsuit was merely a decorative prop placed in a fountain pond by Wall Street and Hub City to enhance the Caribbean theme of the RumFest event, and that an unknown event attendee had removed the beach ball from the pond and introduced it to the crowd. PESLIC also knew that, at no time, did Wall Street or Hub City intend for the subject beach ball to be thrown, pushed or batted around by the RumFest crowd, nor did it invite or encourage any of the event attendees to do so. *See also* (Doc. No. 30; Composite Exhibit "1" -- four photographs which depict the subject beach ball floating in the fountain pond while the RumFest event is taking place, as intended). [5]

The Subject Policy & The 'Amusement Device' Exclusion

Despite its knowledge of these facts, PESLIC filed this coverage action in the district court seeking a declaration that it owes Wall Street and Hub City ***15** neither a duty to defend nor a duty to indemnify them in the Hunt Lawsuit. There is no dispute that, at all times material to the Hunt Lawsuit, Wall Street and Hub City were insured under CGL Policy Number 1RA3GL0000216-02 issued by PESLIC -- i.e. the Subject Policy. [6] Rather, the *sole* basis upon which PESLIC is relying to abdicate the contractual duties it owes to its insureds is an exclusion contained within a special endorsement to the Subject Policy, titled 'Exclusion -- Amusement Devices'. This exclusionary provision provides as follows:

EXCLUSION -- AMUSEMENT DEVICES

Amusement Device

This insurance does not apply to any loss, claim, "suit" or any obligation of any "insured" to indemnify, defend or contribute jointly or severally with another because of "bodily injury", "property damage", "personal and advertising injury" or "injury", actually or allegedly arising directly or indirectly based on, attributable to, arising out of, involving, as a consequence of, resulting from or in any way related to the ownership maintenance, operation, sponsorship, instruction, supervision, set-up or take-down or other use of an "amusement device".

The following definition is added to **Section V - Definitions**:

Amusement Device

For the purpose of this insurance, "amusement device" shall include, but not be limited to:

1. Any mechanical or non-mechanical ride;

***16** 2. Any device that requires the user to strike, punch, or kick;

3. Rock climbing walls, Velcro walls and similar scaling devices;

4. “Moon Bounces”, “Moon Walks”, “Space Walks”, and similar inflatable games and devices;

5. Laser tag, bungee jumping, Sumo wrestling, human spheres, slides, water slides and similar games and devices;

6. Gymnastic equipment;

7. Mechanical bull, horse, surfboard, skateboard and similar devices;

8. Dunking booth or tank; and

9. Trampoline.

(Doc No. 1, Exhibit “A”).

As noted above, PESLIC contends that, under its interpretation, the subject beach ball qualifies as an “amusement device” and, as such, the Exclusion operates to bar coverage for *all* of the negligence claims asserted in the Hunt Lawsuit. [7] PESLIC further asserts that none of the facts or theories alleged in the Hunt Lawsuit, including theories of negligence supervision and negligent training, trigger its duty to defend Wall Street and Hub City in the underlying lawsuit.

Conversely, Wall Street and Hub City maintain that the facts and simple negligence claims raised in the Hunt Lawsuit can easily be ‘fairly and potentially’ ***17** interpreted to trigger PESLIC's broad duty to defend. Moreover, Wall Street and Hub City further assert that the subject beach ball was merely a decorative prop, placed in a fountain pond to enhance the ambience of the RumFest event -- a floating ornament meant to be observed from a distance, and not something that was intended to be pushed, passed or batted around by the crowd, and certainly not something that Wall Street or Hub City invited or encouraged the crowd or any event attendee to push, pass or bat around. Additionally, Wall Street and Hub City assert that the Amusement Device Exclusion is ambiguous and subject to multiple interpretations; and, as such, must be construed in favor of coverage and against PESLIC as the drafter of the Subject Policy.

18** ***SUMMARY OF ARGUMENT

Appellants respectfully submit that, in reaching its conclusion, the district court applied an exceedingly narrow construction of the allegations raised in the Hunt Lawsuit; and, in doing so, the district court vitiated several bedrock principles of Florida insurance law to reach an inequitable result that has left Wall Street and Hub City without the benefit of the bargain for which they paid PESLIC a substantial premium. It is well-established under Florida law that, if the allegations of the underlying complaint leave *any* doubt regarding a carrier's duty to defend, the question must be resolved in favor of the insured requiring its insurer to provide a defense -- yet the district court turned that core principle upside down and, instead, resolved this threshold question in PESLIC's favor and against Appellants based on its incorrect finding that “[c]learly, the extra-large beach ball was provided for the amusement of the crowd -- to be pushed around in the air.” (Doc. No. 37, at p. 10). This is not alleged in the underlying complaint, and is simply not true. Aside from the fact that the word “amusement” is not found anywhere in the underlying complaint filed, the allegations of the complaint reflect that Robert Hunt was allegedly injured in act of self-defense -- i.e. as a result of him pushing away the subject beach ball “to prevent it from hitting him in the head”. Moreover, the subject

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beach ball was not, ***in fact***, provided as something to ***19** be pushed around in the air; but, rather, was placed in a fountain pond to serve as a floating thematic prop for the RumFest event.

In that regard, not only does the underlying complaint filed in the Hunt Lawsuit allege facts and multiple liability theories which fairly and potentially trigger PESLIC's broad duty to defend Wall Street and Hub City regarding the negligence claims upon which they have been sued, but PESLIC also knew before filing its Motion for Judgment on the Pleadings that the subject beach ball referenced in the underlying complaint was *not*, in fact, provided for the amusement of the crowd to be pushed around in the air. Rather, PESLIC's investigation of the underlying facts (as reflected in the Interrogatory Answers served by its chosen defense counsel) establish that the subject beach ball was placed into a fountain pond to serve as a floating decorative prop for the RumFest event, that was removed by an unknown event attendee and introduced into the crowd without Appellants' knowledge or consent. In that regard, PESLIC also knew that Appellants did not "require", invite or encourage the RumFest attendees to push, punch or throw the subject beach ball -- as its intended purpose and use was to simply float in the fountain pond and provide additional ambience for the Caribbean-themed event.

Additionally, Appellants further submit that the district court erred in concluding that the Amusement Device Exclusion is unambiguous. In addition to ***20** an insurer's broad duty to defend its insureds, another foundational principle of Florida insurance law is that policies should receive a "reasonable, practical and sensible interpretation consistent with the intent of the parties"; and, if policy language is susceptible to differing interpretations, such language should be construed strictly and most strongly against the insurer and liberally in favor of the insured, so as to effect the dominant purpose of payment to the insured. Moreover, policy provisions such as the Amusement Device Exclusion which attempt to exclude coverage are to be construed narrowly, and even more strictly against the insurer than coverage clauses. In finding the subject Exclusion to be unambiguous, the district court's order subverts each of these longstanding principles.

