IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT COURT OF FLORIDA
CASE NO. 4D03-2840

BURNS INTERNATIONAL SECURITY SERVICES INC. OF FLORIDA,

Appellant/Cross-Appellee,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY, as subrogee of D & H DISTRIBUTING CORPORATION and D & H DISTRIBUTING CORPORATION, Individually,

Appellees/Cross-Appellants.
_____/

ON APPEAL FROM THE SEVENTEENTH CIRCUIT COURT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF AND CROSS APPEAL BRIEF OF APPELLEES

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ARGUMENT I

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INTRODUCTION

The appellant, Burns International Security Services Inc. of Florida (ABurns@), was the defendant below. The appellees, Philadelphia Indemnity Insurance Company (APhiladelphia Indemnity@), as subrogee of D & H Distributing Corporation and D & H Distributing Corporation, Individually (AD & H@), were the plaintiffs below. In this brief, the parties will be referred to by name. Philadelphia Indemnity and D & H may sometimes collectively be referred to as plaintiffs or appellees. The symbol [R A_@] will designate the documents contained in the Record on Appeal. The symbol [T A__@] will designate the pages of the Trial Transcript. The symbol [SR A__@] will designate the documents contained in the Supplemental Record on Appeal.

STATEMENT OF THE CASE

Philadelphia Indemnity filed a subrogation complaint against Burns and others[1] stemming out of a theft loss suffered by its insured D & H Distributing on or about November 10, 2000. [R 1-92]. According to the complaint, Philadelphia Indemnity issued an insurance policy to D & H which covered theft of personal property owned by D & H and stored at its warehouse located at the Parkway Commerce Center (AParkway@) in Pompano Beach, Florida, where D & H leased space. [R 2-3]. Burns is a security company which provided guards and/or physical security to the tenants of Parkway, including D & H. [R 3]. As a result of the theft loss, Philadelphia Indemnity paid D & H $747,177.88 for damages sustained in the loss; D & H also suffered a loss of its $5,000 deductible under the policy. [R 4].

The complaint alleged that Burns owed a duty of care to tenants of Parkway, including D & H, to provide adequate physical security, to hire appropriately trained guards to deter criminal activity, and to provide all other services reasonably expected of a security guard service. [R 8]. The complaint further alleged that Burns breached this duty in numerous ways, resulting in the described losses. [R 8]. The complaint

[1]Burns was the only defendant at the time of trial. The claims against Parkway Commerce Center and ADT Security Services were voluntarily dismissed. [R 227-228; 504-505].

sought damages in the amount of $752,177.88, plus prejudgment interest from the date of loss, as well as costs. [R 9].

Burns denied most of the essential allegations of the complaint, but admitted the allegations contained in paragraph 30 of the complaint, which stated that Burns Awas a firm providing security services, including, but not limited to, providing security guards for the office park where the business offices of D & H Distributing Corporation were located.@ [R 114-120; 8]. Burns set forth certain affirmative defenses, including the alleged failure to meet conditions precedent; Burns also took the position that plaintiff could not recover because Burns had no contractual relationship with plaintiff. [R 119]. However, Burns did not specifically raise as a defense the position that Philadelphia Indemnity should not have paid D & H the full amount of the loss because the insurance policy contained an exclusion (or) reduction for employee theft. [R 114-120].

Plaintiffs moved for partial summary judgment ruling that Florida Statute sec. 768.81 did not apply to this case because subsection (4) provides that it Aapplies to negligence cases@ and not Ato any action,@ like this one, Abased upon an intentional tort.@ [R 351-353]. This motion was denied prior to trial. [R 445-446]. Plaintiffs raised this issue again at trial [T 777] and then again after trial when the trial court considered the proper amount of the judgment. [SR June 3, 2003 Transcript].

Before trial, plaintiffs moved in limine to prohibit the introduction of insurance issues, including evidence of the coverage provided to D & H. [R 681-686]. The trial court held a hearing on this motion prior to the start of trial. A copy of the transcript of this hearing is contained in the supplemental record on appeal. [SR May 9, 2003 transcript]. During this hearing, the trial judge specifically noted that his pretrial rulings on the motions in limine were Awithout prejudice. One of the reasons is there are times things unfold in the courtroom. You come up with additional authority during the trial that may cause me to reconsider. So these are interlocutory rulings. So don=t forget about that when we=re in the courtroom.@ [SR May 9, 2003 transcript, p. 13]. At this hearing the plaintiffs informed the judge that they anticipated Burns may Aclaim this risk was excluded as an employee dishonesty claim [in the insurance policy].@ [SR May 9, 2003 transcript, p. 15]. When asked by the judge whether Burns intended to offer such evidence, Burns=s counsel responded: A**We=re not contesting the fact that they paid the loss. We=re NOT contesting the coverage for the loss.**@ Instead, Burns stated that it wanted to present evidence that AD & H fail[ed] to take reasonable steps that any business maintaining that inventory would take. . .@ [SR May 9, 2003 transcript, p. 15-16]. Thus, just before trial, Burns conceded that it was **not** contesting insurance coverage for the loss. As a result of this hearing, the trial court entered its order on plaintiff=s motions in limine on May 12, 2003. [R 785-787].

The order granted the motion to prohibit the introduction of insurance issues. [R 786]. However, the court did not Aforeclose the possibility of defendant offering evidence of insurance records that may be probative of the negligence of plaintiff D & H Distributors, only.@ [R 786].

Burns moved for a directed verdict on two grounds after the close of the plaintiffs= case. [T 751]. First, Burns argued that there was no evidence that either Burns failed to follow the post orders and conduct rounds, or that the failure in security services was causally related to the theft. [T 751]. Second, Burns argued that plaintiffs failed to establish the reasonable foreseeability of the theft because of the lack of evidence of prior similar crimes. [T 751-752]. The motion was denied. [T 752]. After the close of the evidence, Burns= renewed motion for directed verdict on the same grounds was denied. [T 769].

Plaintiffs moved for a directed verdict on the issues of duty and breach of duty, noting that even Burns= own security expert admitted that its security services fell below the standard of care. [T 770]. In response to the motion, counsel for Burns conceded that plaintiffs established that Burns failed both to meet its obligations under the security contract for Parkway and to follow its post orders. [T 770]. The trial court thus granted plaintiff=s motion for directed verdict on the issues of duty *and* breach of

duty[2], noting that Burns= *own* witnesses, including Joseph Schultz and security expert Kenneth Harms, agreed that Burns= performance was unprofessional, irresponsible, and did not comply with its obligations. [T 774-775].

The jury found that the negligence on the part of Burns was a legal cause of 45 percent of the loss or damage to Philadelphia and D & H. [T 840]. The jury further apportioned 13 percent comparative negligence to D & H; 10 percent negligence to ADT; and 32 percent to Parkway. [T 840]. Burns filed a motion for new trial, which was denied. [R 905-912; 1001-1002].

[2]Burns did not appeal the ruling as to Abreach of duty.@ The only remaining issue is thus whether Burns= negligence caused any damage to plaintiffs.

There was a major dispute between the parties as to the proper amount of the judgment, which is the subject of the cross-appeal contained herein.[3] Plaintiff sought a judgment in the amount of $668,117.98 (plus interest), which was the amount of the stipulated damages of $767,951.71, reduced by 13 percent for plaintiffs= comparative negligence. However, the trial judge accepted Burns= position that the proper amount of the judgment should be only $510,653.10 (plus interest), thus reducing

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[3]Plaintiffs= argued that Florida Statutes section 768.81 did not apply to this action, and that even if it did, the doctrine of joint and several liability still controlled, such that plaintiffs were entitled to their full measure of damages, $668,117.98 (plus interest). On the other hand, Burns argued that the proper amount of the judgment should be only $510,653.10 (plus interest). Plaintiff=s explained its position in correspondence which is part of the supplemental record on appeal. [SR Correspondence dated May 28, 2003 and June 3, 2003]. Burns expressed its position in its response to plaintiff=s proposed final judgment. [R 913-920; 921-1000]. The court considered argument on the issue on June 3, 2003. The supplemental record on appeal contains a copy of that transcript. [SR June 3, 2003 Transcript]. The argument section of this brief discusses additional details concerning the methods suggested by the parties to

plaintiffs full measure of damages by $157,464.88 (plus interest). [R 1001-1002]. On June 23, 2003, the trial court entered final judgment of $611,588.13 in favor of Philadelphia Indemnity and final judgment of $4,415.31 in favor of D & H (both of these amounts included some calculations for pre-judgment interest). [R 1001-1002]. Burns filed its notice of appeal on July 18, 2003 [1003-1006], and Philadelphia Indemnity filed its notice of cross appeal on July 24, 2003. [1007-1010].

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calculate the amount of the final judgment.

STATEMENT OF THE FACTS

This case stemmed from a theft[4] loss suffered by D & H during the weekend of November 10th and 13th of 2000 at the Parkway Commerce Center, where D & H leased space. At trial the parties **stipulated** that Philadelphia Indemnity suffered damages in the amount of $762,851.71 and that D & H suffered an additional loss of its $5,000 deductible. [T 212-214].

[4]Although the loss of D & H property was obviously the result of a forcible burglary [T 704-706; 747], since most of the witnesses described what occurred as a Atheft,@ the world Atheft@ will generally be used to describe the event.

