IN THE FLORIDA SUPREME COURT
CASE NO: SC01-464

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Defendant/Petitioner,

v.

ANGELA STECK,

Plaintiff/Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 2D00-932

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PRELIMINARY STATEMENT

For the purposes of this Initial Brief, Plaintiff/Appellee Angela Steck will be referred to as Angela Steck or Ms. Steck. Defendant/Appellant Blue Cross and Blue Shield of Florida, Inc., will be referred to as "BCBSF."

References to the Appendix shall be made by citing "App." and the number of the document in the Appendix, as well as by stating the name of the pleading referred to. In regard to citations to deposition transcripts filed with the trial court, portions of which are included in the Appendix, reference to the pertinent page and line of the deposition is also included.

STATEMENT OF THE CASE AND OF THE FACTS

This case arises out of an automobile/pedestrian accident that occurred on June 29, 1997 at about 11:00 p.m. at the intersection of North Dale Mabry Highway and Humphrey Avenue in Tampa. The accident occurred when Angela Steck walked in front of an automobile traveling southbound on North Dale Mabry Highway. As a result of her injuries, Ms. Steck required extensive hospitalization and incurred substantial hospital and medical expenses (App. 6 - Amended Complaint). At the time of her accident, Ms. Steck was insured pursuant to a "Conversion Option III" health insurance contract issued by BCBSF. (App. 17 - Affidavit of Sandra Jackson)

On February 11, 1998, Ms. Steck filed this action for breach of contract and declaratory judgment, seeking a determination that the medical expenses she incurred for treatment of the injuries she suffered in her June 29, 1997, accident were covered under BCBSF's Conversion Option III health insurance contract. (App. 6 - Amended Complaint) BCBSF answered, denying any obligation to pay contract benefits, because under her policy, benefits were excluded for "a condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician." (App. 5 - Answer to Amended Complaint)

Shortly after Ms. Steck's admission to St. Joseph's Hospital, BCBSF discovered that her blood alcohol serum level at the time of the accident was .312, which is equal to a .26 whole blood equivalency, more than 3 times the legal limit to be deemed under the influence of alcohol had Ms. Steck been driving a car at the time of her accident. (App. 16 - Affidavit of Mark Montgomery) BCBSF subsequently learned that her blood alcohol level was actually substantially higher, due to the fact that Ms. Steck received 4.7 liters of intravenous fluids in the roughly 36 minute period between her accident and her blood draw. Consequently, her blood alcohol level at the time of her accident was determined to be between .40 and .50, rather than .26. (App. 16 - Affidavit of Mark Montgomery) Ms. Steck's blood alcohol level was analyzed by Dr. Mark Montgomery, a doctorate in the field of biochemical toxicology. Dr. Montgomery's affidavit reflects that Ms. Steck's blood alcohol level was the highest he has ever encountered in a living human being. (App. 16 - Affidavit of Mark Montgomery) In Dr. Montgomery's opinion, Ms. Steck was severely impaired at the time of her accident, with all aspects of her central nervous system functioning depressed, including impairment of normal thinking, balance, decision making, judgment, coordination, vision, and the ability to carry out motor functions such as walking and talking. In common parlance, Ms. Steck was drunk at the time of her pedestrian/auto accident. (App. 16 - Affidavit of Mark Montgomery)

BCBSF refused to pay Ms. Steck's hospital and other health care bills incurred due to the injuries she received in her accident. Payment was refused based upon a contract exclusion that stated:

> This contract does not provide benefits for: . . . A condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician; . . .

The contract defined "condition" as: "Any covered disease, illness, ailment, injury or bodily malfunction of an insured." (App. 17 - Affidavit of Sandra Jackson)

Ms. Steck asserted that this exclusionary language means only that there is no coverage for conditions caused by the direct effect of intoxicating liquors or narcotics on the system of an insured (presumably, for example, alcohol toxicity or drug overdose), but that it does not exclude coverage for injuries resulting from acts of an insured by reason of their intoxication. BCBSF disagreed and asserted that the exclusion precludes coverage if Ms. Steck's drunkenness was a cause–either direct or indirect–of her pedestrian/automobile accident and her resulting injuries.

Ms. Steck was deposed after suit was filed and testified that she had no recollection of any events that occurred after nine in the morning on the day of her accident, when she had coffee with her mother at breakfast. In fact, Ms. Steck testified that her next recollection after 9:00 a.m. on June 29, 1997, was waking up in St. Joseph's Hospital in Tampa in the middle of August 1997, about one and one-half months after the accident. (App. 19 - Depo. of Angela Steck pg. 11, ln. 1 - pg. 12, ln. 18, and pg. 34, ln. 6-12) Ms. Steck admitted that her mind was a "blank" concerning how her accident occurred. (App. 19 - Depo. of Angela Steck, pg. 11, ln. 11-16)

At the time of her accident, Ms. Steck had been diagnosed with Moebius Syndrome, a congenital condition that prevented her from moving her eyes laterally. (App. 14 - Depo. of Dr. Moira Burke - pg. 4, ln. 19-25) Ms. Steck's uncorrected vision at the time of her accident was 20/400, but with glasses was 20/30 to 20/40. (App. 14 - Depo. of Dr. Burke - pg. 6, ln. 15-16 and pg. 19, ln. 13-15) She did not have double vision or lazy eye and also had full peripheral vision, but did have to turn her head to see from side to side. (App. 14 - Depo. of Dr. Burke - pg. 5, ln. 16 - pg. 6, ln. 8 and pg. 7, ln. 5-19) Ms. Steck's opthamologist testified that Ms. Steck's vision would qualify her for a Florida driver's license, but in order to cross a street, Ms. Steck had to turn her head to observe oncoming traffic. (App. 14 - Depo. of Dr. Burke - pg. 9, ln. 15 - pg. 10, ln. 7). Significantly, Ms. Steck testified that she crossed streets in precisely the manner described by her opthamologist and she admitted that

her Moebius Syndrome did not cause her difficulty in crossing streets. (App. 19 - Depo. of A. Steck - pg. 44, ln. 1-15)

Although Barbara Steck filed an affidavit claiming her daughter, Angela, was not wearing her glasses at the time of the pedestrian/auto accident, Mrs. Barbara Steck was not present at the time and could not have personal knowledge concerning whether her daughter was wearing her glasses at the time of her accident. (App. 19 - Depo of A. Steck - pg. 11, ln. 17-21) Angela Steck also filed an affidavit in opposition to BCBSF's motion for summary judgment asserting that she was not wearing her glasses at the time of the accident, but that affidavit testimony was contrary to Ms. Steck's earlier deposition testimony that her mind was a "blank" as to how the accident occurred and that she had no recollection of the day of the accident between 9:00 a.m. and the time of the accident, about 11:00 p.m. (App. 19 - Depo of A. Steck - pg.. 11, ln. 11-16)

The driver of the vehicle that struck Ms. Steck, Willard Conrad, was deposed and his deposition was filed. Mr. Conrad did not admit to any negligent act that contributed to cause the accident.