As further discussed herein, the district court's analysis of the Amusement Device Exclusion led to its express rejection of the differing interpretations offered by *both* Appellants and PESLIC. Instead, the district court arrived at its own/*third* interpretation of the Amusement Device Exclusion. In support of its interpretation, the district court noted that the Exclusion, read "in its entirety, presents a strong argument for [the] use of the serial comma", and further stated "it would be appropriate" to insert serial commas [8] in at least two different places in the prefatory clause of the Amusement Device Exclusion. (Doc. No. 37, at pp. 8-9).

***21** Appellants respectfully submit that the district court's suggested insertion of additional punctuation into the Amusement Device Exclusion to support its interpretation (and its resulting determination that the Exclusion is not ambiguous) runs contrary to the well-established principle that it is impermissible for a court to rewrite a contract. In other words, the district court's conclusion that the Amusement Device Exclusion is unambiguous was reached only after its corresponding analysis that involved the insertion of punctuation that is not actually present in the Subject Policy. Of course, if the insertion of one or more serial commas is "appropriate" to better understand the meaning and scope of the Amusement Device Exclusion, Wall Street and Hub City obviously did not have the benefit of this additional, clarifying punctuation -- given that the 'serial commas' referenced by the district court in its order are not actually part of the Subject Policy.

At a minimum, the respective analysis of the Amusement Device Exclusion undertaken by *three* parties with legal background and training -- i.e. counsel for Appellants, counsel for PESLIC and the district court -- resulted in *three* different interpretations. [9] Wall Street and Hub City have no such legal training or background. To that end, the Supreme Court of Florida has previously recognized,

***22** There is no reason why insurance policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in them, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.

Harnett v. Southern Ins. Co., 181 So.2d 524, 528 (Fla. 1965). Far from being 'the proverbial Philadelphia lawyer', Wall Street and Hub City respectfully submit that it is both inequitable and contrary to Florida law to require them to assume the appropriateness of adding 'serial commas' to more clearly understand the meaning and scope of the Amusement Device Exclusion.

In short, the ultimate conclusion reached by the district court, as applied to the underlying circumstances of the Hunt Lawsuit, evokes the familiar idiom that it is sometimes possible to lose sight of the forest because of the trees. The core question at the heart of this coverage dispute is -- does the Subject Policy provide Wall Street and Hub City with general liability coverage for a situation in which an unidentified event attendee removed a decorative prop from a fountain pond without their knowledge or consent, and another attendee sustains an accidental injury as a result of being inadvertently struck by that decorative item after it was introduced into the crowd without any invitation or encouragement from ***23** Appellants. Appellants respectfully submit that the answer to that question should be a clear and unequivocal "Yes".

Accordingly, Appellants respectfully request this Court to enter an Order which reverses or vacates the district court's order, and the corresponding Final Judgment in favor of PESLIC, and to remand this action back to the district court with accompanying instructions to enter an order finding that PESLIC has both a duty to defend and a duty to indemnify Appellants in the underlying Hunt Lawsuit. Alternatively, the district court's order should be reversed or vacated, with instructions on remand for the district court to enter an order finding that PESLIC has a duty to defend Appellants in the Hunt Lawsuit, along with a stay of any determination regarding PESLIC's duty to indemnify until a factual finding has been rendered on the evidence regarding whether the subject beach ball referenced in the Hunt Lawsuit constitutes an "amusement device" under the Amusement Device Exclusion.

24** ***STANDARD OF REVIEW

The district court granted PESLIC's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The district court denied Appellants' Motion for Final Summary pursuant to Rule 56 of the Federal Rules of Procedure. It is well-established that this Court of Appeals reviews motions for judgment on the pleadings, and motions for summary judgment on a *de novo* basis. *See e.g. Grife v. Allstate Floridian Ins. Co.*, 512 F.3d 1302 (11th Cir. 2006); *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006); *Jara v. Núñez*, 878 F.3d 1268, 1271 (11th Cir. 2018); *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014); *Kragor v. Takeda Pharm. Am., Inc.*, 702 F.3d 1304, 1307 (11th Cir. 2012).

It is also well-established that the interpretation of an insurance contract is likewise reviewed on a *de novo* basis, and that Florida law applies to this diversity action involving an insurance policy issued in Florida. *See Vector Products, Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316, 1318 (11th Cir. 2005) (*quoting LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511, 1515 (11th Cir. 1997)); *see also Erie Railroad v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 714-- 15 (11th Cir. 1985).

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Under Florida law, courts must construe insurance contracts on their plain meaning. *Garcia v. Fed. Ins. Co.*, 969 So.2d 288, 291--92 (Fla. 2007). However, ***25** insurance policies that are "ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured." *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla. 1986). In determining whether ambiguities exist, courts must constrain themselves to the language in the agreement; they cannot consider the subjective intent of the parties. See *Harrington v. Citizens Prop. Ins. Corp.*, 54 So.3d 999, 1001-- 02 (Fla. 4th DCA 2010) (*citing* *State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc.*, 678 So.2d 397, 403 (Fla. 4th DCA 1996)). Lastly, in carrying out this analysis, Florida courts must "read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000).

Crucially, any doubt is resolved in favor of providing coverage, and " '[i]f the complaint alleges facts partially within and partially outside the coverage of the policy, the insurer is obligated to defend the entire suit.' " *IDC Construction, LLC*, 339 F.Supp.2d 1342, 1349 (S.D. Fla. 2004) *citing* *Grissom v. Commercial Union Ins. Co.*, 610 So.2d 1299, 1306--1307 (Fla. 1st DCA 1992). All doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured. *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So.2d 810, 813--14 (Fla. 1st DCA 1985). So long as the complaint alleges facts that create potential coverage under the policy, the insurer must defend the suit. ***26** *Tropical Park, Inc. v. United States Fidelity and Guaranty Co.*, 357 So.2d 253, 256 (Fla. 3rd DCA 1978).