The Parkway Commerce Center is an industrial park in Ft. Lauderdale containing six buildings. [T 103-104]. It was enclosed with a fence with barbed wire over the fence. [T 104]. Tenants such as D & H, a computer distributor, paid common area maintenance expenses to the landlord; this included payment for the uniformed security services performed by Burns and which was for the benefit of the tenants. [T 107-108; 133; 581; 738]. Burns[5] was hired to protect all the properties within Parkway, including D & H. [T 133]. Part of Burns= job was to protect the property of D & H. [T 694]. The tenants paid Burns approximately $90,000 for security at Parkway in 2000, with D & H paying the largest share of all the tenants. [T 131-132]. Burns provided this 24 hour a day security service at the time of the theft. [T 108].

The Apost orders@ set forth the obligations of Burns= security guards. [T 112]. The Security Objectives in the post orders were: Professional Image; Visible Deterrent; Safety/Comfort of Employees/Visitors; Total Access Control; Protection of Employees and Property of the Tenants. [T 114-115]. The guard service and the post orders are provided for the benefit of the tenants and their property and are used to deter crime. [T 115]. The post orders also required the guards to patrol the property on golf carts in order to verify the security of each building, the perimeter of the

[5]Originally, the Parkway security contract was in the name of Wells Fargo, but this obligation was taken over by Burns prior to this theft loss. [T 108-109].

property, and all windows, doors and loading docks of the tenants. [T 117-118; 120]. The post orders required one patrol during the 4:00 p.m. to midnight shift, and one patrol during the midnight to 8:00 a.m. shift. [T 272].

There is one gated entrance (and exit) to Parkway, which is controlled by the guards from the guardhouse located near the gate. [T 119]. The D & H warehouse is approximately 30-40 yards from the guard house. [T 257; 689]. A guard has an unobstructed, direct view from the guard booth to the front of the D& H warehouse. [T 293; 386; 590, 611].

The theft was discovered Monday morning, November 13, 2000 and reported to the police at 7:28 a.m. [T 158; 129]. Three fences at Parkway were cut, with the cuts varying in size from four feet to eight feet to ten feet high. [T 129; 159; 160]. Phone lines and electrical connections were cut inside the Parkway meter room, and all of the phone lines to D & H were cut, disabling the audible alarm. [T 129; 159-161; 173]. The perpetrators first tried to break into one of the doors to D & H and then broke in to the business through another door. [T 159].

The criminals also broke into another Parkway business, Trotta Tire Company, and stole three vehicles from Trotta Tire: two large trucks and a van. [T 162-163]. The criminals used the three stolen vehicles to load the merchandise stolen from D & H. [T 164]. The stolen trucks were so large that the criminals could only have exited

Parkway by driving right under the nose of the Burns security guard out the front (and only) entrance of Parkway - not through the holes in the back fence (which were not large enough for the trucks to go through). [T 164-165; 267].

The criminals opened a large bay door in order to load the trucks with the stolen merchandise. [T 175]. They used a forklift belonging to D & H to load the Trotta Tire trucks. [T 176]. Opening steel or metal doors makes much noise; operating the loading machinery makes a piercing noise which can be heard by patrols in the middle of the night. [T 588-589; 689-690]. The D & H warehouse was left in complete disarray. [T 176; 602-603]. The thieves stole a video surveillance tape in the warehouse. [T 179]. The thieves even made coffee and ate the lunch of the warehouse manager. [T 603; 607]. The theft took two to four hours to accomplish, with the thieves even having a meal at the warehouse during the theft. [T 689-689]. Criminals such as these look at what kind of guard service is performed and whether the guards do patrols, in order to avoid detection. [T 204].

Jack Kazakov, a Burns security guard, worked during the weekend of the theft. [T 401]. Kazakov was a full time security officer for Burns *and* had another full time job as a stockbroker with Kreger Financial. [T 401-402]. After finishing his work on Friday afternoon for Kreger in Delray, he drove to his home in Hollywood Florida and then to Parkway. [T 407-408]. During the weekend of the theft, Kazakov worked a

16 hour shift starting Friday night at midnight, came back and worked *another* 16 hour shift starting Saturday night at midnight, *and* came back and worked *another* shift from midnight on Sunday night until about 7:00 a.m. on Monday morning, when the theft was discovered (a total of 39 hours)[6]. [T 166; 333; 435]. During his 39 hours of work the weekend of the theft, Kazakov did no patrols[7] whatsoever and kept no logs (which was required by Burns). [T 169; 360; 423-425]. Kazakov noticed nothing suspicious that weekend. [T 354; 423]. He does not even know if any trucks drove out past him through the entrance gate during the weekend. [T 428; 710]. In fact, he Anever paid attention to anyone going out of the property.@ [T 429].

Burns scheduled Kazakov for such an extensive workload, knowing that he had a history of sleeping on the job, a serious offense. [T 334-338]. Burns previously cited Kazakov for unsatisfactory work performance when he was found sleeping on a job[8] while leaving the property unsecured. [T 340-345; 410; 413]. His supervisor even admitted that Burns was irresponsible in placing Kazakov as a guard at Parkway

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[6]Incredibly, after working 39 hours during the weekend, Kazakov then went back to his day job as a stockbroker in Delray on Monday morning. [T 435].

[7]Kazakov=s supervisor admitted that refusing to do rounds was just as serious an offense as sleeping on the job. [T 355].

[8]This previous sleeping incident occurred while Kazakov was assigned by Burns to work a midnight shift following his daytime work as a stockbroker. [T 412].

in light of his previous serious misconduct. [T 345-346]. His supervisor did not know Kazakov performed paperwork from another job during his shifts, which was not permitted. [T 339; 416]. His supervisor did not even know he had another full time job. [T 340]. Kazakov also brought a large TV to work with him for watching in the guard house. [T 259-260].

Carol Adams was the only other Burns security guard who worked during the weekend of the theft. [T 221]. She worked the 4:00 p.m. to midnight shift on Saturday and Sunday. [T 222]. Adams *never* did a golf cart patrol round, or checked the windows or locks on the buildings on the weekend of the theft, even though the guards were required to do so by the patrol orders. [T 240-245]. Not following post orders is serious misconduct and grounds for termination. [T 251].

According to the Burns employee handbook, the role of an officer was to observe, secure and protect property and to deter theft and destruction of property. [T 227-228]. The job of a security officer at Burns includes protecting the tenant's property from theft or damage. [T 235; 245; 284; 292-293; 295]. One of the essential functions of the security guards at Parkway was protecting the property from theft. [T 236; 322]. The employee handbook states that patrol includes checking for unsafe conditions, hazards, unlocked doors, security violations, locked ingress and egress, and the presence of unauthorized persons. [T 239-240].

D & H expected Burns to provide protection for the D & H property in the warehouse when D & H was closed. [T 592]. An ADT alarm system, including door and window contacts and motion detectors, was installed at D & H warehouse. [T 594]. In addition, there were four surveillance cameras which would record video. [T 597]. It was obvious that the D & H warehouse contained valuable products. [T 599]. There was a false alarm on the Friday evening before the theft. [T 626].

Plaintiff=s security expert, Donald Schultz, testified about Burns= conduct. Burns never recommended a higher level of security services at Parkway. [T 673]. If the post orders could not have been accomplished by Burns, then Burns should not have obligated itself to such orders. [T 674]. Burns was required to patrol and check all buildings, windows, and doors, yet did *no* patrols the entire weekend of the theft. [T 675; 681; 750].

The security services provided by Burns at the time of the theft were inadequate because both a guard at the gate *and* a rover guard were needed and were not provided. [T 676]. Moreover, Burns failed to perform the random patrols to which it had agreed. [T 676-678]. The Burns manual describes protecting property, preventing theft, and preventing unauthorized entry as part of its responsibility. [T 679]. The illegal entry would normally be caught by a patrol or video camera. [T 680; 733].

Burns failed to recommend electronic surveillance to enable the guard to monitor the 13 acre property from the guard house. [T 735].

It was also totally unreasonable for Burns to assign a guard to work back-to-back double shifts, especially in light of the guard=s history of sleeping on the job. [T 682-683]. It was not acceptable for a guard to watch television or do outside work while a guard is on duty. [T 684]. The guard service provided by Burns fell below the standard of care. [T 684]. Placing a guard - who has been found sleeping before - on a double shift, where that guard states that he saw no trucks leave and does not know who came in or out, implies that he may have been sleeping. [T 684]. Had Burns performed properly, the guard probably should have been aware of the theft; thus the theft was preventable. [T 687-688; 690-691].

Prior to this theft, there were two instances in which D & H had products missing or stolen from the warehouse; these occurrences could be attributed to employees or vendors taking product. [T 627; 703; 745]. There was insufficient evidence to even make an arrest in those cases. [T 745]. There were no suspects or resulting arrests for this theft either. [T 745]. The criminal investigation of the theft resulted in no arrests. [T 157]. The criminals in this case are unknown. [T 561-562].

The only live witness presented by Burns at trial was security expert Kenneth Harms, who noted that D & H=s efforts in security included an alarm system which

provided perimeter control (doors and windows); interior control (motion sensors, etc.); and four video cameras inside. [T 475; 479]. Harms found fault with D & H=s conduct in various ways. First, he stated that the alarm system lacked a cellular or radio backup to send an alarm signal to the alarm company and provide an audible alert, in the event the phone lines were cut.[9] [T 475]. Second, he testified that D & H poorly screened employees and failed to inform Parkway about two earlier thefts. [T 477; 503-504; 507]. However, Burns= expert was unable to specify any particular failure of D & H in screening its own employees which caused this theft. [T 566]. Third, he claimed that D & H did not make sure that there was adequate additional physical security on the warehouse property, such as additional locks, metal plates around locks, etc. [T 528].