Ms. Steck's accident was also witnessed by several other individuals present at the accident scene. One of those impartial eye witnesses, Joseph VanBuren, a cab driver for United Cab Company, was stopped in his taxicab facing east at the traffic light on Humphrey Avenue at the Dale Mabry intersection where the accident occurred. (App. 18 - Depo. of VanBuren - pg. 6, ln. 21 - pg. 7, ln.2) Mr. VanBuren was waiting for the light to turn green and had no vehicle in front of him. (App. 18 - Depo. of VanBuren - pg. 7, ln. 23 pg. 8, ln. 2) The intersection was well lit, the weather was clear, and his view was unobstructed. (App. 18 - Depo. of VanBuren - pg. 9, ln. 1-13). Mr. VanBuren observed Ms. Steck for about five minutes, from a distance of approximately 50 to 60 feet. (App. 18 - Depo. of VanBuren - pg. 11, ln. 12 -pg. 12, ln. 11) Mr. VanBuren saw Ms. Steck standing in the Dale Mabry Highway median waiving her hands, and apparently talking to herself. (App. 18 - Depo. of VanBuren - pg. 9, ln. 23-25 and pg. 11, ln. 8-11) Ms. Steck looked to her right at on-coming southbound traffic once or twice during the time Mr. VanBuren watched her. (App. 18 - Depo. of VanBuren - pg. 13, ln. 5 - pg. 14, ln. 7) Although there were breaks in traffic sufficient to allow Ms. Steck to cross the southbound lanes of Dale Mabry Highway, she did not take advantage of those opportunities. (App. 18 - Depo. of VanBuren - pg. 14, ln. 14-21). Instead, Ms. Steck finally looked to her right again, should have seen an oncoming vehicle, but simply walked in front of a southbound car and was struck by the car. (App. 18 -Depo. of VanBuren - pg. 15, ln. 22 - pg. 16, ln. 22) In Mr. VanBuren's opinion, there was nothing the driver of the auto that struck

Ms. Steck could have done to avoid the accident. (App. 18 - Depo. of VanBuren - pg. 16, ln. 23 - pg. 17, ln. 6)

After discovery, on November 23, 1998, BCBSF filed a motion for final summary judgment, on the grounds that: (1) the health insurance contract's "drunkenness exclusion" excluded coverage for expenses incurred as a result of Ms. Steck's drunkenness; (2) Ms. Steck was drunk at the time of her accident, due to a measured blood alcohol level of .26 and an actual blood alcohol level of .40 to .50; and (3) the undisputed testimony concerning the manner in which the accident occurred demonstrated that the accident was caused by Ms. Steck's drunkenness. (App. 20 - Blue Cross and Blue Shield of Florida, Inc.'s motion for final summary judgment) On December 1, 1998, Ms. Steck filed her own Motion for Final Summary Judgment, asserting that she was entitled to summary judgment in her favor because the "drunkenness exclusion" did not apply to conditions resulting from acts by Ms. Steck that occurred because she was intoxicated. (App. 15 - Plaintiff's Motion for Final Summary Judgment)

On February 15, 1999, Judge Pendino heard argument on the cross motions for summary judgment. On March 2, 1999, Judge Pendino entered orders granting BCBSF's motion for final summary judgment and denying Ms. Steck's motion for final summary judgment. (App. 11 - Order Granting Blue Cross and Blue Shield of Florida, Inc.'s Motion for Summary Judgment) On March 11, 1999, Ms. Steck filed a motion for rehearing. (App. 9 - Plaintiff's Motion for Rehearing) After further pleading regarding the pertinent legal issues, on July 19, 1999, Judge Pendino heard and granted Ms. Steck's motion for rehearing, inviting the parties to reassert and reargue their competing summary judgment motions.

In the meantime, Ms. Steck filed an Amended Complaint, seeking recovery for medical bills incurred after the June 27, 1997, accident, including medical bills incurred in connection with a second automobile/wheelchair accident on September 20, 1998. (App. 6 - Amended Complaint) On August 19, 1999, BCBSF filed an Amended Answer, again raising the drunkenness exclusion and other defenses, as it appeared from hospital records that Ms. Steck was also intoxicated at the time of the 1998 collision. (App. 5 - Answer to Amended Complaint)

On December 13, 1999, the parties again argued their summary judgment motions, and on January 24, 2000, Judge Pendino entered a partial summary judgment on liability in favor of Plaintiff and an order denying Defendant's motion for summary judgment, (App. 1 and 2) citing Mason v. Life & Casualty Ins., Co., of Tenn., 41 So.2d 153 (Fla. 1949) ("Mason I") and Mason v. Life & Casualty Ins., Co., of Tenn., 41 So.2d 155 (Fla. 1949 ("Mason II").

BCBSF appealed and the Second District affirmed, finding that Mason II controlled and holding that the policy's drunkenness exclusion only applied to exclude expenses related to a "direct" injury to biological systems of a person, such as acute alcohol poisoning or liver damage, not to "indirect" injuries, such as accidental injuries caused by the behavior of an insured while intoxicated. Blue Cross and Blue Shield of Florida, Inc. v. Steck, 778 So.2d 374 (Fla. 2d DCA 2001).

BCBSF timely filed a petition for review and this Court accepted jurisdiction on August 28, 2001.

SUMMARY OF ARGUMENT

BCBSF's drunkenness exclusion is authorized by, and tracks the language of, Section 627.629, Florida Statutes. The precursor of Section 627.629, Florida Statutes, was promulgated by the Florida Legislature in 1953. Since 1953, there have been eight reported decisions in Florida construing drunkenness exclusions in life or health insurance policies. In all of the cases (except this one), including Harris v. Carolina Life Insurance Co., 233 So. 2d 833 (Fla. 1970), Florida's appellate courts and the Eleventh Circuit Court of Appeals have either explicitly or implicitly held that Florida's drunkenness exclusion precludes recovery of policy benefits if the insured's drunkenness was an indirect cause of the insured's death or injury. BCBSF submits that the undisputed facts in this case demonstrate that Ms. Steck's drunkenness was the cause (or, at least, a cause) of her pedestrian/auto accident and that, consequently, the conditions and injuries resulting from that accident are not covered under her health insurance policy.