*27 *ARGUMENT*

I. The allegations raised in the Hunt Lawsuit are, by themselves, sufficient to trigger PESLIC's broad duty to defend

It is a well-established, foundational principle of Florida law that an insurer's duty to defend is separate from, and broader than, its duty to indemnify. *Lime Tree Vill. Cmty. Club Ass'n, Inc. v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405 (11th Cir.1993) *citing Baron Oil Co., supra*, at 813--14; *see also* *Trizec Properties, Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 811-12 (11th Cir. 1985). An insurer's duty to defend is generally determined by examining the allegations in the underlying complaint against the insured. [10] *Id.* (*citing* *Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So.2d 533, 536 (Fla.1977)); *see also* *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1077 n.3 (Fla.1998). In that regard, an insurer must defend its insured if the complaint alleges facts that ***fairly and potentially*** bring the suit within coverage. *Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So.2d 435, 442--43 (Fla.2005) (emphasis added). Stated differently, an insurer must defend if the allegations of the underlying complaint *could* bring the insured within the policy provisions of coverage. ***28** *Driggers Eng'g Servs. Inc. v. CFA Fin. Corp.*, 113 F.Supp.3d 1224, 1228 (M.D. Fla. 2015) (italics in original); *State Farm Fire & Cas. Co. v. Higgins*, 788 So.2d 992, 995-96 (Fla. 4th DCA 2001), *approved*, 894 So.2d 5 (Fla. 2004). All doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured. *Baron Oil Co., supra*, at 814; *see also* *Lawyers Title Ins. Corp. v. JDC (Am.) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995) ("[i]f an examination of the allegations of the complaint leaves any doubt regarding the insurer's duty to defend, the issue is resolved in favor of the insured.")

Moreover, if an insurer seeks to avoid a duty to defend because of a policy exclusion (as PESLIC is attempting to do in this case), then 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**." *Luhman v. Covington Specialty Ins. Co.*, 2017 WL 850178, at *5 (S.D. Fla. 2017) (emphasis in original); *citing to* *Northland Cas. Co. v. HBE Corp.*, 160 F.Supp.2d 1348, 1359 (M.D.

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Fla. 2001); *see also* *Hartford Acc. & Indem. Co. v. Beaver*, 466 F.3d 1289, 1296 (11th Cir.2006) (same); *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4th DCA 1997) (noting that it is well-settled that courts strictly construe exclusionary clauses in liability insurance policies to allow the broadest coverage possible); *Tropical Park, Inc., supra*, at 256 ("[i]n particular, exclusionary clauses in insurance contracts must be ***29** construed liberally against the insurance company and in favor of the insured in order that the purpose of insurance will not be defeated.)

As an initial observation, it bears noting that the words "amusement" and "amusement device" are nowhere to be found in the complaint filed in the Hunt Lawsuit. There is likewise no allegation that Mr. Hunt's injury was the result of him participating in any game or other organized activity involving the subject beach ball. Indeed, there is no allegation that Appellants required, invited or encouraged Robert Hunt (or any other event attendee) to throw, push or bat around the subject beach ball. Instead, the underlying complaint in the Hunt Lawsuit alleges that Mr. Hunt's injury occurred as an act of self-defense -- a result of him pushing away the subject beach ball to prevent it from hitting him in the head and to avoid being struck in the face. (Doc No. 1, Exhibit "1", at ¶¶ 9 & 10).

Apart from the allegations or the descriptions regarding the subject beach ball, the underlying complaint in the Hunt Lawsuit also sets forth a variety of alternative liability theories against Wall Street and Hub City, including theories of negligent supervision and negligent failure to warn. The underlying complaint also broadly alleges that Wall Street and Hub City were negligent by "failing to correct or adequately correct a dangerous condition when [they] knew or should have known of its existence". Each of these alternate theories of liability allege separate instances or circumstances of negligence which would clearly trigger ***30** PESLIC's broad duty to defend under the Subject Policy. [11] For instance, with respect to the claims for negligent supervision or monitoring alleged in the Hunt Lawsuit, a 'fair and reasonable' reading of the underlying complaint could certainly include a theory of negligence in which Mr. Hunt has alleged that Appellants' security staff or other employees failed to exercise reasonable care by not observing or stopping one of the RumFest attendees from removing the decorative beach ball from the fountain pond in which it was floating and/or failing to prevent that attendee from inserting the subject beach ball into the crowd.

The question for this Court to answer, therefore, is whether the foregoing allegations ***could fairly and potentially*** bring the negligence claims asserted against Appellants within the coverage afforded by the Subject Policy. Stated differently, has PESLIC established that the allegations raised in the Hunt Lawsuit are cast ***solely and entirely*** within the Amusement Device Exclusion, and are not subject to any other reasonable interpretation. With the understanding that the subject Exclusion must be strictly construed to allow the broadest coverage possible *and* that any doubt regarding the allegations in the underlying complaint ***31** must be resolved in their favor, Appellants submit that the allegations asserted in the Hunt Lawsuit should easily trigger PESLIC's broad duty to defend.

Indeed, a determination of PESLIC's duty to defend Appellants in the Hunt Lawsuit can be reached by answering one, simple question -- is it reasonable to interpret the phrase "extra-large heavy beach ball" (to the extent this is the descriptive label used eleven (11) times throughout the underlying complaint) as a possible reference to a thematic prop intended to serve as a floating decoration, and *not* a "device" to be "punched, struck or kicked". [12] If this Court concludes that such an interpretation is reasonable, then the Amusement Device Exclusion does not apply and PESLIC owes its insureds a duty to defend. As discussed in the next Section, not only is this a reasonable interpretation, it is what the actual, uncontroverted facts establish.

Accordingly, the allegations raised in the Hunt Lawsuit, by themselves, trigger PESLIC's broad duty to defend.

***32** *II. PESLIC has knowledge of uncontroverted facts establishing that the subject beach ball was a decorative prop removed from a fountain pond without Appellants' knowledge or consent,*

and not an "amusement device" to be struck, punched or kicked, and PESLIC cannot ignore these facts simply because the underlying complaint fails to specifically include or recite them

Even if this Court concludes that the allegations raised in the Hunt Lawsuit, as currently pled in the underlying complaint, do not by themselves trigger PESLIC's broad duty to defend, the instant action is one in which the uncontroverted facts underlying the Hunt Lawsuit were known to PESLIC well before it filed its motion for judgment on the pleading; and, therefore, may be properly considered by the Court as a limited exception to Florida's "8-corners rule" in determining PESLIC's duty to defend.

While Appellants recognize that a carrier's duty to defend will *generally* be resolved by reviewing the allegations raised in the underlying complaint and the terms of the applicable policy, the Supreme Court of Florida has expressly noted that "there are some natural exceptions to [the 8-corners rule] where an insurer's claim that there is no duty to defend is ***based on factual issues that would not normally be alleged in the underlying complaint***." *See Higgins v. State Farm Fire & Cas. Co., supra*, at p. 10 fn.2 (emphasis added). In *Composite Structures, Inc. v. Continental Ins. Co.*, 560 Fed.Appx. 861 (11th Cir. 2014), this Court ***33** likewise recognized that courts are "permitted to consider" facts outside the underlying complaint if those facts are "uncontroverted" and "not a fact that would normally be alleged in a complaint". *Citing to* *Nationwide Mutual Fire Insurance Co. v. Keen*, 658 So.2d 1101 (Fla. 4th DCA 1995); *Acosta, Inc. v. National Union Fire Insurance Co.*, 39 So.3d 565 (Fla. 1st DCA 2010).