Even Burns= own security expert conceded that Burns failed in many ways to perform in a manner consistent with good security practices. [T 541]. Kazakov was assigned too many hours. [T 541]. Burns should have put Parkway on notice about Burns= inability to properly guard Parkway. [T 541-542]. Burns= security expert further conceded that Burns violated its own policy concerning Kazakov=s schedule,

[9] Plaintiff=s expert testified that an alarm system with a cellular backup can still be bypassed. [T 693].

and that sleeping on the job was very bad in the security business.[10] [T 545]. In regard to Kazakov, Burns violated its own guideline concerning guards working another full time job simultaneously. [T 567].

According to Harms, Burns further compounded its errors when the guards failed to follow the post orders, which required them to check the windows and locks. [T 548; 552-553; 560]. Burns= security expert even conceded that Burns *had a duty to provide security to D & H*, who was one of the tenants paying for the security. [T 548-549]. In the words of Burns= expert: AUltimately [Burns] owed a duty to everyone on the property to provide reasonable security.@ [T 549]. One of the reasons guards are hired is to prevent crime. [T 549]. According to *its own expert*, Burns did not provide professional service in this case and did not fulfill its obligation to provide a workmanlike guard service. [T 553-563]. The very definition of a security officer, according to the Burns training manual, is one who protects property from theft. [T 554].

[10]Burns= expert said it was wrong for Burns to place this guard at Parkway, in light of what Burns knew or should have known about him.

At trial, Philadelphia Indemnity presented the testimony of Kevin Smith, an independent insurance adjuster. [T 304]. He was assigned by Philadelphia Indemnity to adjust the D& H theft loss. [T 304]. When Philadelphia Indemnity sought to introduce evidence concerning the particular insurance policy issued to D & H, *Burns* objected to such evidence on the grounds of relevance. [T 305]. Burns= objection was sustained and Philadelphia Indemnity was precluded from offering the policy or testimony about the policy into evidence. [T 306]. In explaining the rationale for upholding *Burns*= objection, the trial court explained that the issue of damages was undisputed since Burns stipulated to the amount of the claim, leaving only the issue of negligence for the jury. [T 306]. Even so, counsel for Philadelphia Indemnity expressed a concern that Burns might still want to maintain a coverage defense under the insurance policy. [T 306]. The trial judge explained that Philadelphia was a subrogee, standing in the shoes of its insured, D & H, and that there was no coverage issue in the case. [T 306-307]. In the face of this colloquy, counsel for Burns stood mute, never claiming that evidence of the policy was relevant (which was consistent with Burns= objection to such evidence).[11] [T 305-307].

[11] When discussing the admissibility of certain portions of Mr. Schwab=s deposition, Burns= counsel agreed with the court again that the value of the insurance

was not an issue because of the stipulation of the parties. [T 758-759].

SUMMARY OF ARGUMENT

The trial court correctly denied Burns motion for directed verdict as to duty and causation. As recognized by the Florida Supreme court (and the Restatement of Torts), the Aundertaker=s doctrine@ provides that whenever one undertakes to provide a service to others, one assumes a duty to act reasonably. Plaintiffs proved that Burns assumed a specific, legally recognized duty to D & H to act with due care in protecting the property in the D & H warehouse from theft, notwithstanding a lack of privity between D & H and Burns.

The trial was replete with evidence supporting the existence of a duty on behalf of Burns. Parkway hired Burns to protect all of the businesses within the warehouse center, thus obligating Burns to protect the property of D & H. Burns= own security expert even specifically conceded that Burns had a duty to provide security to D & H, who was one of the tenants paying for the security. Under the circumstances of this case, the trial court properly denied Burns= motion for directed verdict based on lack of duty.

Next, the trial court properly denied Burns= motion for directed verdict as to causation. First, the evidence of Burns= negligence was so overwhelming that even Burns= own security expert conceded that Burns was negligent in the manner in which it provided security to D & H. Plaintiff=s evidence also demonstrated that the security

services provided by Burns at the time of the theft were inadequate. In fact, Burns *conceded* at trial that plaintiffs established that Burns failed to meet its obligations under the security contract for Parkway and that Burns failed to follow the post orders.

In regard to causation, the jury could have easily concluded that Burns= negligence probably caused the loss. Plaintiff=s expert testified that had Burns performed its security obligations properly, the theft could have been prevented. Burns contributed to the loss by negligently assigning a guard with a history of sleeping on the job to a double shift, resulting in the single guard being asleep or less alert at the time of the theft. The jury could also have determined that the failure of the Burns= guards to do *any* of the required patrols could have been causally related to the failure of Burns to deter or prevent the crime in the first place *or* to Burns= failure to observe the operation of the crime and take proper action.

Florida law provides that questions of foreseeability, adequate security, and safety measures are questions of fact for a jury. Here the evidence fully supported the jury=s determination that Burns= negligence proximately caused the theft loss. The trial judge properly denied the motion for directed verdict on this issue.

Burns next claims that the trial judge erred in excluding evidence which would have shown a potential exclusion (or reduction) for employee theft contained in the Philadelphia Indemnity insurance policy. For multiple reasons, this argument fails.

First, Burns never pleaded such a policy exclusion or reduction as a defense in this case. Second, before trial Burns conceded that it was **not** contesting the coverage for the loss. Third, Burns stipulated to the amount of damages at trial, thus mooting any argument that could have potentially reduced or eliminated damages, so long as Burns was found to be at fault for the loss. Fourth, Burns waived any claimed error regarding the admission of evidence when it actually *objected* to the admission of such evidence at trial. Fifth, Burns failed to preserve any claimed error regarding the introduction of insurance policy evidence by failing to proffer such evidence at trial. Sixth, any error in excluding evidence regarding the insurance policy was harmless because there was no proof that an employee of D & H was involved in the theft, such that Philadelphia Indemnity could have excluded or reduced the claim. Based on the myriad of reasons, the trial judge did not abuse his broad discretion concerning the admissibility of the evidence.

On cross appeal, Philadelphia Indemnity and D & H will prove that the trial judge erred in failing to award plaintiffs the full measure of its damages. The trial judge erred by awarding only $510,653.10 (plus interest), rather than the correct amount of $668,117.98, thus wrongly reducing plaintiffs full measure of damages by $157,464.88 (plus interest). As the Florida Supreme Court has already ruled, a claim for negligent security resulting in an intentional criminal act is an

Aaction based upon an intentional tort@ pursuant to section 768.81(4)(b), Florida Statutes, so that the doctrine of joint and several liability (and not comparative fault) applies to this action. Plaintiffs are entitled to collect their full measure of damages.

Alternatively, even if Section 768.81 does apply to this action, the trial judge misapplied and miscalculated the amount of damages due to plaintiffs under Section 768.81(3)(a). Pursuant to that section, liability in our case is based upon fault, except that joint and several liability applies to that portion of economic damages up to $500,000. Moreover, under the statute, the amount of damages calculated under joint and several liability shall be *in addition to* those damages already apportioned to Burns based on its own percentage of fault. Under the proper application of subsection (3), joint and several liability *does* apply in this case, allowing D & H to recover its *full* measure of damages. The trial judge therefore erred in failing to award D & H the full measure of its damages ($668,117.98) (87% of the stipulated damages of $767,951.71, reduced by 13% comparative negligence).

Finally, the trial judge committed error in awarding Philadelphia Indemnity interest only from the time of its payment to D & H, rather than from the date of the theft loss, a number of months earlier.

ARGUMENT I

WHERE BURNS UNDERTOOK BY CONTRACT WITH PARKWAY TO PROVIDE SECURITY SERVICES FOR PARKWAY=S TENANTS (INCLUDING D & H), THE TRIAL JUDGE PROPERLY DETERMINED THAT BURNS OWED D & H A LEGAL DUTY TO EXERCISE REASONABLE CARE IN PROVIDING SECURITY TO PROTECT THE PROPERTY OF D & H.

Standard of Review

Appellees agree that in a negligence case, whether a duty of care exists is generally an issue of law to be determined by the court and, therefore, may be resolved pursuant to a motion for directed verdict. *Marriott International, Inc. v. Perez-Melendez*,855 So.2d 624 (Fla. 5th DCA 2003). However, it would not be correct to apply this standard to the second part of Burns= first argument (regarding causation). AWhether the duty, once established, has been breached by the defendant and whether that breach proximately caused the plaintiff=s injuries are generally issues of fact to be resolved by the jury and, therefore, are usually inappropriate for resolution via a motion for directed verdict. The courts have repeatedly and consistently held that motions for directed verdict in negligence cases must be treated with extreme caution because of the applicable standard of review and because it is the province of the jury rather than the trial or appellate court to weigh and evaluate the evidence.@ *Id*. at 628-629. As this court noted in *Collins v. School Board of Broward County,* 471 So.2d 560,

563 (Fla. 4th DCA 1985), when presented with a motion for directed verdict, Athe court must view all of the evidence in a light most favorable to the non-movant, and, in the face of evidence which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made. . . . Similarly, every reasonable conclusion which may be drawn from the evidence must also be construed favorably to the non-movant. . . Only where there is no evidence upon which a jury could properly rely, in finding for the plaintiff, should a directed verdict be granted.@ *Id*. at 563.