The reliance of the Court below on Mason I and Mason II is misplaced because both of these decisions predate Harris and the 1953 statute authorizing the inclusion of a drunkenness exclusion in Florida heath insurance policies. Mason I and Mason II equate a drunkenness exclusion which excludes coverage for a claim "resulting directly from" the use of intoxicating liquor with an exclusion which applies if a claim is "resulting from" the use of intoxicating liquor. BCBSF submits that Mason II was reversed by implication by Harris or, alternatively, was wrongly decided, and that in any event, its rationale has been superceded by statute.

Mason II should be explicitly reversed for at least three reasons. First, Mason II should be reversed because a policy exclusion for injuries which "result directly from" drunkenness has an obviously different meaning than an exclusion for injuries which "result from" drunkenness. In addition, Mason II should be reversed because extension of the Mason II rationale to the statutorily permitted illegal occupation health insurance policy exclusion would render that statutory provision meaningless. Finally, Mason II should be reversed because reversal will promote a clear legislative policy decision to impose on insureds rather than insurers and their other policy holders, the costs of certain personally destructive behavior by an insured.

ARGUMENT

I. FLORIDA LAW NOW APPLIES THE DRUNKENNESS EXCLUSION IN HEALTH INSURANCE POLICIES IF AN INSURED'S DRUNKENNESS IS ONE OF THE CAUSES OF AN INSURED'S ILLNESS OR INJURY.

A. Mason I and Mason II, the Pre-1953 Law.

Florida's first reported decisions dealing with drunkenness exclusions in life or health insurance policies are Mason v. Life & Casualty Inc. Co. of Tennessee, 41 So. 2d 153 (Fla. 1949) ("Mason I"), and Mason v. Life & Casualty Ins. Co. of Tennessee, 41 So. 2d 155 (Fla. 1949) ("Mason II"). The underlying facts of the two cases are the same. The insured under two life insurance policies issued by Life & Casualty Insurance Company of Tennessee was intoxicated and riding in a taxicab toward Pensacola, Florida. The insured ordered the taxidriver to stop and let her out of the cab on a dark, deserted stretch of road outside Pensacola. While walking along the road while intoxicated, the insured was hit by a truck and died as a result. The truck driver was without fault for the pedestrian/truck accident.

The insurance policies in Mason I and Mason II paid double benefits if death resulted from accidental causes. The policy in Mason I also stated: "This accidental death benefit does not cover . . . death resulting directly from the use of intoxicating liquors or narcotics . . .." Id. at 154 (emphasis supplied). The Mason I court held the exclusion inapplicable to the facts in that case, stating:

> This provision of the policy is plain, simple and unambiguous and plainly refers to the effect of the use of intoxicating liquors upon the system of an assured as distinguished from acts committed by him by reason of his being under the influence of, or his mind being affected by, intoxicants.
>
> To bring a cause of death within such an exception clause of a policy, the burden is on the insurer to show that the use of intoxicants by the insured was voluntary and that it was the direct cause of death. Id. at 155 (citations omitted).

The life insurance policy in Mason II had a different intoxication exclusion. The policy in Mason II stated: "This policy does not cover . . . loss or injury resulting from the use of intoxicating liquors . . .." Mason II, 41 So.2d at 155 (emphasis supplied). The court in Mason II, without discussing the difference in contract language in the two exclusions (Mason I excluded benefits "resulting directly from the use of intoxicating liquor" and Mason II excluded benefits "resulting from the use of intoxicating liquor") held, in a brief, three paragraph opinion:

> We see no valid distinction between the facts of this case and the companion case referred to above. In our view, the judgment in this case, as was the judgment in the companion case, must be reversed because of the failure of the insurance company to show that the death of the insured was within the exception clause of the policy. Mason II, 41 So.2d at 155-156.

B. Section 627.629, Florida Statutes Permits Health Insurers to Include "Drunkenness Exclusions" in their Policies.

In 1953, the Florida legislature first permitted health insurance policies to include the following exclusionary language:

> INTOXICANTS and NARCOTICS: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administrated on the advice of a physician. Chapter 28027, Laws of Fla. (1953).

It appears that this provision was derived from the National Association of Insurance Commissioners (N.A.I.C.) model laws, regulations, and guidelines, promulgated in 1950, and specifically from N.A.I.C. 180-1, as that N.A.I.C. model law included the same exclusion. The exclusionary language approved by the Florida legislature did not require that a loss from intoxication flow "directly" from the ingestion of alcohol or narcotics in order to bar recovery under a policy. Instead, intoxication was only required to be a cause of the loss (or a loss to be a consequence of intoxication) in order to exclude a loss from coverage. As discussed below, with the exception of the instant case, every reported Florida decision going back almost 50 years has consistently followed this approach.

In 1982, the Florida legislature amended the permitted drunkenness exclusion, changing the statute to allow the following language:

> The contract may provide: Intoxicants and narcotics: The insurer will not be liable for any loss resulting from the insured being drunk or under the influence of any narcotic unless taken on the advice of a physician. Section 627.629, Florida Statutes, (1982).

Again, the change in Florida's statutorily permitted exclusion appears to have been based upon N.A.I.C. 185-1, the model code adopted in 1979 to provide policy provisions in "simplified language." The pertinent model code provision stated:

> Intoxicants and narcotics: The company will not be liable for a loss resulting from the insured being drunk or under

> the influence of any narcotic unless taken on the advice of a physician. N.A.I.C. 185-1.

The same exclusionary language was permitted by the statute in effect when Ms. Steck's Conversion Option III policy was issued by BCBSF. Significantly, BCBSF's drunkenness exclusion tracks the language of the statute, excluding coverage for:

> A condition resulting from you being drunk or under the influence of any narcotic unless taken on the advice of a physician; . . ..

C. Harris and Other Florida Cases Decided After 1953 Apply the Drunkenness Exclusion if an Insured's Drunkenness is an Indirect Cause of Illness or Injury.

After Mason I and Mason II and after the legislative endorsement of a drunkenness exclusion in 1953, the first Florida court to construe a drunkenness exclusion was Rivers v. Conger Life Ins. Co., 229 So. 2d 625 (Fla. 4th DCA 1969). In Rivers, the trial judge had granted the insurance company's motion to set aside the verdict. Because the policy exclusion in that case was broader than that permitted by law, the Fourth District Court of Appeal construed the then existing statutory provision that permitted a policy exclusion for drunkenness. The statute applicable at the time was the same as that promulgated in 1953 which authorized the following exclusion:

> INTOXICANTS and NARCOTICS: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated . . .. Id. at 627.