It is important to emphasize that each of the cases cited above involve circumstances in which the ***insurer*** was the party offering uncontroverted facts to further argue that it did not owe a duty to defend. Here, it is Appellants, as the ***insureds***, who have presented uncontroverted, supplemental evidence regarding the actual and intended use of the subject beach ball, and the fact that it was surreptitiously removed from the fountain pond by an unknown event attendee and without Appellants' knowledge or consent shortly before the incident described in the Hunt Lawsuit. In other words, the instant matter is the *inverse* to the scenarios presented by *Composite Structures*, *Keen* and *Acosta*.

To further illustrate this point, coverage cases involving an analysis of an insurer's 'duty to defend' analysis are for the most part divided into three typical scenarios:
Scenario 1: An underlying complaint which clearly alleges facts that come within the coverage of the applicable liability policy. Obviously, this is a scenario that requires an insurer to defend its insured with no need to look beyond the allegations in the complaint;

***34** *Scenario 2*: An underlying complaint which alleges facts that do *not* come within the coverage of the liability policy and an insurer has no knowledge of any additional or other facts that could result in coverage. Under these circumstances, it is generally held that an insurer would have *no* duty to defend its insured, and;

Scenario 3: An underlying complaint which alleges facts that come within the coverage of the liability policy, but the insurer knows of other actual facts that would ***negate*** coverage. This is the scenario noted in *Composite Structures*, *Keen* and *Acosta* (and others) under which the courts found that there was a limited exception to the 8-corners rule and determined that the insurer was relieved of its duty to defend.

Of course, the instant matter presents the *inverse* to Scenario No. 3 -- i.e. a situation wherein PESLIC argues that the facts alleged in the underlying complaint do not come with the coverage of the Subject Policy, while at the same time being aware of additional, actual facts that would *establish* coverage under the Subject Policy.

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As noted in its order, the district court concluded that the limited exception to the 8-corners rule recognized in *Composite Structures, Keen* and *Acosta* (and others) was inapplicable to the instant matter because "such cases [invoking the exception] are best viewed 'as exceptional cases in which courts have crafted an equitable remedy when it is manifestly obvious to all involved that the actual facts placed the claims *outside the scope of coverage*.' " (Doc. No. 37, at p.2) (italics in ***35** order) *citing to* *Stephens v. Mid-Continent Cas. Co.*, 749 F.3d 1318, 1323 (11th Cir. 2014) (*quoting* *First Specialty Ins. V. 633 Partners, Ltd.*, 300 Fed.Appx. 777, 786 (11th Cir. 2008). With its emphasis on the phrase 'outside the scope of coverage', the district court's order goes on to state that Appellants "wish to use outside evidence to place the claim within coverage, not outside of it. Thus, the consideration of evidence outside of the underlying complaint and departure from the general principal is not warranted here." (Doc. No. 37, a p. 3)

However, this distinction upon which the district court relied as its basis for *not* considering any of the uncontroverted facts regarding the actual and intended use of the subject beach ball not only subverts the bedrock principle of Florida insurance law that an insurer's duty to defend is broad and liberally construed, but Appellants respectfully submit that making such a distinction is patently inequitable to the insured.

Indeed, as has been noted by other courts, "an insurer cannot ignore knowledge of facts that may give rise to coverage under the policy simply because the complaint -- ***which is, after all, drafted by a claimant over whose draftsmanship the insured has no control*** -- does not specifically allege these facts of which the insurer has knowledge." *Revelation Ind. Inc. v. St. Paul Fire & Marine Ins.*, 206 P.3d 919 (Mont. 2009) (emphasis added) (further stating that "[u]nder such circumstances, the insurer must defend. It may commence a defense ***36** under a reservation of rights while conducting an investigation, and it may commence a declaratory action...It may not, however, ignore information in its possession that may give rise to coverage simply because the complaint fails to recite it, and thereupon refuse to defend.").

The logic espoused by the Montana Supreme Court in the *Revelation* case is not only common sense, but it is also wholly consistent with Florida's longstanding principle that an insurer has a broad a duty to defend, and any doubt regarding that duty must be resolved in favor of the insured. Conversely, if an insurer was permitted to shirk its duty to defend even though it is aware of actual, uncontroverted facts that establish coverage under its policy, simply because the underlying complaint failed to include those facts (which may have been unknown to the claimant and his counsel at the time the underlying complaint was filed, or have no particular relevance to the substance of his claim), then the ultimate decision on whether the insured will receive the liability coverage for which it paid a substantial premium is left entirely to the knowledge, discretion and whims of the complaint drafter -- someone over whom the insured has no control. Stated simply, this is not fair or equitable. *See also* *Nateman v. Hartford Casualty Insurance Co.*, 544 So. 2d 1026 (Fla. 3rd DCA 1989) (finding that "the basic insurer-insured relationship" and an insurer's duty to defend should not "be left to the imagination ***37** of the drafter of a complaint", and further holding that actual and uncontroverted facts were properly considered in resolving an insurer's duty to defend).

These concepts were also discussed in *Victoria Select Ins. Co. v. Vrchota Corp.*, 805 F. Supp.2d 1337 (S.D. Fla 2011).[13] In *Victoria Select*, while initially noting that an insurer's duty to defend is generally determined from the allegations contained within the four corners of the complaint, the court recognized that "a different rule may apply when the complaint on its face shows no coverage, but the insured notifies the insurer of facts that would potentially place the claim within the policy coverages". *Id.*, 1343. The court further explained that, under these circumstances, "it is commonly recognized that ***the insurer has an obligation to consider the insured's factual contentions, conduct a reasonable investigation into those facts and base its decision on 'true facts'***." *Id.* (emphasis added); *see also* *Broward Marine, Inc. v. Aetna Ins. Co.*, 459 So. 2d 330, 331 (Fla 4th DCA 1984) (holding that, while the duty to defend is initially determined from the allegation of the complaint, "if it later becomes apparent that claims not originally ***38** within the scope of the pleadings are being made which are within the

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insurance coverage, the insurance carrier upon notification would then become obligated to defend") *citing to* *C.A. Fielland v. Fidelity and Casualty Co. of New York*, 297 So.2d 122, 127 (Fla. 2nd DCA 1974) (noting that "[t]he duty to defend, in the first instance, is determined from the allegations of the complaint...Yet, if it later becomes apparent that claims not originally within the scope of the pleadings are being made which are within the insurance coverage, the insurance carrier upon notification would then become obligated to defend).