Argument

In *Clay Electric Cooperative, Inc. v. Johnson*, 28 Fla. L. Weekly S 866, __ So. 2d __ (Fla. 2003), the Florida Supreme Court recently explained the Aundertaker=s doctrine@:

> Whenever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service B i.e., the Aundertaker@ B thereby assumes a duty to act carefully and to not put others at an undue risk of harm. This maxim, termed the Aundertaker=s doctrine,@ applies to both governmental and nongovernmental entities. The doctrine further applies not just to parties in privity with one another B i.e, the parties directly involved in an agreement or undertaking B but also to third parties. Florida courts have applied the doctrine to a variety of third-party, contract-based negligence claims and ruled that the defendants could be held liable, notwithstanding a lack of privity.

As noted by the Supreme Court in *Clay Electric*, Section 324A of the Restatement (Second) of Torts (1965) (Liability to Third Person for Negligent Performance of Undertaking), sets forth the standards for assessing liability in such cases:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> [a] his failure to exercise reasonable care increases the risk of such harm, or
> [b] he has undertaken to perform a duty owed by the other to the third person, or
> [c] the harm is suffered because of reliance of the other or the third person upon the undertaking.
> Restatement (Second) of Torts section 324A (1965).

In our case, plaintiffs adequately proved that Burns assumed a specific, legally recognized duty to D & H to act with due care in protecting the property in the D & H warehouse from theft, notwithstanding a lack of privity between D & H and Burns. AThe principle that the obligation to exercise reasonable care in the performance of a contractual duty extends to third parties who may be foreseeably injured and not just to those in privity of contract is a bedrock principle of modern tort jurisprudence. *Clay Electric* (Justice Pariente, specially concurring). It is no surprise, of course, that Burns completely fails to consider the application of the undertaker=s doctrine under the facts of our case, because the application of the doctrine is fatal to its position.

Instead, Burns primarily contends on appeal that A[t]he law in Florida, and particularly in the Fourth District, is crystal clear that for a landlord or security company to have a legally cognizable duty with respect to an intervening criminal action, there must be some reasonably related, somewhat similar, reasonably proximate, and not wholly dissimilar criminal activity in the past.@ Initial Brief at 17. Not only does this statement ignore the undertaker=s doctrine, but it simply is not an accurate statement of law. In *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. 4th DCA 1991), *dismissed*, 589 So.2d 291 (Fla. 1991), *and disapproved on other grounds*, *Angrand v. Key*, 657 So.2d 1146 (Fla. 1995), the Fourth District held that foreseeability is determined in light of *all the circumstances* of the case rather than by a rigid application of the mechanical rule requiring evidence of prior similar criminal acts against invitees on the property[12]. When considering all of the circumstances of

[12]This court noted in *Shelburne* that cases such as *Relyea v. State*, 385 So.2d 1378 (Fla. 4th DCA 1980), disapproved on other grounds, *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986) which hold that the defendant must have knowledge of prior, similar criminal acts in order to impose the duty to protect invitees from criminal acts of a third person, are not in accord with cases from the Florida Supreme Court such as *Hall v. Billy Jack=s, Inc.*, 458 So.760 (Fla. 1984), *Allen v. Babrab, Inc.*, 438 So.2d 356 (Fla. 1983) and *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983). *Hall* held that forseeability may also be established by proof of inadequate security. *Shelburne*, 576 So.2d at 330.

The First District, in *Paterson v. Deeb*, 472 So.2d 1210, 1219 (Fla. 1st DCA 1985), *rev. denied*, 484 So.2d 8 (Fla. 1986), Aexpressly declin[ed] to require as the essential predicate to liability allegation and proof that the landlord had actual or constructive knowledge of prior similar criminal acts

our case, it is easy to conclude that the undertaker=s doctrine created a duty on the part of Burns to protect the property of D & H from theft.

The circumstances of our case demonstrate that tenants such as D & H, a computer distributor, paid common area maintenance expenses to the landlord (Parkway), which included payment for the uniformed security services performed by Burns and provided for the benefit of the tenants. Burns was hired to protect all the properties within Parkway, including D & H. Simply put, part of Burns= obligation was to protect the property of D & H.

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committed on the premises. We are not willing . . . to sacrifice the first victim=s right to safety upon the altar of foreseeability by slavishly adhering to the now-discredited notion that at least one criminal [act] must have occurred on the premises before@ liability for a criminal [act] can be established. In *Paterson*, the court specifically noted cases which recognized *alternative* legal grounds for implying such a duty, such as undertaking to provide security. *Id*. at 1214. *See also Holley v. Mt. Zion Terrace Apartments, Inc. v. Mt. Zion Terrace Apartments, Inc.*, 382 So.2d 98 (Fla. 3d DCA 1980), where the court explained that the hiring of security guards itself was evidence that the defendant recognized the dangerous nature of the premises and that the crime was thus

reasonably forseeable.. *Id*. at 99-100.

Burns specifically undertook this obligation for consideration and recognized the obligation as necessary for the protection of a third person, D & H. Moreover, D & H expected Burns, and relied upon Burns, to provide protection for the D & H property in the warehouse. If Burns= failure to exercise reasonable care increased the risk of harm to D & H property [section 324A (a)]; or if Burns undertook to perform a duty owed by Parkway to D & H [section 324A (b)]; or if D & H suffered harm because of its reliance on Burns in the undertaking [section 324A (c)], then Burns is liable for its negligence to D & H. The evidence at trial showed the application of all three subsections of section 324A.

Even Burns= own expert implicitly recognized the application of the undertaker=s doctrine in this case. Burns= security expert specifically *conceded that Burns had a duty to provide security to D & H,* who was one of the tenants paying for the security. In the words of Burns= own expert: AUltimately [Burns] owed a duty to everyone on the property to provide reasonable security.@ [T 549].

The *Clay Electric* decision is hardly the first time that the Florida courts have applied the undertaker=s doctrine or section 324A of the Restatement (Second) of Torts. In *Union Park Memorial Chapel v. Hutt,* 670 So.2d 64 (Fla. 1996), the supreme court held that a funeral director who voluntarily undertakes to organize and lead a funeral procession owes a duty of reasonable care to the procession participants. The

high court stated that it is Aclearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care.@ *Id*. at 67. The supreme court followed section 324A of the Restatement (Second) of Torts. *Id*. at 67.

In addition to section 324A of the Restatement, *Hutt* relied on its decision more than 70 years ago in *Banfield v. Addington*, 104 Fla. 661, 667, 140 So.893, 896 (1932),which recognized that A[i]n every situation where a man undertakes to act, . . . he is under an implied legal obligation or duty to act with reasonable care, to the end that the person *or property of others* may not be injured.@ (emphasis added). In addition to *Banfield*, the supreme court cited other cases applying the undertaker=s doctrine. *See Slemp v. City of North Miami*, 545 So.2d 256 (Fla. 1989) (holding that even if city had no general duty to protect property owners from flooding due to natural causes, once city has undertaken to provide such protection, it assumes the responsibility to do so with reasonable care); *Kowkabany v. Home Depot, Inc.*, 606 So.2d 716, 721 (Fla. 1st DCA 1992) (holding that by undertaking to safely load landscaping timbers into vehicle, defendant owed a duty of reasonable care to a bicyclist who was struck by the timbers protruding from the vehicle window); *Garrison Retirement Home v. Hancock*, 484 So.2d 1257, 1262 (Fla. 4th DCA 1985)

(holding that a retirement home that assumed and undertook care and supervision of a home resident owed a duty to a third party to exercise reasonable care in the supervision of the resident=s activities). *See also Barfield v. Langley*, 432 So.2d 748 (Fla. 2d DCA 1983) (it is axiomatic that an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care) and *Kaufman v. A-1 Bus Lines, Inc.*, 416 So.2d 863 (Fla. 3d DCA 1982) (action undertaken for the benefit of another must be performed in accordance with a duty to exercise due care).

In *Wells Fargo Guard Services Inc. of Florida v. Nash*, 654 So.2d 155 (Fla. 1st DCA 1995), *rev=d on other grounds, Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996) (a defendant must plead and prove the negligence of a nonparty to include the nonparty=s name on the jury verdict), the First District considered a case very similar to our case.[13] In that decision, as in ours, Wells Fargo (and Burns) supplied security services pursuant to a contract with the property owner, thus Aundertaking to provide security services on the premises.@ *Id*. at 156. Citing the Restatement (Second) of Torts section 324A and *Kowkabany v. Home Depot, Inc.*, 606 So.2d 716 (Fla. 1st DCA 1992), the First District agreed that by undertaking to provide

[13]Coincidently, the defendant in that case was also Wells Fargo (whose contractual obligation under the Parkway contract was taken over by Burns).

security services, Wells Fargo owed a duty to the plaintiff (a nonparty to the contract who was robbed and assaulted). Similarly, by undertaking to provide security services, Burns owed a duty to D & H (a nonparty to the contract who was the victim of intentional crime).[14]

The undertaker=s doctrine was also applied by the Fourth District in *Garrison Retirement Home Corp. v. Hancock*, 484 So.2d 1257, 1261 (Fla. 4th DCA 1985), where the court noted that the duty of care under the doctrine runs to third parties. And decades ago, the Florida Supreme Court held in *Nicholas v. Miami Burglar Alarm Co., Inc.*, 339 So.2d 175, 176-177 (Fla. 1976) that a burglar alarm company under contract to monitor an alarm system may be negligent for failure to inform the police or the warehouse owner of a trouble signal which its employees had received, because the company had assumed the duty to do so, even though the contract did not so require. *See also Pitts v. Metropolitan Dade County*, 374 So.2d 996 (Fla. 3d DCA 1979) (court determined that a security service whose function it was to patrol a hospital parking complex could be held liable to a plaintiff assaulted in the complex for a negligent

[14]Of course, parties to a contract, such as Burns and Parkway, Amay not effectively contract that either or neither of them will not be liable to third parties injured under circumstances where the law affords such third parties a remedy in tort.@ *Bovis v. 7-Eleven, Inc.*, 505 So.2d 661 (Fla. 5th DCA 1987).

failure to properly perform that duty) and *Fincher Investigative Agency, Inc. v. Scott*, 394 So.2d 559 (Fla. 3d DCA 1981) (issue of whether a guard service was negligent and whether such negligence contributed to the victim=s injury was for jury).