In analyzing the exclusion permitted by Florida Statutes, the Rivers court concluded:

> The words 'in consequence of being intoxicated' mean that a causative connection between intoxication and death must be shown if coverage is to be denied. As is pointed out in 10 Couch on Insurance, 2d Ed., §41: 457: "Where the exception clause is so phrased that the harm is the consequence or sequel of the insured's intoxication or other specified condition, it necessarily follows that in order to avoid liability under the exception the insurer must establish that the intoxication has some causative connection with the death or injury of the insured, where the clause is so phrased as to make the death or injury of the insured a sequel of his intoxication. Thus, it has been held that where a policy does not cover injuries received by the insured as 'result' or 'in consequence' of being intoxicated, or 'caused' by intoxication, some causal connection must be shown." Cf., Mason v. Life & Casualty Ins. Co. of Tennessee, Fla. 1949, 41 So.2d 153. In sum, it is obvious that this provision is more favorable to the beneficiary than the exception relied upon by the appellee . . . We therefore hold that, in order to avoid liability in this case, appellee was required to demonstrate a causative connection between Jefferson's intoxication and death. Rivers, 229 So.2d at 628. (emphasis added)

Significantly, the Rivers court did not hold that the exclusion authorized by the then existing Florida statutory provision could only apply if the insured's intoxication led directly to the death of the insured, as in death by alcohol toxicity, the position urged by Ms. Steck and adopted by the Second District Court of Appeal in this case. Instead, the Rivers court recognized that the insurer could come within the terms of the statutorily authorized exclusion if it had proven that the insured's intoxication had

a causative connection with the fire and the resulting death suffered by the insured in that case. In fact, the Rivers court equated the words "result" (used in the current statute and the BCBSF policy) and "in consequence" (used in the 1953 statute), in concluding that only some or a causative connection was required.

The facts in Rivers, however, were distinctly different from the facts in Ms. Steck's case. In Rivers, there was testimony that the deceased was sober at 4:30 or 5:30 in the afternoon and there was no direct evidence of his drinking up to the time of the fire. The evidence was in conflict as to whether any empty wine bottles were found after the fire. The evidence of the deceased's consumption of intoxicants came solely from a doctor who smelled alcohol on the deceased's breath at the hospital. The doctor could not, however, specify the amount of alcohol intake by the deceased, and a blood alcohol test was not performed. Consequently, there was no expert testimony regarding whether the insured was intoxicated at the time he was burned in the fire. The District Court of Appeal reinstated the verdict on the premise that there was sufficient evidence for the jury to have concluded that the exclusion did not apply.

Conversely, in Ms. Steck's case, the evidence in the record irrefutably demonstrates that Ms. Steck was drunk and had a blood alcohol level of .40 to .50 at the time of her accident. Ms. Steck has no recollection of the accident and the record eyewitness testimony indicates that Ms. Steck should have seen the on-coming

traffic, but simply walked in front of the car that struck her. The evidence in this case only supports one conclusion--that Ms. Steck's drunkenness was at least a cause (and, in BCBSF's view, the only cause) of her accident and resulting injuries. Rivers held that a statutory and policy exclusion using the words "in consequence of" or "resulting from" only requires a proven, indirect causal connection in order to be applicable. The facts in Ms. Steck's case demonstrate without dispute that such a causal connection existed and require reversal of the summary judgment awarded Ms. Steck.

Next, this Court interpreted a drunkenness exclusion in Harris v. Carolina Life Ins. Co., 233 So.2d 833 (Fla. 1970). In that case, the life insurance policy contained an exclusion which stated:

> Exceptions, Death. . . resulting directly or indirectly, wholly or partially from any of the following causes are risks not assumed under this policy: . . bodily injury while under the influence of alcohol or drug. . . . Id. at 833-834.

The insured in Harris was riding as a passenger in an automobile when he was killed in a traffic accident. The parties agreed that although the deceased insured passenger was under the influence of alcohol at the time of his death, there was no causal connection between the insured's intoxication and his death. The trial court held there was no coverage and granted summary judgment for the insurer. The district court affirmed that decision and held that the language of the policy did not require any

causal connection between an insured's death and his intoxication. The Harris court discussed its previous holding in Mason I, and concluded:

> While the facts in the Mason case would probably be sufficient to show death indirectly related to intoxication under the provision of the policy in the instant case, the facts in the instant case clearly do not. Despite the difference in language in the policy provision, the cases do conflict. Harris, 233 So.2d at 834.

The Harris court went on to hold that the pertinent policy language required that the insurer prove some causal relationship between death and intoxication in order for the exclusionary provision to be effective. Significantly, the Harris court did not hold that a drunkenness exclusion could only apply to death caused exclusively by alcohol toxicity. It held instead that there must be some causal relationship between the intoxication and the loss in order for the exclusion to apply. Here, the policy language in Harris which was "resulting directly or indirectly, wholly or partially," was more akin to the language in Ms. Steck's policy, "resulting from", than it is to Mason I, "resulting directly from". Accordingly, this Court should follow Harris and apply the drunkenness exclusion to bar coverage so long as the evidence demonstrates that Ms. Steck's drunkenness was the cause of her accident, a conclusion that is incapable of legitimate dispute based upon this record.

The next Florida case to construe an alcohol or drug exclusion in a life insurance policy was Sasloe v. Home Life Ins. Co., 416 So.2d 867 (Fla. 3d DCA

1982). In that case, the court affirmed a directed verdict against the beneficiary of the insured. An autopsy of the driver/insured, who died after his auto struck a tree, revealed that at the time of the accident the insured had a low level of alcohol in his blood, as well as the presence of methaqualone in the "lethal range," and various other drugs. The autopsy physician testified that the insured was intoxicated and his intoxication directly contributed to his death in that it caused the collision. Other witnesses testified that the deceased insured was speeding and driving erratically just prior to his accident. There was no evidence that mechanical failures in the vehicle contributed to the accident in any way. The Sasloe court affirmed the trial court's directed verdict, concluding:

> The evidence at the conclusion of the case amply demonstrated that the amount and type of drugs ingested by Mark Sasloe had a direct causal relationship with his death, or at least indirectly or partly contributed to his death. Therefore, there was no liability under this policy. Id. at 867.