Recognizing these common sense concepts, which obviously advance and support Florida's longstanding principle that insurers have a broad duty to defend their insureds, the underlying circumstances in the instant matter establish that PESLIC was aware of each of the following facts regarding the subject beach ball referenced in the Hunt Lawsuit well before it filed its motion for judgment on the pleadings in the district court:
i) The subject beach ball was placed in a fountain/pond as a thematic decoration for the RumFest event;

ii) As such, the beach ball was floating in standing water, purposely away from the reach from any event attendee;

iii) The beach ball was removed from the fountain pond by an unknown event attendee without the knowledge or consent of Wall Street and Hub City, and;

***39** iv) Wall Street and Hub City did not intend for the subject beach ball to be thrown, punched, kicked, or batted around by the event attendees.

These facts are uncontroverted, and were known to PESLIC no later than December 21, 2018 -- the date on which its chosen defense counsel served verified Interrogatory Answers in the Hunt Lawsuit. [14] (Doc. No. 30, at Exhibit "C"). Appellants note that the district court's order states that these facts "are not uncontroverted", because they "directly conflict[] with [PESLIC's] *assertion* that the ball was an amusement device". (Doc. No. 37, p. 2) (italics added). However, an 'assertion' is not a 'fact', [15] and the record is devoid of any evidence whatsoever that would refute any of the four facts enumerated above.

Additionally, Appellants further note that none of uncontroverted facts set forth above were likely known to Robert Hunt and his counsel at the time the Hunt Lawsuit was filed, nor are any of those facts necessary to include in a complaint in order to state a viable negligence claim under Florida law. As merely an event attendee, Robert Hunt would not have known that the subject beach ball had been purposely placed into a fountain pond at the beginning of the RumFest event to serve as a floating decorative prop, and he would have likewise been unaware that ***40** it was an unidentified event attendee who removed this decorative prop from the fountain pond without Appellants' knowledge or consent. Indeed, had those uncontroverted facts been known to Robert Hunt's counsel at the time the Hunt Lawsuit was filed, he may have opted to use the equally descriptive term 'decorative prop', instead of 'extra-large heavy beach ball', in drafting the underlying complaint. [16]

Accordingly, while Appellants steadfastly maintain that the complaint filed in the Hunt Lawsuit alleges facts and negligence theories which fairly and potentially trigger PESLIC's broad duty to defend, if there is any doubt on whether the duty to defend has been triggered this Court is authorized to consider the supplemental evidence which provides additional context regarding the actual and intended use of the subject beach ball. These uncontroverted facts establish that: i) the subject beach ball was intended to be used as decorative prop floating in a pond; ii) it was removed from the pond by an unknown event attendee without Appellants' knowledge or consent, and; iii) Appellants neither intended nor invited the event attendees, including Robert Hunt, to throw, punch, kick, or otherwise bat ***41** around the subject beach ball. Stated differently, not only is the complaint devoid of any allegation that the subject beach ball was meant, intended, or otherwise "required" to be thrown, punched, struck

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or batted around by any RumFest attendee, but the uncontroverted facts known to PESLIC establish that the subject beach was a decorative feature, not an "amusement device".

In that regard, although it was not addressed by the district court in its order, Appellants offered the following analogy in its motion for summary judgment:

Instead of removing a decorative beach ball that had been floating in a fountain pond, what if the unidentified event attendee had removed a golf club that Wall Street had mounted in its restaurant as part of a display of sports memorabilia intended to amuse and entertain its customers? If Robert Hunt had been accidentally injured as a result of this customer swinging a golf club that he had surreptitiously removed from its wall mount, and the resulting personal injury lawsuit against Wall Street included similar claims of negligent supervision and negligent failure to prevent or correct a dangerous condition, it would defy common sense to conclude that the golf club was somehow an "amusement device" rather than an item of sports memorabilia that had been removed from a wall mount. Indeed, it would be an absurd result to hold that the Amusement Device Exclusion precludes coverage for this hypothetical scenario -- which represents precisely the type of situation for which a bar owner procures general ***42** liability coverage.[17] The circumstances underlying the Hunt Lawsuit are no different. *See Deni Associates of Florida Inc., supra*, at 1140 ("[s]uffice it to say that insurance policies will not be construed to reach an absurd result).

Appellants respectfully submit that, if the Court believes that the facts and alleged in the underlying complaint do *not* somehow trigger PESLIC's broad duty to defend, an exception to the '8-corners rule' is warranted in this case not only because these are facts that that would not normally be alleged in the underlying complaint (and were likely unknown to Robert Hunt and his attorney), but also because PESLIC had knowledge of these facts well before it asked the district court to find that it did not owe Appellants a duty to defend. To hold otherwise would not only subvert Florida's longstanding principles that an insurer's duty to defend is broad and any doubt must be resolved in favor of the insured, but would result in a clearly inequitable outcome where Appellants are left entirely without coverage for a negligence claim in which one of its invitees was allegedly injured ***43** after being struck by a decoration that was removed from a pond by an unknown person without Appellants' knowledge or consent.

III. If the Amusement Device Exclusion is somehow found to be applicable to the claims raised in the Hunt Lawsuit, this Exclusion is ambiguous and susceptible to multiple, reasonable interpretations; and, therefore, must be construed against PESLIC as the drafter of the Exclusion

Although Appellants assert that, for the numerous reasons set forth above, the Amusement Device Exclusion is *not* applicable to the claims raised in the Hunt Lawsuit, if this Court concludes that the Exclusion does apply to the underlying complaint, Appellants respectfully submit that this Exclusion is ambiguous and susceptible to multiple interpretations; and, therefore, must be construed against PESLIC as the drafter of the Exclusion.

It is well-established under Florida law that, if language in an insurance policy is susceptible to differing interpretations, it should be construed in favor of the insured. *See eg.* *Container Corp. of Am. v. Maryland Cas. Co.*, 707 So.2d 733, 736 (Fla. 1998). Stated differently, if a policy provision is susceptible to more than one reasonable construction -- with one interpretation that provides coverage and another interpretation that limits coverage -- that provision will be considered ambiguous. *See Weldon v. All Am. Life Ins. Co.*, 605 So. 2d 911, 914-15 (Fla. 2d DCA 1992) *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). ***44** And, under Florida law, ambiguous policy provisions are to be interpreted liberally in favor of the insured and strictly against the insurer, as the drafter of the policy. *See* *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1076 (Fla. 1998); *Deni Assocs. of Fla., Inc. supra,* at 1138; *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 744 (Fla. 2002); *Shelby Mut. Ins. Co. v. Manchester*, 376 So.2d 266, 268 (Fla. 3rd DCA 1979) (where the terms of an insurance policy are capable of

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two constructions, the construction that permits recovery is to be given effect); *Beasley v. Wolf*, 151 So.2d 679, 680 (Fla. 3rd DCA 1963) (insurance policies "are to be construed strictly and most strongly against the insurer and liberally in favor of the insured, so as to effect the dominant purpose of payment to the insured.").