ASection 324A of the Restatement has been applied in many types of situations, including those involving security guards.@ *Professional Sports, Inc. v. Gillette Security, Inc.*, 159 Ariz. 218, 766 P.2d 91 (App. 1989) (a security company may be liable for harm suffered to a third person if it failed to exercise reasonable care in performing the duties it undertook pursuant to contract, relying on Restatement (Second) of Torts section 324A). For example, in *Gold Mills, Inc. v. Orbit Processing Corp.*, 121 N.J. Super. 370, 297 A.2d 203 (1972), a court held that a security company which negligently performed its contract to guard certain premises was liable for the theft of a third party=s goods stored on the premise. The court specifically ruled that its facts fell within the provision of subsection 324A (b) because the defendant undertook to provide guards. In another example, the court in *Erickson v. Curtis Investment Company*, 447 N.W. 2d 165 (S.Ct. Minn. 1989), used section 324A to support its conclusion that a security firm hired by the owner of a parking ramp facility owed the duty of a reasonably prudent professional security firm, and the duty extended to customers of the lessee of the ramp as well as customers of the owner, which operated an adjoining hotel.

In the words of the supreme court in *Union Park Memorial Chapel v. Hutt*, 670 So.2d 64 (Fla. 1996): AVoluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others or might result in harm to others due to their reliance upon the undertaking confers a duty of reasonable care, because it thereby >creates a forseeable zone of risk.= *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992).@ Therefore, when Burns voluntarily undertook to provide security for Parkway=s tenants such as D & H, that very undertaking created a forseeable zone of risk and thus a duty, thus completely negating Burns= position that the theft was not forseeable due to a lack of prior similar crimes.

If, as Burns claims, the theft was not forseeable, then why was Burns even at Parkway purportedly providing security. If the theft was not forseeable, then why does Burns literally define a security guard as someone who prevents theft? If Burns could not foresee crimes such as the theft in this case, then how can Burns explain taking $90,000 a year from D & H and the other tenants of Parkway? Was Burns the real thief because it was stealing large sums of money for providing a service for which it (the security expert) could foresee no need? In reality, Burns was there precisely because it *could* and did foresee the theft of property belonging to D & H and the other Parkway tenants.[15] Burns undertook the specific obligation to make proper efforts to

[15] The Burns manual describes protecting property, preventing theft, and

deter or prevent potential theft (which it foresaw), and it breached this obligation, causing substantial damage to D & H. If this obligation to D & H was any greater than that of Parkway, as claimed by Burns, it is because Burns voluntarily undertook such a duty.

In sum, Philadelphia and D & H adequately proved that Burns assumed a specific, legally recognized duty to D & H to act with due care in protecting the property in the D & H warehouse from theft. A duty was thus created under the undertaker=s doctrine. Therefore, the trial judge properly rejected Burns= claim that a directed verdict was proper based on lack of duty.

The Trial Court Properly Denied Burns= Motion for Directed Verdict as to Causation

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preventing unauthorized entry as part of its responsibility.

Based on its argument heading and its analysis, Burns= first point on appeal appears to relate *solely* to its position that the trial court erred in failing to grant it a directed verdict because it had no duty to D & H as a matter of law. In several pages of its first argument (from the last paragraph on page 28 through the end of the argument on page 30), however, Burns briefly states that D & H failed to present any evidence as to *causation* in this trial and alludes to the notion that the trial was based on speculation.[16] To the extent that Burns may intend for these conclusory statements to be considered an argument on appeal, they will be addressed.

To begin, the evidence of Burns= negligence was so overwhelming that even *Burns= security expert* conceded that Burns was negligent in failing to provide professional service in this case; in failing to meet its obligation to provide a workmanlike guard service; and in failing in many ways to perform in a manner

[16] Burns essentially copied this section of the argument word for word from page 6-7 of its motion for new trial [R 910-911], which was filed before the trial record was transcribed and Burns could clearly see that its comments regarding the evidence of causation were inaccurate. Unlike in its brief, Burns did have a separate argument heading regarding this argument in its new trial motion, implying that the conclusory statements in its brief regarding causation are not to be considered seriously.

consistent with good security practices. According to its own expert: 1) Burns should have put Parkway on notice about Burns= inability to properly guard Parkway; 2) Burns violated its own policy concerning the scheduling of security guards; 3) Burns violated its own guideline regarding guards working another full time job which interferes with their security work; 4) sleeping on the job was very bad in the security business; 5) Burns compounded its errors when the guards failed to follow the post orders, which required them to check the windows and locks. Surprisingly, this was the evidence *presented by Burns=* witness.

Plaintiff=s security expert, Donald Schultz, also testified to the following seven points: Burns never recommended a higher level of security services at Parkway; if the post orders could not have been accomplished by Burns, then it should not have obligated itself to such orders; Burns was obligated to patrol and check all buildings, windows, and doors, yet did no patrols the entire weekend of the theft; the security services provided by Burns at the time of the theft were inadequate because a guard at the gate *and* a rover guard was needed; Burns= assignment of a guard to work back-to-back double shifts, especially in light of the guard=s history of sleeping on the job, was totally unreasonable; watching television or doing outside work while a guard is on duty is not acceptable; finally, the guard service provided by Burns fell below the standard of care.

The evidence regarding Burns' negligence was so strong that counsel for Burns *conceded*[17] that plaintiffs established that Burns failed to meet its obligations under the security contract for Parkway and that Burns failed to follow the post orders. Burns has confirmed this concession as to its negligence by not raising the issue on appeal.

[17] Burns made this concession when plaintiffs moved for a directed verdict on the issues of duty and breach of duty.

Only the causation issue remains to be addressed. Burns contends that the jury determination that its blatant, compounded negligent acts and omissions proximately caused the theft loss (and the stipulated damages) of D & H was speculation. Burns= position lacks any coincidence with reality. The jury could have easily concluded that Burns= negligence probably caused the loss.[18] Plaintiff=s security expert specifically testified that had Burns performed properly, the guard probably should have been aware of the theft, making the theft preventable. Plaintiff=s expert also explained that Burns also failed to recommend electronic surveillance to enable the guard to monitor the 13 acre property from the guard house. The expert opined that had Burns done so, the illegal entry would normally be caught by a patrol or video camera, thus preventing or deterring the crime.[19] Moreover, placing a guard - who has been found sleeping

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[18] While Burns suggests that plaintiffs were Arequired to show that the [theft] would have been prevented had reasonable measures been taken, this is not the test. Causation, like any other element of plaintiff=s case, need not be demonstrated by conclusive proof: >it is enough that (plaintiff) introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant, than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise.=@ *Orlando Executive Park, Inc. v. P.D.R.*, 402 So.2d 442 (quoting from W. Prosser, Law of Torts, s 41 at 242 (4th Ed. 1977).

[19] Thus the jury may have found that Burns= negligence may have caused or contributed to the loss in more than one way. In addition to its negligence at the time of the theft (i.e., such as failing to perform rounds and failing to observe the crime during its commission), Burns= negligence prior to the theft in failing to recommend additional security measures such as video

before - on a double shift, where that guard states that he saw no trucks leave and does not know who came in or out, implies that he may have been sleeping on the job, thus contributing to the loss.

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surveillance or additional guards may have failed to prevent or deter the crime from ever being attempted.

The guard certainly could not have been very alert when he allowed (or perhaps did not even notice) the three stolen trucks to drive right under his nose out the front gate. The jury could have also determined that the guard=s sleepiness or inattentiveness prevented him from hearing or observing the theft operation occurring just 100 feet away from him when Parkway was not otherwise active. And certainly the jury could have determined that the failure of the Burns= guards to do *any* of the required patrols could have been causally related to the failure of Burns to deter or prevent the crime in the first place *or* to Burns= failure to observe the operation of the crime at the time of its occurrence.[20] It is, after all, Apeculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care@. *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So.2d 98, 100-101 (Fla. 3d DCA 1980). Florida law provides that questions of foreseeability and, more specifically, adequate security and safety measures, are questions of fact for a jury. *Shelburne*, 576

[20]*Williams v. Office of Security & Intelligence, Inc.*, 509 So.2d 1282 (Fla. 3d DCA 1987) involved a negligence claim against a guard service arising out of crime against the plaintiff. The court concluded that the evidence at trial established that the guard service was negligent and that the negligence was a proximate cause of the crime. The court noted that the guards were hired to patrol the apartment complex premises, however instead the guards slept, watched television, etc. As in our case, Williams showed that the crime would not have been attempted if the guards had been performing their duties and that because the guards were negligent in their performance, they encouraged criminals to commit crimes, rather than deterring such behavior. *Id*. at 1283. Therefore, a directed verdict in favor of the defendant was not proper in that case, as it was not proper here.