The policy in Sasloe excluded coverage "if death results directly or indirectly, wholly or partly, from . . .medicines; drugs; sedatives; . . . " Id. at 867-868. The Sasloe court did not hold that drugs must have directly caused death in order for the exclusion to apply. It was enough that the ingested drugs were a cause of the auto accident that led to the insured's death.

In New York Life Ins. Co. v. Coll, 568 So.3d 1306 (Fla. 3d DCA 1990), the court dealt with an evidentiary issue concerning whether a blood alcohol test result was prima facie evidence that the insured was under the influence of alcoholic beverages. The insured died in a single car accident when she hit a pole. There was testimony of a possibly defective steering system and non-expert testimony that the deceased driver was acting "normally". The New York Life court concluded that a .10 or greater blood alcohol content created a permissive inference of impairment and could be considered by the trier of fact as evidence of impairment. The New York Life policy contained an exclusion for "a loss caused in any way by intoxicants, unless administered under the advice of a physician." Id. at 1307. The New York Life court reversed the trial court judgment in favor of the insured and remanded with directions that the court should apply the permissive inference of impairment that the evidence in that case supported. Thus, the New York Life court did not hold that the alcohol exclusion only applies if the ingestion of alcohol directly results in death. Instead, an indirect causal relationship was deemed sufficient for application of the exclusion in New York Life.

In Blue Cross and Blue Shield of Florida, Inc. v. Ming, 579 So.2d 771 (Fla. 5th DCA 1991), the Court recognized that BCBSF's drunkenness exclusion was applicable in a case where the insured was injured in a drunk driving accident. The

exclusion in Blue Cross denied benefits for injuries "resulting from an insured's participation in a felony and from the insured's being drunk." Id. at 771. Essentially the same exclusion exists in the BCBSF policy here. The trial court in Blue Cross had entered summary judgment for the plaintiff doctor, who was suing as the assignee of the insured. The Blue Cross court reversed, holding:

> This cause is reversed and remanded with directions to enter summary judgment for the insurer. Without considering the insured's [sic] "standing defense" the facts relating to the insured's injuries from his drunk condition and felonious conduct are not in dispute and both exclusions obviously apply. Id. at 772.

Again, although the policy exclusion contained the "resulting from" language, the Blue Cross court did not hold that BCBSF's drunkenness exclusion only applied in cases of injuries resulting exclusively from alcohol toxicity, the result urged here by Ms. Steck.

An Eleventh Circuit Court of Appeal decision recently construed a policy which also contained language identical to that in the Steck/BCBSF policy. Hastie v. J.C. Penney Life Ins. Co., 115 F.3d 895 (11th Cir. 1997) involved a motorcycle operator who died from head injuries received in a motorcycle/automobile collision. The insured's autopsy report revealed a blood alcohol level of .254 and the death certificate listed the underlying cause of death as being "motorcycle - motor vehicle

accident" with "acute alcohol intoxication" as a "significant condition contributing to death but not resulting in the underlying cause." Id. at 896. The J.C. Penney Life Insurance policies contained alcohol exclusions that stated: "No benefits shall be paid for Loss caused by or resulting from. . .an injury occurring while the covered person is intoxicated. . ." and that "no benefits shall be paid for any loss . . . which is caused by or results from . . . an Injury occurring while the covered person is intoxicated. . ." Id. The trial court entered summary judgment in favor of the insurer stating that whether intoxication was a cause of the accident was irrelevant so long as the decedent died while he was intoxicated. The Eleventh Circuit reversed and relying upon the decision in Harris v. Carolina Life Ins. Co., 233 So.2d 833 (Fla. 1970), held that the insurer had the burden of demonstrating some causal connection between intoxication and death in order to apply the exclusions in question. Again, significantly, the controlling precedent was deemed to be Harris (a causal connection must be demonstrated), not Mason I (intoxication must be the direct cause of loss). Hastie did not adopt the argument advanced by Ms. Steck and adopted in the Second District Court of Appeal, that the drunkenness exclusion can only apply to cases involving injuries directly caused by the effect of alcohol on the biological system of the insured. To the contrary, the court remanded for a trial on the issue of causation.

The Fifth District in American Heritage Life Insurance Co. v. English, 786 So.2d 1280 (Fla. 5th DCA 2001) also recognized Harris as the precedent controlling a drunkenness exclusion in a life insurance policy. In American Heritage, the insured was injured in and later died as a result of a one car auto accident. The deceased had a blood alcohol level of .189 at the time of his accident, although he told the paramedic who assisted him that he "had fallen asleep while driving", Id. at 1280, not that he had driven off the road as a result of intoxication. The American Heritage policy contained an exclusion virtually identical to the drunkenness exclusion in Ms. Steck's policy. The American Heritage exclusion stated:

> "[This] policy does not cover any loss incurred as a result of: d. Any injury sustained while under the influence of alcohol or any narcotic unless administered upon the advice of a physician." Id. at 1280.

The American Heritage court rejected the Second District's rule announced in this case, that an alcohol or drunkenness exclusion using the statutorily prescribed "resulting from" language could only be applied in those cases where drunkenness had a direct effect on the biological system of an insured, such as a case of acute alcohol poisoning or liver damage. Instead, American Heritage recognized that this Court's decision in Harris established a new test for drunkenness exclusions, applying the exclusion in those cases where there was a demonstrated causal connection between

alcohol intoxication and the loss suffered by the insured. Moreover, the American Heritage court found that the insurer in that case met the Harris test, holding:

> In the instant case, unlike the passenger in Harris, who had no control over the vehicle in which he was riding, Ned was the instrument that caused the vehicle to crash into an oak tree. Ned admitted to the paramedic that it was he who caused the accident, attributing it to falling asleep while he was driving. Whether he fell asleep as a result of fatigue or the effects of alcohol, we believe that AHL carried its Harris burden to show a causal relationship between death and intoxication. The proof of causal relationship was as close as could be proved without the decedent having announced before death that his intoxication caused him to hit the oak tree. American Heritage, 786 So.2d at 1281.

The American Heritage court therefore reversed the trial court's judgment of liability under the policy.

Except for the decision in this case, no Florida case decided after 1953 and passage of the statutorily permitted drunkenness exclusion limits the exclusion to cases of alcohol toxicity or drug overdose. This Court should follow its decision in Harris and the clear trend of recent case law and should reject the strained interpretation advocated by Ms. Steck and adopted by the Second District Court of Appeal.

II. MASON II WAS WRONGLY DECIDED AND SHOULD BE REVERSED.

A. Mason II Improperly Equated Two Different Policy Exclusions.

Ms. Steck has argued and will undoubtedly continue to argue that the holdings in Mason I and Mason II equate a drunkenness exclusion that applies to an illness or injury "resulting directly from" drunkenness (Mason I) with a drunkenness exclusion that applies to an illness or injury "resulting from" drunkenness (Mason II). To the extent Mason II so holds, it is bad law.