Moreover, as it relates to policy provision which attempt to exclude coverage (such as the Amusement Device Exclusion), such exclusionary clauses are to be construed narrowly and even more strictly against the insurer than coverage clauses. *See State Comprehensive Health Ass'n v. Carmichael*, 706 So. 2d 319, 320 (Fla. 4th DCA 1997); *Demshar v. AAACon Auto. Transport, Inc.*, 337 So.2d 963, 965 (Fla. 1976) (stating that exclusionary clauses are construed more strictly than coverage clauses).

Appellants certainly acknowledge that, if the language in an insurance contract is found to be plain and unambiguous, it must be interpreted in accordance with its plain meaning so as to give effect to the policy as written, and that in order ***45** for an insurance policy to be found ambiguous, "[t]here must be a genuine inconsistency, uncertainty, or ambiguity in meaning that remains after resort to the ordinary rules of construction." *Valiant Ins. Co. v. Evonosky*, 864 F.Supp. 1189, 1191 (11th Cir. 1994) (further noting that the mere fact that policy language requires interpretation does not necessarily render the language ambiguous.); *see also Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975--76 (Fla. 2017).

With that said, it is readily apparent that Amusement Device Exclusion upon which PESLIC relies in this case has glaring ambiguity and is susceptible to multiple interpretations. Indeed, the district court's order, itself, serves as compelling proof that the Amusement Device Exclusion is ambiguous and can be interpreted *several* different ways.

Although there are multiple instances of ambiguity found within the Exclusion, the language most scrutinized by the district court is found within the prefatory clause which states as follows:

> This insurance does not apply to any loss, claim, 'suit' or any obligation of any 'insured' to indemnify, defend or contribute jointly or severally with another because of 'bodily injury', 'property damage', 'personal and advertising injury' or 'injury', actually or allegedly arising directly or indirectly based on, attributable to, arising out of, involving, as a consequence of, resulting from or in any way related to the ownership maintenance, operation, sponsorship, instruction, supervision, set-up or take-down or other use of an 'amusement device'...

***46** (Doc. 1, at Exhibit "2", p. 19).

In short, Appellants assert that the most logical and reasonable construction of this prefatory clause is that the Amusement Device Exclusion is intended to apply only to those claims arising out of circumstances where a third-party vendor has provided one of the twenty-plus examples of "amusement devices" specifically listed within the Exclusion (or an "amusement device" of the same kind or class), and there is a resulting claim for indemnity, defense or contribution. Such an interpretation is certainly a reasonable one, *especially* in the context of an activity such as a rock wall, mechanical bull, bounce house or dunk booth etc. (or any of the other numerous games and activities specifically listed within the Exclusion), as it would not be unusual for these types of "amusement devices" to be installed or set up by a third-party for a special event promoted or hosted by an insured, with the third-party also requiring the insured to execute some type of corresponding indemnity agreement. Moreover, the specific reference to 'indemnity, defense and contribution' is language that is conspicuously absent from several of the other Exclusions contained within the Subject Policy. *See eg.* 'Exclusion -- Athletic or Sports Participants'; 'Exclusion -- Stunt Activity'; 'Exclusion -- Cross-Suits Liability'; 'Exclusion -- Drinking Games & Alternative Consumption', and; 'Exclusion --

Aircraft, Auto or Watercraft' -- none of which contain similar language. (Doc No. 1, at Exhibit "B", pp. 20, 21, 26, 28 and 78). The fact that ***47** these three words are absent from every other exclusionary endorsement to the Subject Policy certainly raises a reasonable question of why these words were included as part of the Amusement Device Exclusion -- and their inclusion certainly lends support to Appellants' interpretation of the Exclusion.

Conversely, PESLIC argued to the district court that the clause "to indemnify, defend or contribute jointly or severally" only modifies " 'suit' " and "obligation" ***but not*** "loss" or "claim." The district court described PESLIC's analysis of the prefatory clause as "convoluted", and further stated that PESLIC's lengthy analysis "exemplifies the mental gymnastics required if the Court were to adopt its reading." (Doc. No. 37, p. 8).

Ultimately, the district court expressly "disagree[d] with both interpretations." *Id.* Instead, the district court arrived at its own (third) interpretation regarding the Amusement Device Exclusion. In support of its interpretation, the district court stated that "[t]he amusement device exclusion in its entirety presents a strong argument for use of the serial comma." *Id.* To that end, it is the district court's opinion that the "clearest reading" of the prefatory clause would be one in which a 'serial comma' was placed between the word "suit" and the phrase "or any obligation", such that the phrase "to indemnify, defend of contribute" would only modify "obligation". *Id.*, at p. 9. In further interpreting the prefatory clause of the Exclusion, the district court went on to state that "it would ***48** [also] be appropriate for a comma to be placed in between 'defend' and 'or contribute' because contribute does not modify defend but is another obligation of any insured." *Id.*, at p. 9. However, neither of the 'serial commas' that the district court indicated would be appropriate to insert in order to provide the "clearest reading" of the Exclusion *are actually incorporated into the Subject Policy. See* *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla.1979) (recognizing that it is improper for the courts to rewrite contracts, and further noting that, if the policy is susceptible to multiple interpretations, the preferred interpretation is the one that provides the widest range of coverage); *Taurus Holdings, Inc. v. U.S. Fidelity and Guar. Co.*, 913 So.2d 528 (Fla. 2005). To borrow a phrase from the district court, the absence of these 'serial commas' coupled with the fact that the explicit reference to 'indemnity, defense and contribution' is something that appears to be found only within the Amusement Device Exclusion (and missing from several other Exclusions), leaves the Subject Policy with a less-than-clear meaning.

Finally, it bears noting that, following the entry of the district court's order, another legally trained professional and apparent law school professor weighed in with online commentary regarding the court's decision and his own analysis of the ***49** Amusement Device Exclusion. [18] *See* https://www.adamsdrafting.com/some-serious-comma-confusion-out-of-florida/. In arriving at ***two*** additional, plausible interpretations (fourth and fifth) of the Amusement Device Exclusion, this commentator noted *seven* different "problems" with the district court's suggested use of a 'serial comma' in interpreting the Exclusion, including for example:

1) The serial comma...has nothing to do with what is going on in this provision. More specifically, MSCD ¶¶ 12.57--12.76 describes three kinds of confusion that could be remedied by a serial comma: inadvertent combined elements, inadvertent apposition, and inadvertent object of preposition. None of the three appears in this provision. [19]

2) The final item in a list never modifies the other items in the list. For example, there's no basis for saying that in the phrase a red, blue, green, or yellow ball the word yellow somehow modifies the words red, blue, and green.
3) The [district court] suggests that the "clearest reading" involves adding a serial comma after 'suit', but does not say what the two or more other possible meanings are. (If there were just one other possible meaning, presumably the district court would have said "clearer.")