So.2d at 237. All in all, Burns= conclusory statement that the jury determination of causation was speculation is nothing more than pure speculation on the part of Burns. Burns= argument must be rejected.

ARGUMENT II

WHERE BURNS FAILED TO PLEAD A POLICY DEFENSE OF LACK OF COVERAGE; SPECIFICALLY CONCEDED BEFORE TRIAL THAT IS WAS NOT CONTESTING COVERAGE FOR THE LOSS; STIPULATED TO THE AMOUNT OF DAMAGES; WAIVED SUCH ARGUMENT BY OBJECTING TO EVIDENCE REGARDING THE INSURANCE POLICY; FAILED TO PRESERVE THE CLAIMED ERROR; SUCH EVIDENCE WAS NOT RELEVANT; AND THE CLAIMED ERROR IS HARMLESS ANYWAY, THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION IN PRECLUDING SUCH EVIDENCE.

Standard of Review

A trial court has broad discretion concerning the admissibility of evidence, and its rulings will not be disturbed absent an abuse of discretion. *Heath v. State*, 648 So.2d 660, 664 (Fla. 1995).

Argument

Burns argues that the trial judge erred in excluding evidence which would have showed a potential exclusion (or reduction) for employee theft contained in the Philadelphia Indemnity insurance policy. However, there are many reasons why this argument must be summarily rejected. First, Burns never pleaded such a policy exclusion or reduction as a defense in this case. Second, Just before trial, Burns conceded: AWe=re NOT contesting the coverage for the loss.@ [SR May 9, 2003 transcript, p. 15-16]. Third, Burns= stipulation at trial as to damages mooted any argument that could have potentially reduced or eliminated damages, so long as Burns was found to be at fault for the loss. Fourth, Burns= waived any claimed error regarding the admission of evidence when it objected to the admission of such evidence at trial. Fifth, Burns failed to preserve any claimed error regarding the introduction of insurance policy evidence by failing to proffer such evidence at trial. Sixth, any error in excluding evidence regarding the insurance policy was harmless because there was no proof that an employee of D & H was involved in the theft, such that Philadelphia Indemnity could have excluded or reduced the claim. For all these reasons, the trial judge did not abuse his broad discretion concerning the admissibility of the evidence. All of these issues will be addressed in turn, following a review of the relevant trial record.

Trial Record

Initially, Burns did not specifically raise as a defense the position that Philadelphia Indemnity should not have paid D & H the full amount of the loss because the insurance policy contained an exclusion (or) reduction for employee theft. [R 114-120]. Before trial, plaintiffs moved in limine to prohibit the introduction of insurance issues, including evidence of the coverage provided to D & H. At the hearing on the motion just before trial, the trial judge specifically noted that his pretrial rulings on the motions in limine were without prejudice, because Athere are times things unfold in the courtroom.@ [SR May 9, 2003 transcript, p. 13]. At this hearing the plaintiffs informed the judge that they anticipated Burns may Aclaim this risk was excluded as an employee dishonesty claim [in the insurance policy].@ [SR May 9, 2003 transcript, p. 15]. When asked by the judge whether Burns intended to offer such evidence, Burns=s counsel responded: A**We=re not contesting the fact that they paid the loss. We=re NOT contesting the coverage for the loss.**@ [SR May 9, 2003 transcript, p. 15-16]. Thus, just before trial, Burns conceded that it was **not** contesting insurance coverage for the loss. This was consistent with Burns= failure to raise the issue as a defense.

At trial, Philadelphia presented the testimony of Kevin Smith, an independent insurance adjuster. [T 304]. He was assigned by Philadelphia Indemnity to adjust the D& H theft loss. [T 304]. When Philadelphia Indemnity sought to introduce evidence concerning the particular insurance policy issued to D & H, **Burns objected** to such

evidence on the grounds of relevance. [T 305]. Burns= objection was sustained and Philadelphia Indemnity was precluded from offering the policy or testimony about the policy into evidence (which would have placed any policy exclusions into evidence). [T 306].

In explaining the rationale for upholding *Burns*= objection, the trial court explained that the issue of damages was undisputed since Burns stipulated to the amount of the claim, leaving only the issue of negligence for the jury. [T 306]. Even so, counsel for Philadelphia Indemnity expressed a concern that Burns might still want to maintain a coverage defense under the insurance policy. [T 306]. The trial judge explained that Philadelphia was a subrogee, standing in the shoes of its insured, D & H, and that there was no coverage issue in the case. [T 306-307]. In the face of this colloquy, counsel for Burns stood mute, never claiming that evidence of the policy was relevant. (This position was consistent with Burns= objection to such evidence, its pretrial concession that it was not contesting coverage for the loss, and its failure to plead such a defense in the first place). [T 305-307]. In addition, when discussing the admissibility of certain portions of Mr. Schwab=s deposition, Burns= counsel agreed with the court again that the value of the insurance was not an issue because of the stipulation of the parties. [T 758-759].

A. Burns Failed to Plead Lack of Coverage Under the Policy

Although Burns now claims error regarding an evidentiary exclusion (or reduction) of evidence regarding Philadelphia Indemnity=s policy, Burns never pleaded such a policy exclusion or reduction as a defense in this case. Florida Rule of Civil Procedure 1.140(h) requires a defendant to give proper notice of all defenses the defendant intends to assert. See *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996). Burns therefore waived any claim regarding such a policy provision because it simply was not an issue in the case.

B. Burns Conceded Before Trial That It Was Not Contesting Coverage

On appeal Burns complains about the exclusion of evidence regarding Philadelphia Indemnity policy exclusions or reductions. However, just before trial, Burns conceded that it was **not** contesting coverage for the loss. APretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced.@ *Lotspeich Company v. Neogard Corporation*, 416 So.2d 1163, 1165 (Fla. 1982). *See also Gun Plumbing, Inc. v. Dania Bank*, 252 So.2d 1 (Fla. 1971). Burns cannot now raise an issue that it specifically waived.

C. Burns Stipulation to Damages Moots its Argument

At trial Burns stipulated that Philadelphia Indemnity suffered damages in the amount of $762,851.71 and that D & H suffered a loss of its $5,000 deductible. [T 212-214]. As this court has noted, it is well settled that a stipulation, properly entered

into and relating to a matter upon which it is appropriate to stipulate, is binding upon the parties and upon the court. *Hufcor/Gulfstream, Inc. v. Homestead Concrete & Drainage, Inc.*, 831 So.2d 767 (Fla. 4th DCA 2002). Once this stipulation was made, Burns was precluded from contesting whether Philadelphia Indemnity suffered any damages and the amount of such damages (so long as there was some liability as to Burns). That issue thus became moot and evidence of the insurance policy was no longer relevant or probative of any issue in the case. Following the stipulation, Burns could no longer claim - at trial or on appeal - that Philadelphia Indemnity should have paid less than it did on the loss, or that it was a mere volunteer in making payment to D & H.

This can also be viewed from an estoppel perspective. Burns cannot now argue a position entirely inconsistent with its previous position. *Dubois v. Osborne*, 745 So.2d 479 (Fla. 1st DCA 1999). The doctrine of estoppel against inconsistent positions Aprovides that a party who assumed a certain position in a legal proceeding may not thereafter assume a contrary position . . .@ *McCurdy v. Collis*, 508 So.2d 380, 384 (Fla. 1st DCA 1987). Since Burns stipulated that damages were not an issue, it cannot now take a contrary position. For this reason also Burns= argument must be rejected.

D. Burns= Waived Any Claimed Error Regarding the Admission of Evidence When It Objected to the Admission of Such Evidence

By objecting to the admission of such evidence, Burns clearly waived any claimed error regarding the exclusion of evidence which would have showed a potential exclusion (or reduction) for employee theft contained in the Philadelphia Indemnity insurance policy. As noted, plaintiffs actually sought to introduce evidence concerning the insurance policy issued by Philadelphia to D & H because of a concern that Burns might attempt to maintain a coverage defense under the policy. However, **Burns actually objected** to such evidence as not relevant, and the objection was sustained. Therefore, evidence about the policy was prevented **by Burns itself**.

The trial court noted that there was no relevance to such evidence because there was no dispute as to damages because Burns stipulated to the amount of the claim. Even in the face of this colloquy, counsel for Burns stood mute, never claiming that evidence of the policy was relevant. In light of the fact that Burns actually prevented admission on the evidence at trial *and* did not claim that the evidence was relevant, it is inconceivable that Burns has not waived this issue.

E. Burns Failed to Preserve Any Claimed Error Regarding Exclusion of Policy Evidence by Failing to Proffer Such Evidence at Trial.