To equate the phrase "resulting directly from" to the phrase "resulting from," is to render the use of the word "directly" meaningless. It is a well settled axiom of contract construction that courts will give meaning to each provision in a contract if that can reasonably be done. Peoples Gas System, Inc. v. City Gas Co., 147 So. 2d 334 (Fla. 3d DCA 1962). In addition, no word in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts of the contract can be given to it. Royal American Realty, Inc. v. Bank of Palm Beach and Trust Co., 215 So. 2d 336 (Fla. 4th DCA 1968). Mason I held that the insertion of the word "directly" into a drunkenness exclusion rendered the exclusion applicable only if drunkenness led directly to death by the effect of alcohol on the system of the insured (presumably, in other words, only if alcohol toxicity caused death). When this Court decided Mason II, however, and equated the phrase "resulting directly from" with the phrase "resulting from," it effectively wrote the word "directly" into the Mason II policy when it was actually omitted by the insurer. By effectively adding the word

"directly" to the drunkenness exclusion in Mason II, the Court violated another axiom of contract construction--that the absence of a provision from a contract is evidence of an intention to exclude, rather than an intention to include, the omitted provision. Jacobs v. Petrino, 351 So. 2d 1036 (Fla 4th DCA 1976) cert. denied 349 So. 2d 1231 (Fla.1977).

The Mason II court should have ruled that the phrase "resulting from" meant something different than the phrase "resulting directly from." To hold otherwise was to make the modifier "directly" meaningless. In fact, the Mason II court should have recognized that there can be only two kinds of "results," direct results and indirect results. Consequently, when an insurer used the phrase "results directly from" in one policy, then omitted the modifier "directly" in another policy issued to the same insured, the insurer necessarily meant that both kinds of results, "direct" and "indirect" results, must have been intended to be excluded by the broader policy exclusion construed in Mason II. To hold otherwise was error.

BCBSF recognizes that Florida's courts are to construe ambiguous insurance policies against an insurer. Prudential Property and Casualty Ins. Co. v. Swindal, 622 So.2d 467 (Fla. 1993). On the other hand, insurance policies are also to be construed in accordance with the plain language of the policies as bargained for by the parties. Id. at 470. If the language of an insurance policy is not ambiguous or otherwise

susceptible of more than one meaning, a court's task is simply to apply the plain meaning of the words and phrases used to the facts before it. National Union Fire Ins. Co. of Pennsylvania v. Carib Aviation, Inc., 759 F.2d 873 (11th Cir. 1985). There is nothing ambiguous about the exclusionary phrase "condition resulting from you being drunk. . ." Consequently, no negative construction against BCBSF is required or appropriate.

Assuming there can be both direct and indirect results, the use of the term "results" necessarily encompasses them both. An exclusion that applies to a "result" generally, would logically apply to both kinds of results, direct results and indirect results. BCBSF submits that the ordinary, average or reasonable person would not understand the exclusion here to be limited to cases involving alcohol toxicity or drug overdose. Any reasonable person presented with the facts in the record here would agree that Ms. Steck's injuries "resulted from" her being drunk (from three to six times the legal limit for driving while intoxicated) and walking in front of a car. Florida's courts are required to give insurance contracts their everyday meaning and must read them in light of the skill and experience of ordinary people, giving a reasonable and practical construction to the policy. Lindheimer v. St. Paul Fire and Marine Ins. Co., 643 So.2d 636 (Fla. 3d DCA 1994) rev. denied, 651 So.2d 1194 (Fla. 1995). Limiting BCBSF's exclusion to the direct results of drunkenness, i.e., alcohol toxicity, would

give a strained and unnatural construction to the policy. An ordinary, reasonable person would understand the exclusion to apply to injuries suffered by drunk drivers and pedestrian drunks. This Court should give the exclusion its ordinary, commonly understood construction, and apply it to both the direct and indirect results of drunkenness, including Ms. Steck's claims.

B. If This Court Limits the Drunkenness Exclusion to the "Direct Effect" of Drunkenness on the Bodily System of an Insured, then not only will the Drunkenness Exclusion be rendered Virtually Meaningless but the Illegal Occupation Exclusion Will be Rendered Absolutely Meaningless.

As noted above, Section 627.629, Florida Statutes authorized the drunkenness exclusion utilized by BCBSF in Ms. Steck's policy. The statute uses the words "resulting from the insured being drunk. . ." in setting forth the permitted exclusionary language. Section 627.618, Florida Statutes prohibits BCBSF from using other exclusionary language if the effect of the alternate language is to broaden the exclusion. Section 627.618, Florida Statutes states, in material part:

> ". . .no health insurance policy delivered or issued for delivery in this state shall contain any provision respecting the matters set forth in ss. 627.619-627.629, inclusive, unless such provision is in the words in which the same appears in the applicable section, except that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording approved by the Department which is not less favorable in any respect to the insured or the beneficiary." (Emphasis suppled).

Although the restrictive interpretation of the "resulting from" exclusionary language adopted by the court below would leave the statutorily permitted drunkenness exclusion with at least some very limited application, the same restrictive interpretation of the "resulting from" language adopted in Mason II and Steck would render the statutorily permitted health insurance policy exclusion pertaining to felonies or illegal occupations totally and absolutely without meaning.

The Florida Legislature permits health insurers to include in their policies the following exclusion:

> Illegal occupation. The insurer will not be liable for any loss which results from the insured committing or attempting to commit a felony or from the insured engaging in an illegal occupation. Section 627.628, Florida Statutes.

The illegal occupation exclusion can be traced back to the same 1953 legislative session that first authorized an alcohol or drunkenness exclusion in Florida health insurance policies. Chapter 28027, Laws of Fla. (1953) permitted the following exclusionary language:

> Illegal Occupation: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation.

In 1982, at the same time the drunkenness exclusion was amended to include "resulting from" language, the Florida Legislature amended the illegal occupation exclusion to include its present "results from" language. Section 627.628, Florida Statutes (1982). If this Court holds that "results from" means only "results directly from", however, then the "illegal occupation" exclusion has no possible application as it currently exists.