4) A comma added after 'suit' would not be a serial comma--the [word] 'any' before 'obligation' turns the noun phrase beginning obligation into a separate object of the sentence, ***50** with the nouns 'loss', 'claim', and 'suit' serving as an initial group of objects. A comma after 'suit' would have to serve some other purpose.

In light of the fact that ***five*** different interpretations of the Amusement Device Exclusion have been rendered by several, knowledgeable lawyers as well as an experienced judge, Appellants agree with the online commentator that "the language at issue is poor". *Id.* To that end, however, a poorly drafted, grammatically unclear Exclusion must not operate to the detriment of the insured. Indeed, as the Supreme Court of Florida has previously recognized, "[t]here is no reason why insurance policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in them, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions." *Harnett v. Southern Ins. Co.*, supra.

To engage in the level of parsing and analysis that is necessary to clearly understand the scope and meaning of the Amusement Device Exclusion, including the apparent assumption of multiple 'serial commas' in order to achieve the "clearest reading" of the Exclusion, is not only too burdensome but patently unfair to a layperson or 'non-Philadelphia lawyer' such as Appellants. It also runs ***51** contrary to the well-established principles that ambiguous policy provisions are to be interpreted liberally in favor of the insured and strictly against the insurer, and exclusionary clauses are to be construed narrowly and even more strictly against the insurer than coverage clauses. Because the Amusement Device Exclusion is susceptible to multiple interpretations it must be construed against PESLIC as the drafter of the Subject Policy.

IV. The district court's ruling that PESLIC has no duty to defend and, therefore, no duty to indemnify its insureds for the claims raised in the Hunt Lawsuit has effectively denied Appellants any opportunity to present to a factfinder the uncontroverted facts that the subject beach ball was not an "amusement device" to be "struck, punched or kicked"; but, rather, a decoration intended to float in a fountain pond as a thematic prop

It is well-established that, under Florida law, an insurer's duty to indemnify is determined by analyzing the policy coverages in light of the ***actual facts*** of the underlying case. *Auto Owners Ins. Co. v. Travelers Cas. & Surety Co.*, 227 F.Supp.2d 1248, 1258 (M.D. Fla. 2002) (*citing* *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1077 n.3 (Fla. 1998)). Unlike the broad duty to defend discussed in the other Sections of this Brief, an insurer's duty to indemnify its insured "is narrower and is determined by the underlying facts adduced at trial or developed through discovery during the litigation." *U.S. Fire Ins. Co. v. Hayden Bonded Storage Co.*, 930 So.2d 686, 691 (Fla. 4th DCA 2006); *see also* *Hagen v.* ***52** *Aetna Cas. and Sur. Co.*, 675 So.2d 963, 965 (Fla. 5th DCA 1996) (recognizing that "[r]egardless of the allegations of the complaint, it is the underlying facts that determine the duty to indemnify."). In other words, to determine whether there is a duty to indemnify, one looks at the actual facts, not only those that were alleged in the state court complaint.

Appellants recognize the body of case law which stands for the proposition that if an insurer has no duty to defend, it also has no duty to indemnify. *See e.g.* *Clarendon Nat'l Ins. Co. v. Vickers*, 2006 WL 8434796, at *3 (S.D. Fla. May 25, 2006) ("It is well-settled law in Florida that where an insurer has no duty to defend, it has no duty to indemnify its insured.") *Burlington Ins. Co., Inc. v. Normandy General Partners*, 560 Fed.Appx. 844, 847--48 (11th Cir.2014) ("If, on the other hand, the insurer had no duty to defend the insured, it necessarily follows that it had no duty to indemnify.") *WellCare of Fla., Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 16 So.3d 904, 906 (Fla. 2nd DCA 2009) ("[T]he duty to indemnify is narrower than the duty to defend and thus cannot exist if there is no duty to defend."). However, given that the district court was unwilling to consider

the uncontroverted facts regarding the actual and intended use of the subject beach ball, applying this principle to the instant matter will result in a grossly inequitable outcome where Appellants have been completely denied any opportunity to present (uncontroverted) evidence to a factfinder that would establish that the subject ***53** beach ball allegedly injured Robert Hunt was not an "amusement device" and not something that was intended to be thrown, punched, kicked or otherwise batted around; but, rather, a decorative prop that was removed from a fountain pond by an unknown individual without Appellants' knowledge or consent.

At a minimum, therefore, Appellants respectfully submit that it is premature to make any determination regarding PESLIC's duty to indemnify in the Hunt Lawsuit until the actual facts regarding the subject beach ball have been determined by the factfinder, or until such time that the Hunt Lawsuit has resulted in a final judgment, settlement, or other final resolution. See *Scottsdale Ins. Co. v. Klub Kutter's Bar & Lounge, LLC*, 2018 WL 1933702, at *6 (S.D. Fla. Apr. 24, 2018) (determining that insurer had a duty to defend the insured and staying the proceedings on the indemnity issue until the underlying case resulted in a final judgment, settlement, or final resolution through some other means); *Mt. Hawley Insurance Company v. Maitland Center, LLC*, 2018 WL 3634579, at *4 (S.D. Fla. 2018) (same).

***54** *CONCLUSION & STATEMENT OF RELIEF SOUGHT*

Appellants respectfully submit that the district court's order loses sight of the forest for the trees, and its ultimate conclusion that PESLIC has neither a duty to defend nor a duty to indemnify its insured for the negligence claims raised in the Hunt Lawsuit is not only a patently inequitable result given the underlying circumstances, but also runs contrary to several, well-established principles of Florida insurance law.

By concluding that PESLIC owes neither a duty to defend nor a duty to indemnify in the underlying Hunt Lawsuit, the district court's order has left Appellants without coverage for simple negligence claims arising out an incident in which one of their customers was allegedly injured in an act of self-defense, as a result of pushing away an extra-large, heavy beach ball to prevent it from hitting him in the face. Moreover, the district court's order has effectively denied Appellants any opportunity to have a judge or jury consider the uncontroverted facts establishing that the subject beach ball was actually a decorative prop that had been removed from a fountain pond by an unknown RumFest attendee without Appellants' knowledge or consent -- information and facts that have been known to PESLIC long before it even filed its motion for judgment on the pleadings. Appellants respectfully submit that this is precisely the type of situation for which ***55** they paid PESLIC a *significant* premium, in exchange for general liability coverage, and the district court's ruling has denied them the benefit of that bargain.