Burns never tried to introduce (or even proffered) any evidence of alleged policy exclusions or reductions in the trial record. Florida Statutes section 90.104 provides that a Acourt may predicate error, set aside or reverse a judgment . . . when a

substantial right of the party is adversely affected and: (b) [w]hen the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.@ Burns never made any offer of proof concerning the details of the policy exclusions upon which it desired to rely and never asked any witness questions concerning such exclusions. The details of such alleged policy exclusions simply were not made part of the record at trial, and this court cannot even examine the terms of such exclusions. No claimed error was preserved.

In *Donley v. State*, 694 So.2d 149 (Fla. 4th DCA), *cause dismissed*, 697 So.2d 1215 (Fla. 1997), the court held that if a trial judge tentatively grants a motion in limine concerning an area of evidence , but then indicates a willingness to reconsider its ruling after hearing the witness=s testimony, it is necessary to proffer the testimony sought to be introduced in order to preserve the issue for appeal. Here the trial judge specifically noted that his pretrial rulings on the motions in limine were without prejudice, because Athere are times things unfold in the courtroom.@

Because the Ashifting sands of the trial in progress may cause a judge to rethink an earlier evidentiary ruling based on a maturing understanding of the case,@ *Donley* at 150, if Burns wanted to admit certain policy exclusions into evidence, it should have sought to introduce them into evidence at trial. Because Burns never tried to introduce

(or even proffered) the insurance policy into evidence, the issue was not preserved for appellate review. See, e.g., *State Farm Mutual Automobile Insurance Company v. Gordon*, 712 So.2d 1138 (Fla. 3d DCA 1998). Therefore, the argument must be rejected.

F. Any Error Regarding Exclusion of Policy Evidence Was Harmless Where There Was No Proof that an Employee of D & H was Involved in the Theft

Burns argues that evidence of the policy was relevant because it contained an exclusion (or reduction) in the case of employee theft.[21] Burns contends that Philadelphia did not have to pay the loss because of such policy terms, was therefore a mere volunteer in paying the loss, and cannot recover for such a payment. Burns cited the case of *Estate of Jacobson v. Attorneys= Title Insurance Fund, Inc.*, 685 So.2d 19 (Fla. 3d DCA 1996) as a direct and apt analogy. It is neither direct, nor apt. In that case, the title company was considered a mere volunteer when it paid an invalid lien.

[21] Burns= suggestion that the jury presumably found that the theft was caused by employee theft (Initial Brief at 35-36) is sheer speculation. As suggested by Burns= expert witness, D & H may have been found comparatively negligent because the alarm system lacked a cellular or radio backup, because D & H failed to have additional physical security such as locks, or based on other matters.

Since the lien was never valid, there was no valid claim and the insurer paid for something that was not covered under its policy.

In contrast, in our case Philadelphia Indemnity paid a valid claim, a theft loss for which there was *no valid, applicable exclusion.* Had a D & H employee been convicted of the burglary/theft, then Philadelphia may have conceivably been able to pay a reduced coverage amount under the policy for the loss suffered by D & H (*if there were* an applicable exclusion, which was *not* shown) . However, the evidence showed that *no D & H employee was even charged, let alone convicted*, of the crime. Under these facts, Philadelphia had no legal right to deny the claim of D & H, merely because someone may have suspected (but not proved) employee theft. Therefore, there would have been no relevance to jury consideration of the policy terms. Any such error regarding the admission of policy terms, even if not waived, was harmless error.[22]

[22]This entire argument by Burns concerning Philadelphia Indemnity's alleged policy exclusions is a red herring anyway. Even if for some reason the insurance carrier was not required under its policy to pay for the theft loss, D &

H would have then accrued the same loss and would be entitled to the same amount of damages against Burns. It would just mean that the major beneficiary of the payment would be D & H, rather than Philadelphia Indemnity. It would not affect Burns= liability; rather, it would only change the name of the payee on the check.

In sum, Burns now complains on appeal about the trial court=s exclusion of evidence regarding alleged policy exclusions or reductions in the insurance policy provided by Philadelphia Indemnity to D & H. However, Burns never pleaded such a policy exclusion or reduction as a defense in this case. Burns conceded before trial that it was not contesting coverage for the loss. If this were not enough of a waiver, Burns then stipulated at trial as to damages, precluding any argument that could have potentially reduced or eliminated damages. Adding comedy to the mix, Burns then actually objected to the admission into evidence of the very policy it now complains the judge wrongly refused to allow. As if its waiver were not blatant enough, Burns then failed again to preserve any claimed error by failing to proffer evidence of the alleged policy exclusions at trial. Moreover, any error in excluding evidence regarding the insurance policy was harmless because there was no proof that an employee of D & H was involved in the theft such that Philadelphia Indemnity could have excluded or reduced the claim. Finally, Burns= argument is meaningless because even if Philadelphia were not required to pay for the theft loss, the damages would then have accrued to D & H, who would be entitled to payment from Burns. Based on all these reasons, the trial judge properly exercised his broad discretion concerning the admissibility of the evidence.

CROSS APPEAL

ARGUMENT I

WHERE THE TRIAL COURT IMPROPERLY RULED THAT THE COMPARATIVE FAULT STATUTE (SECTION 768.81) APPLIED TO THIS CLAIM AND THEN FURTHER COMPOUNDED HIS ERROR BY MISAPPLYING THE JOINT LIABILITY PROVISIONS OF THE STATUTE, THIS COURT MUST CORRECT AND INCREASE THE AMOUNT OF THE DAMAGE AWARD PURSUANT TO THE PROPER APPLICATION OF THE LAW.

Standard of Review

AStatutory interpretation is a question of law subject to *de novo* review.@ *Bellsouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 289 (Fla. 2003); *State v. Glatzmayer*, 789 So.2d 297, 301 n. 7 (Fla. 2001).

Argument

The trial judge erred in failing to award plaintiffs the full measure of its damages. In this case, the stipulated amount of damages was $767,951.71. This amount must be discounted by 13 percent - the portion for which plaintiffs cannot

recover based on their comparative negligence. When the stipulated damages of $767,951.71 are reduced by 13 percent, that leaves damages of $668,117.98, for which plaintiffs claim entitlement. This amount will be called the Afull measure damages.@ As will be explained, the trial judge erred by awarding only $510,653.10 (plus interest), rather than the correct amount of $668,117.98, thus wrongly reducing plaintiffs full measure of damages by $157,464.88 (plus interest).

A. Introduction - History of Joint and Several Liabilty

Joint and several liability was part of the common law in this state. *Fabre v. Marin*, 623 So.2d 1182, 1184 (Fla. 1993). Under joint and several liability, all negligent defendants were held responsible for the total of the plaintiff=s damages no matter what the extent of each defendant=s fault in causing the accident. *Id*. at 1184. In *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), the Florida Supreme Court made major strides in equating liability with fault by receding from the doctrine of contributory negligence and adopting the doctrine of comparative negligence, under which a negligent plaintiff=s damages would be reduced by his proportion of negligence, but not barred.

In *Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987), the Florida Supreme Court declined to judicially eliminate joint and several liability because it was a public policy matter which was best decided by the legislature. In response to that

decision, the legislature enacted section 768.81 (3). *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993).[23] In *Fabre*, the court ruled that the only means of determining a party=s percentage of fault is to compare that party=s percentage to all the other entities who contributed to the accident, whether or not they could have been joined as defendants. *Id*. at 1185.

B. Florida Statutes Section 768.81 Does Not Apply to This Action[24]

In *Merrill Crossings Associates, v. McDonald*, 705 So.2d 560, 560-561 (Fla. 1997), the Florida Supreme Court considered whether an action alleging the negligence of the defendants in failing to employ reasonable security measures, with the omission resulting in an intentional, criminal act being perpetrated upon the plaintiff by a non-

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[23]As noted in *Fabre*, Aby retaining joint and several liability for [certain categories of cases], the legislature continued to recognize the justification for joint and several liability under some circumstances.@ *Id*. at 1186, fn 1. It should be noted that the 1999 amendments to section 768.81(3) substantially modified the original 1986 parameters of the application of joint liability.

[24]Plaintiffs repeatedly raised this argument throughout the case: in a motion for partial summary judgment [R 351-353]; again at trial [T 777]; and again at the hearing concerning the entry of the final judgment. [SR June 3, 2003 Transcript].

party on property controlled by the defendants, was an Aaction based upon an intentional tort@ pursuant to section 768.81(4)(b), Florida Statutes, so that the doctrine of joint and several liability applies.[25] The high court answered that question - the same question present in our case - in the affirmative. *Id*. at 561.[26]

Subsection (4) of the Act (Applicability) provided:

> (a) This section applies to negligence cases. For purposes of this section, Anegligence cases@ includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort or breach of warranty and like theories. In determining whether a case fall within the term Anegligence case,@ the court shall look to the substance of the action and not the conclusory terms used by the parties.
> (b) This section does not apply . . . to any action based on an

[25]The general rule is that statutes in derogation of the common law are strictly construed. *Bellsouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 290 (Fla. 2003). This court cannot thus Abroadly@ read the statute to take away plaintiff=s common law right to apply joint and several liability.

[26]The Supreme Court reaffirmed its *Merrill Crossings* holding in *Stellas v. Alamo Rent-A-Car*, 702 So.2d 232 (Fla. 1997).

intentional tort. .
. .

Section 768.81, Florida Statutes (1993).[27]

[27]The language of subsection (4) considered by *Merrill Crossings* remains the same after the 1999 amendment to section 768.81.