There are no felonies or attempted felonies that "directly" cause health care expenses for insureds. Insureds may be shot in robbery attempts and have resulting health care expenses, but the expenses do not "result directly from the effect of the robbery upon the biological system of the robber" (the test adopted by Steck). Instead, gun shot wounds necessitate health care expenses as the indirect effect of a robbery, i.e., they are caused by the gun shot wounds inflicted upon the thief during the robbery, not by an act of theft itself. Similarly, prostitutes may have health care expenses "resulting from" venereal disease, but venereal disease is an indirect effect of their engaging in an illegal occupation, not the "direct effect" of the illegal occupation upon the biological system of the prostitute.

One of the rules of statutory construction is that the courts should never presume that the legislature intended to enact a purposeless, and therefore useless, statute. Sharer v. Hotel Corporation of America, 144 So.2d 813 (Fla. 1962). Yet the

interpretation of the words "results from" offered by the courts in Steck and Mason II would render the illegal occupation exclusion authorized by Section 627.628, Florida Statutes meaningless, purposeless, and useless. This Court should not countenance such a result.

This Court's decision in Harris limits the drunkenness exclusion (and, by implication, the illegal occupation exclusion) to those cases in which there is a causal connection between drunkenness (or illegal occupations) and health care expenses. Clearly, however, the Florida Legislature could not have intended a totally meaningless policy exclusion with Section 627.628, Florida Statutes, and must not have intended that an exclusion written in conformance with Section 627.629, Florida Statutes would have the severely limited reach allowed by the decision in Steck. In fact, there would have been no reason for the legislature to even authorize the intoxication exclusion if it had not intended to change the scope of the exclusion as interpreted in Mason II. Rather, just as the Florida Legislature permits insurers to exclude coverage for the indirect effects of felonies, it must have intended that the same language could exclude the health care expenses incurred (albeit "indirectly") by drunk drivers and drunken pedestrians who walk into traffic.

C. Adoption of the "Resulting From" Language by the Florida Legislature was not intended to restrict or limit the scope of the alcohol exclusion.

As the source of Florida's drunkenness exclusion appears to be the N.A.I.C. model laws, reference to the commentary to the N.A.I.C. model laws provides additional support for BCBSF's argument that the "resulting from" language used in Section 627.629, Florida Statutes, was not intended to limit the exclusion to the "direct effect" of drunkenness upon the biological system of the insured.

In 1953, when it first approved the drunkenness exclusion, the Florida Legislature permitted the exclusion to extend to "any loss sustained or contracted in consequence of the insured's being intoxicated . . .." The same language can be found in N.A.I.C. Model Code Provision 180-1, promulgated in 1950.

In 1979, the N.A.I.C. published a new Model Code Provision titled: "Accident and Health Insurance Rate and Policy Standards Restatement of the N.A.I.C. Uniform Individual Accident and Sickness Policy Provision Law in Simplified Language." The purpose of the 1979 restatement was the following:

> This restatement of the required and most often used optional provisions of the Uniform Policy Provision Law in simplified language is intended as a guideline for the submission and approval of individual accident and sickness policies written in simplified language. Although it is intended specifically for use in those states that adopt the N.A.I.C. Model Life and Health Insurance Policy Language Simplification Act, its use as a guide for approval of policies voluntarily written in simplified language is encouraged.

> The restated provisions are intended to most accurately reflect the original intent of the Uniform Policy Provision Law and to duplicate its substantive requirements. The rights and obligations of both the insured and insurer or any case law interpreting the uniform provisions are not intended to be affected. They are intended as a uniform "safe harbor" for companies relying upon them. The restatements are no less favorable to the insured or beneficiary and their use is sanctioned under the authority granted by Section 3A of the Uniform Policy Provision Law.

The 1979 N.A.I.C. Model Code 185-1changed the recommended language of its illegal occupation and drunkenness exclusions to read as follows:

> (9) Illegal Occupation: The company will not be liable for any loss that results from the insured committing or attempting to commit a felony or from the insured engaging in an illegal occupation.
>
> (10) Intoxicants and Narcotics: The company will not be liable for a loss resulting from the insured being drunk or under the influence of any narcotic unless taken on the advice of a physician.

The recommended changes to these exclusions were then adopted in Florida (virtually verbatim) with the 1982 change in the insurance code that implemented the currently authorized illegal occupation and drunkenness exclusions.

If, as the N.A.I.C. stated in 1979, the purpose of the language change in the drunkenness exclusion from "any loss sustained or contracted in consequence of the insured's being intoxicated . . .." to "a loss resulting from the insured being drunk . .

." was not to make a substantive change in the exclusion, then this Court should also give effect to that intent and should not read the 1982 version of the statute to be a more limited exclusion than that permitted in 1953. A loss which "results from" drunkenness should have the same meaning as a loss "sustained or contracted in consequence of the insured's being intoxicated." As it is clear that Ms. Steck's accident was "sustained or contracted" as a consequence of her being drunk and trying to walk across a busy highway, the exclusion should be held to bar recovery in this case.

D. Public Policy Supports Application of the Drunkenness Exclusion to Injuries or Illnesses that Indirectly Result from an Insured's Drunkenness or use of Narcotics.

It may be that when Mason II was written in 1949, the cost to insure against medical and hospital expenses was not a significant consideration, but the same cannot be said today. BCBSF submits that Sections 627.628 and 627.629, Florida Statutes (the "illegal occupation exclusion" and the "drunkenness exclusion") represent a decision by the Florida Legislature to permit the economic cost of illegal or personally destructive behavior to be imposed on the people who engage in such behavior, without spreading the cost of their personal choices to health insurers (initially) and ultimately to health insurance consumers (who eventually bear the cost of such risky behavior in the form of higher premiums).

If this Court limits application of the statutorily permitted drunkenness exclusion to cases in which the insured is treated solely for the effects of alcohol toxicity or drug overdose, it will be reversing a trend established by a long line of Florida cases construing similar provisions, including this Court's decision in Harris. It also will be imposing an extremely limited scope on the exclusion authorized by the Florida legislature in Section 627.629, Florida Statutes. Moreover, its holding will give rise to potentially absurd results. For instance, if the statutory exclusion is limited to exclusion of benefits for treatment of the "direct" effects of alcohol toxicity, as urged by Ms. Steck, an insured who drinks himself into an alcoholic coma and passes out, striking his head on the ground, would be prevented from recovering benefits for the cost of pumping his stomach of alcohol (a direct effect of drunkenness that presumably would be excluded from coverage), but would remain entitled to recover for treatment of head or other injuries suffered in the resulting fall (an indirect effect of the drunkenness). Such a result would follow because the "direct cause" of the head or other injury in a fall would be a person's impact with the ground, not the direct effect of alcohol on the body itself. Similarly, an individual under the influence of narcotics might injure himself because of drug induced hallucinations. Under Ms. Steck's interpretation of the exclusion, the injuries suffered as a result of acts

undertaken due to the hallucination would be covered events, but drug detoxification would be excluded from coverage. No sound logic is apparent in such cases.