Accordingly, for the reasons stated above, Appellants, Hub City Enterprises, Inc. and Wall St. Enterprises of Orlando, Inc., respectfully request this Court to enter an Order which reverses or vacates the district court's Opinion and Order (Doc. No. 37), and the subsequent final judgment (Doc. No. 38) entered by the district court on October 4, 2019, to the extent that the district court's order and corresponding final judgment are based on its finding that the Amusement Device Exclusion precludes coverage under the Subject Policy for the negligence claims raised in the Hunt Lawsuit. Appellants further request that the Court remand this action back to the district court with instructions to grant their Motion for Summary Judgment. (Doc. No. 30).

Alternatively, Appellants would request that this Court reverse or vacate the district court's Opinion and Order and subsequent Final Judgment, with instructions that PESLIC has a duty to defend Appellants in the Hunt Lawsuit but to stay any determination regarding its duty to indemnify until a factual finding has been rendered on whether the subject beach ball referenced in the Hunt Lawsuit constitutes an "amusement device" under the Subject Policy's Amusement Device Exclusion.

***56** Dated: December 16, 2019.

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Footnotes

1 Appellants' Motion for Summary Judgment also served as its Response to PESLIC's Motion for Judgment on the Pleadings.

2 PESLIC sought to recover the attorneys' fees it incurred for suing its insureds and, based on PESLIC's failure to cite any case law or provide other authority to support such an award, the lower court denied PESLIC's request.

3 The Interrogatory Answers prepared by PESLIC's chosen counsel were served on December 21, 2018. PESLIC's Motion for Judgment on the Pleadings was filed almost four (4) months later -- i.e. on April 1, 2019.

4 These same facts were reiterated and supplemented in the Affidavit of Paul Emery, the Events & Marketing Director for the Wall Street Plaza for the last nine (9) years, filed in support of the motion for summary judgment filed by Wall Street and Hub City. (Doc. No. 30, Exhibit "A").

5 To the extent PESLIC may advance an argument that this Court should not consider these photographs which depict the intended use of the subject beach ball, Wall Street and Hub City note that PESLIC's Complaint for Declaratory Judgment includes photographs that were not part of the complaint filed in the Hunt Lawsuit.

6 The Subject Policy provides Wall Street and Hub City with commercial general liability coverage up to $1,000,000 for each "occurrence" and $2,000,000 general aggregate.

7 It bears noting that nowhere in the Exclusion is the term "beach ball" mentioned or included.

8 A "serial comma" is a comma used to separate the second-to-last item in a list from a final item introduced by the conjunction *and* or *or*, and is also sometimes referred to as a 'Harvard comma' or an 'Oxford comma'. *See* https://www.merriam-webster.com/dictionary/serial%20comma.

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9 As further discussed herein, there are even more, reasonable interpretations of this poorly worded and grammatically confusing Exclusion.

10 This principle is generally known as the "8-corners rule" -- referring to the four corners of the underlying complaint, and the four corners of the subject insurance policy. *See eg.* *Colony Ins. Co. v. Barnes*, 410 F.Supp.2d 1137 (N.D. Fla. 2005). However, as discussed in the next Section, Florida also recognizes limited exceptions to the 4-corners rule.

11 The district court's order does not discuss the alternate theories of liability alleged against Appellants in the underlying complaint, which include *inter alia* claims of negligent supervision, negligent failure to maintain the premises, and negligent failure to train their employees.

12 Wall Street and Hub City candidly admit that, by following PESLIC down the proverbial 'rabbit hole' and responding to the various arguments raised in its motion for judgment on the pleadings regarding the meaning of numerous words and phrases found within the Amusement Device Exclusion, they 'lost sight of the forest for the trees' -- and, in turn, failed to highlight for the district court the simplicity on which the question of PESLIC's broad duty to defend actually rests. In other words, it is entirely unnecessary to parse through the various words and numerous phrases found within the Exclusion and engage in the "mental gymnastics" noted by the district court regarding the meaning of those words *if* it is reasonable to conclude that the term "extra-large, heavy beach ball" is simply the descriptive label that Robert Hunt's attorneys used to refer to what was merely a decorative prop. Such a conclusion is indeed reasonable because that is exactly what the "extra-large, heavy beach ball" was.

13 In its order, the district court recognized that *Victoria Select* stands for the proposition that courts may consider evidence beyond the underlying complaint and policy when an *insured* notifies the *insurer* of facts that would potentially place the claim within the policy and the insurer fails to do a reasonable investigation of those facts. (Doc. No. 37, p. 2). However, the district court determined that *Victoria Select* opinion was "distinguishable, not binding on this Court, and cites no Florida cases in support". *Id*. The district court's order does not identify how the principles discussed in the *Victoria Select* are distinguishable from the matter at hand.

14 PESLIC filed its motion for judgment on the pleadings on April 1, 2019. (Doc. No. 27).

15 To illustrate this point, it is an uncontroverted fact that the sky is blue. This does not become a disputed fact simply because someone may "assert" that the sky is yellow.

16 If the label 'decorative prop' had been substituted in place of the term "extra-large heavy beach ball", the underlying Hunt Lawsuit would instead include allegations that Hub City and Wall Street were negligent by, *inter alia*: i) allowing the use of a decorative prop by the crowd of guests at RumFest; ii) failing to warn or adequately warn Plaintiff of the dangerous condition created by a decorative prop, and; iii) failing to train and/or adequately supervise their employees regarding the dangerous condition created by the crowd's use of a decorative prop.

17 It bears noting that, in response to Appellants' motion for summary judgment, PESLIC offered yet another hypothetical scenario and stated that "if a patron were injured after...a light fixture became detached from the ceiling...the commercial general liability insurance would potentially apply". (Doc. No. 31, p.14). As PESLIC, itself, suggests, if Appellants are covered for negligence claims made by a hypothetical patron injured by a decorative light fixture falling from the ceiling, the result should be no different for negligence claims raised by a patron allegedly injured by a decorative beach ball removed from a fountain pond by an unknown person without Appellants' knowledge or consent.

18 According to his online resumé, the author of this commentary, Kenneth Adams, is a member of the New York Bar, and has taught contract drafting as an adjunct professor at Hofstra University School of Law, the University of Pennsylvania Law School, and Notre Dame Law School. *See* https://www.adamsdrafting.com/wp/wp-content/uploads/2017/09/Kenneth-A.-Adams-Resume-25-Sept-2017.pdf.

19 MSCD is a reference to the guide 'A Manual of Style for Contract Drafting', authored by Mr. Adams, and focuses on "how to express contract terms in prose that is free of the archaisms, redundancies, ambiguities, and other problems that afflict traditional contract language". *See* https://www.americanbar.org/products/inv/book/297140045/

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