Merrill Crossings noted that section 768.81(4), by its own terms[28], applies only to Anegligence cases@ and not to Aany action based upon an intentional tort.@ *Id*. at 561. As the court explained, A[S]ection 768.81(4)(a) explicitly states, ›In determining whether a case falls within the term ›negligence cases,- [such that comparative fault would be required] the court shall look to the substance of the action and not the conclusory terms used by the parties.@ *Id*. at 563. In arriving at this conclusion, the supreme court relied on the Fourth District=s decision in *Slawson v. Fast Food Enterprises*, 671 So.2d 255 (Fla. 4th DCA 1996), *review dismissed*, 679 So.2d 773 (Fla. 1996). In *Slawson*, this court explained that: AThe words chosen, ›based upon an intentional tort,- imply to us the necessity to inquire whether the entire action against or involving multiple parties is founded or constructed on an intentional tort. In other words, the issue is whether an action comprehending one or more negligent torts actually has at its core an intentional tort by someone.@ *Id*. at 258. In *Merrill*

[28]The court=s purpose in construing a statute is to give effect to the Legislature=s intent. *Bellsouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 289 (Fla. 2003). To discern legislative intent, the court must first look to the actual language used in the statute. *Id*. at 289. Here the plain language of the statute shows its inapplicability to our case.

Crossings - like in our case - the court dealt Awith a negligent tortfeasor whose acts or omissions give rise to or permit an intentional tortfeasor=s actions.@ *Id*. at 562.

Based on the *Slawson* analysis, *Merrill Crossings* held that section 768.81, by its own terms, did not apply to mandate comparative fault, because the substance of the action was that McDonald was the victim of an intentional tort. In a strikingly similar fashion, D & H too was the victim of an intentional tort (the burglary/theft). Accordingly, section 768.81 does *not* apply to our case, and the controlling law thus reverts back to common law joint and several liability. As such, the trial judge erred in failing to award D & H the full measure of its damages ($668,117.98) (87% of the $767,951.71of stipulated damages, reduced 13% for comparative negligence).

C. Even If Section 768.81 Applies to This Action, the Trial Court Misapplied the Joint Liability Provisions (Section 768.81(3)) of the Statute.

Even if Section 768.81 applies to this action, the trial judge plainly misapplied and miscalculated the amount of damages under Section 768.81(3)(a). Under a proper analysis of that subsection, plaintiff are unquestionably entitled to recover $668,117.98 (plus interest), which is 87% of the $767,951.71 *stipulated* damages (after deducting 13 percent for comparative negligence).[29] Under the proper application of subsection

[29] In awarding only $510,653.10 (before interest) in damages, instead of the correct amount of $668,117.98 (before interest), the trial judge made a $157,464.88 mistake (not counting extra interest earned on this difference).

(3), joint and several liability *does* apply in this case, allowing D & H to recover its full measure of damages (all the stipulated damages minus a 13 percent deduction for comparative negligence).[30]

Subsection (3)(a) of 768.81 provides:

[30] AWhen interpreting a statute, courts must determine legislative intent from the plain meaning of the statute. If the language of the statute is clear and unambiguous, a court must derive legislative intent from the words used without involving rules of construction or speculating as to what the legislature intended.@ *State v. Dugan*, 685 So.2d 1210, 1212 (Fla. 1996) (citations omitted).

AApportionment of Damages. B In cases to which this section applies,[31] the court shall enter judgment against each party liable on the basis of such party=s percentage of fault and not on the basis of the doctrine of joint and several liability, **EXCEPT** as provided in paragraphs (a), (b), and (c):

(a) Where a plaintiff is found to be at fault, the following shall apply:

. . . . .

3. For any defendant found at least 25 percent but not more than 50 percent at fault, joint and several liability shall not apply to that portion of economic damages in excess of $500,000.

. . . . .

For any defendant under . . . subparagraph 3 . . . , the amount of economic damages calculated under joint and several liability **SHALL BE IN ADDITION TO** the amount of economic damages **ALREADY APPORTIONED** TO THAT DEFENDANT BASED ON THAT DEFENDANT=S PERCENTAGE OF FAULT. (Emphasis added).

[31]As just explained, this court is bound to determine under *Merrill Crossings* that 768.81 does **not** apply to this action. But even if it does, the trial court still reversibly erred in miscalculating plaintiffs= full measure of damages.

As stated in the provision, Burns= **joint** liability for economic damages (the only kind in this case) **shall be in addition to** the amount of economic damages **already apportioned to Burns based on Burns= percentage of fault**. Thus, the court must **first** determine the amount of Burns= liability for damages based on its own percentage of fault. When Burns= 45 percent of fault is applied to the stipulated damages of $767,951.71, the result is direct (non-joint) liability of Burns for $345,578.26. When the amount of damages for Burns= direct liability ($345,578.26) is subtracted from plaintiffs= full measure of damages ($668,117.98)[32], the remaining balance is $322,539.72 which represents the balance of damages for which *potential* joint liability applies. This balance of $322,539.72 is less than the $500,000 statutory cap for joint liability under subsection (3)(a)3. Therefore, Burns has joint liability for this $322,539.72 balance, **in addition to** the $345,578.26 of damages **already apportioned to Burns based on its percentage of fault**.[33] When the additional

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[32]Again, we consider plaintiff=s full measure of damages to be $668,117.98 (plus interest), which is 87% of the $767,951.71 *stipulated* damages (after deducting 13 percent for comparative negligence).

[33]That is precisely how the statute works. In contrast, the inexplicable method suggested by Burns and adopted by the trial court resulted in a total award of only $510,653.10 (plus interest), cheating plaintiffs out the $157,464.88 difference between that figure and plaintiffs= properly calculated full measure of damages. As noted in the Final Judgment [R 1002], the trial court adopted Burns= suggestion contained in its response to plaintiff=s proposed final judgment [R 913-929], which argued that Burns was 87%

$322,539.72 balance is added to $345,578.26 for Burns= direct liability based on its own fault, the total amount of Burns= liability becomes, of course, $668,117.98 - the full measure of plaintiffs= damages.

This method of calculation strictly follows the statutory language and logic. First a defendant must pay damages based on its proportion of liability. In addition, the statute allows joint liability for *up to* another $500,000, thus effectively capping joint liability under our facts to $500,000. In contrast, the method adopted by the trial court is contrary to the language of the statute, backwards and illogical. Effectively, the method employed by the trial judge provides a credit to the defendant for its directly apportioned liability, which was applied to *reduce* the available $500,000 dollars of the joint liability cap. Under the trial court=s method of calculation, when the percentage of the defendant=s fault is greater, then a greater portion of the joint liability cap is eaten up by this credit given to defendant its own fault. This effectively reduces joint liability when the defendant has a greater proportion of fault or liability. This is an absurd construction of the statute and cannot be justified.

(jointly and severally) liable for economic damages up to $500,000 ($435,000), **and then** 45% responsible for another $168,117.99 (or $75,653.10). Adding $435,000 to $75,653.10 equals the $510,653.10 amount determined by the trial court, before adding interest.

In sum, the Florida Supreme Court has already determined that Florida Statutes section 768.81 does not apply to an action like this one which is Abased on@ an intentional tort. Moreover, even if the provision applies, its application permits recovery of plaintiff=s full measure of damages. The trial judge committed legal error in wrongfully interpreting and applying the statute. This decision of the trial court is wrong. It is wrong as a matter of statutory interpretation and application. It is wrong as a matter of justice. This court must correct the error and award plaintiffs their full measure of damages.

CROSS APPEAL

ARGUMENT II

WHERE THE VERDICT LIQUIDATED THE PLAINTIFF=S LOSS AND FIXED IT AS OF A PRIOR DATE, THE TRIAL JUDGE ERRED IN FAILING TO AWARD PREJUDGMENT INTEREST FROM THAT DATE.

Standard of Review

AStatutory interpretation is a question of law subject to *de novo* review.@ *Bellsouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 289 (Fla. 2003); *State v. Glatzmayer*, 789 So.2d 297, 301 n. 7 (Fla. 2001).

Argument

In *Argonaut Insurance Company v. May Plumbing Company*, 474 So.2d 212 (Fla. 1985), the Florida Supreme Court confirmed that for the purpose of assessing prejudgment interest, a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date. Under the Aloss theory,@ Athe loss itself is a wrongful deprivation by the defendant of the plaintiff=s property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant=s liability.@ *Id*. at

215. AIn short, when a verdict liquidates damages on a plaintiff=s out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss.@ *Id*. at 215.

In our case, the damages suffered by Philadelphia Indemnity and D & H were undisputed. However, the trial judge awarded Philadelphia Indemnity interest only from the time of its payment to D & H, not from the time of the theft loss, a number of months earlier. *Argonaut*, like our case, was a subrogation claim. *Argonaut* ruled that interest is due from the date of loss. Therefore, the trial judge erred in failing to award Philadelphia Indemnity interest from the time of the theft loss.

CONCLUSION

Based on the foregoing, appellees request that this court affirm the liability findings contained in the final judgment. The amount of damages, however, should be increased in accordance with the arguments presented in the cross appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been sent by United States mail on the 16th of June, 2004 to: Paul R. Regensdorf, Esq. of Akerman Senterfitt, Las Olas Centre II, Suite 1600, 350 East Las Olas Boulevard, Ft. Lauderdale, Florida 33301.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2). This brief is submitted in Times New Roman 14-point font.

By:_____
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