Florida's legislature has determined that health insurers may exclude from coverage injuries "resulting from" drunkenness or use of narcotics. Presumably, in doing so, the legislature was not only concerned with excluding direct costs of treating alcohol toxicity or drug overdose (which would be relatively insignificant), but was also interested in imposing on individuals who became drunk or who overdosed on drugs the cost of paying for their injuries or treatment necessitated by their drunkenness or drug use. As can be seen from the instant case, the so-called indirect results of such drunkenness can be severe, costly injuries. Nevertheless, the legislature has determined that the cost burden of such destructive (and possibly illegal) behavior should be borne by the individual that engages in the behavior, and not by health insurers or the public that purchases such health insurance.

Simply put, this Court should not hobble the legislature's policy decision by restricting application of the drunkenness exclusion to the limited factual scenarios urged here by Ms. Steck.

E. No Other State Which has Construed a Drunkenness Exclusion in a Health or Life Insurance Policy has Limited Application of the Exclusion to Death or Injury Due to Alcohol Toxicity.

If Florida holds that a drunkenness or drug use exclusion only applies to exclude benefits for services rendered to treat alcohol toxicity or drug overdose, we know of no other state to reach that result. In fact, we have found only one other case involving an intoxication or drug use exclusion which even discusses the distinction between "direct" and "indirect" results from such use, and it rejected the distinction.

In Interstate Life & Accident Insurance Co. v. Gammons, 408 S.W. 2d 397, 56 Tenn. App. 441 (1966), the Tennessee appellate court construed a life insurance policy that included a drunkenness exclusion virtually identical to the then existing Florida statutory provision (the policy in Interstate Life excluded liability "for any loss sustained or contracted in consequence of the insured's being intoxicated"). The insured in Interstate Life died as the result of a one car auto accident in which the insured was the driver. Trial testimony demonstrated that the insured had a high blood alcohol content and was intoxicated. In addition, as in the instant case, the policy beneficiary in Interstate Life argued that the exclusion could only apply if the insured's death was the direct result of the ingestion of alcoholic beverages. The Interstate Life court disagreed with that proposition, holding that the drunkenness exclusion applied if the insured's intoxication was the proximate cause of death, stating:

> It is evident that the trial judge had in mind the construction of this exception which we have made, but we think he applied it too strictly, when he held that the exception only

> applied where the ingestion of intoxicating beverages was itself the cause of death. This construction so limits the exclusion as not to permit it to apply as broadly as it might even when the words "in consequence" are read as "as the consequence" instead of "as a consequence."
>
> Unquestionably, cases can and will arise in which the death is not attributable to the ingestion of alcoholic beverages, but where by the preponderance of the evidence it is shown the state of intoxication is the proximate cause of death, and not simply a factor to be considered, as in this case. Interstate Life, 408 S.W. 2d at 399-400.

Although the court went on to find that the intoxication exclusion did not apply under the facts in that case, significantly, Interstate Life held that the intoxication exclusion was not limited to instances of death due to alcohol toxicity.

There are even a few jurisdictions which have upheld exclusions that require no causal connection with the intoxication. E.g., Flannagan v. Provident Life & Accident Ins. Co., 22 F.2d 136 (4th Cir. 1927); Order of United Commercial Travelers of America v. Greer, 43 F. 2d 499 (10th Cir. 1930). However, every case involving exclusions for death "as the result of" or "in consequence of" or "caused by" intoxication have been decided upon the extent of the proof of causation, without making the artificial distinction relied upon in Steck. Bankers Life and Casualty Co. v. Jenkins, 547 S.W. 2d 237 (Tenn. 1977) (drunkenness exclusion applied to exclude payment of life insurance benefits in a one car accident where driver with .26 blood

alcohol content struck a tree); Landry v. J.C. Penney Life Ins. Co., 920 F. Supp. 99 (W.D. LA. 1995) (exclusion for death "caused by or resulting from" intoxication of insured applied to exclude recovery of benefits for driver killed in one car accident who was found to have .25 blood alcohol level); Old Equity Life Ins. Co. v. Combs, 437 S.W. 2d 173 (Ky. App. 1969) (an exclusion applying to "loss sustained or contracted in consequence of the insured's being intoxicated" applied to a drunken individual shot while throwing chairs and threatening to kill the occupants of a home). Cummings v. Pacific Standard Life Ins. Co., 516 P. 2d 1077, 10 Wash. App. 220 (1974) (a policy exclusion for death sustained "in consequence of the insured's being intoxicated. . .," was held applicable in an auto accident case if the insurer merely established a causal connection between the intoxication and death. (citing Rivers v. Congers Life with approval)). In no case located by BCBSF has another state's appellate court specifically held that a drunkenness exclusion in a life or health insurance policy is limited to instances of death or injury by alcohol toxicity. If this Court so holds, it would seem to be alone in doing so.

CONCLUSION

Since 1953, Florida's legislature has permitted Florida's health insurers to exclude from coverage losses resulting from drunkenness or the use of narcotics. With the exception of Steck, in every Florida appellate decision since 1953, including this Court in Harris, Florida's courts have held that the exclusion can be applied if the insurer establishes a causal connection between the drunkenness or narcotic use and the resulting health care treatment or death. No other Florida court has specifically held that the drunkenness exclusion is limited to charges for treatment of alcohol toxicity or drug overdose. This Court should follow Harris and American Heritage, and should hold that Mason II was incorrectly decided and overruled by Harris and the passage of Section 627.629, Florida Statutes. In so doing, this Court should recognize that Ms. Steck's .40 to .50 blood alcohol level was a cause of her pedestrian/auto accident, should reverse the summary judgment on liability entered in favor of Ms. Steck, and

should remand for entry of final summary judgment in favor of BCBSF in connection with all expenses incurred by Ms. Steck in the treatment of her injuries sustained in the June 29, 1997 accident.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Timothy F. Prugh, Esquire, Prugh and Associates, P.A., 1009 West Platt Street, Tampa, Florida 33606, and Charles P. Schropp, Esquire, Schropp, Buell & Elligett, 3003 West Azeele Street, Suite 100, Tampa, Florida 33609, this _____ day of September, 2001.

I also certify that Petitioner's Initial Brief on The Merits has been prepared using Times New Roman 14-point type, non proportionally spaced.

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