IN THE SUPREME COURT OF FLORIDA

THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Petitioner,

v. CASE NO. 66,492

THE SECOND DISTRICT COURT OF APPEALS; JUDGES HERBOTH S. RYDER, EDWARD F. BOARDMAN, MONTEREY CAMPBELL, RICHARD FRANK, T. TRUETT OTT, PAUL W. DANAHY, JR., JAMES E. LEHAN, STEPHEN H. GRIMES, JOHN M. SCHEB, JACK R. SCHOONOVER; and ENTERPRISE BUILDING CORPORATION,

Respondents.
_____/

PETITION FOR WRIT OF MANDAMUS PURSUANT TO ARTICLE V, SECTION 3(b)(8), TO THE SECOND DISTRICT COURT OF APPEAL, FLORIDA, OR, IN THE ALTERNATIVE, NOTICE TO REVIEW A DECISION WHICH AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS UNDER ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTUTITON

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

The Petitioner, THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, presents this its Petition for Writ of Mandamus directed to the Second District Court of Appeal, composed of Judges Herboth S. Ryder, Edward F. Boardman (retired), Monterey Campbell, Richard Frank, T. Truett Ott, Paul W. Donahy, Jr., James E. Lehan, Stephen H. Grimes, John M. Scheb, Jack R. Schoonover, or, in the alternative, files this Notice to Review a Decision which expressly affects a class of constitutional officers.

1. Petitioner seeks to have reviewed a decision of the Second District Court of Appeal, Florida, dated November 16, 1984, in the case of The School Board of Pinellas County v. Enterprise Building Corp. and The St. Paul Fire & Marine Ins. Co., Case No. 84-117, and the denial of the Board's Motion for Rehearing rendered on January 2, 1985. This Petition and Notice is presented under and pursuant to article V, section 3(b)(8) and article V, section 3(b)(3) of the Florida Constitution (1980) and related Florida Rules of Appellate Procedure.[1] This Petition

1. Fla.R.App.P. 9.100(a) and (b); Fla.R.App.P. 9.030(a)(2)(A)(iii).

is accompanied by a conformed copy of the pertinent portions of the record (see appendix).

2. The following represents the statement of the case and facts:

(a) On May 25, 1982, the School Board of Pinellas County brought suit against Enterprise Building Corporation (Respondent), alleging that the said contractor breached his contract with the School Board in the construction of a public school by placing, or allowing to be placed, in the lightweight concrete, chloride materials prohibited by the plans and specifications. When that chemical combines with moisture, corrosive action takes place in the underlying steel roof deck causing it to pit, rust and disintegrate. It is further evidenced by observing a brown oily substance around the pitting on the steel deck. This condition usually spreads rapidly once it commences.

Respondent Enterprise moved for a summary judgment on the basis that the School Board's claim was barred by a four year statute of limitations, §95.11(3)(c), Fla. Stat., (erroneously cited by Enterprise in its Answer as §95.10, Fla. Stat.) The School Board argued that §95.11(2)(b), which is a five year statute of limitation based upon contract controls. The Board argued that said statute of limitation would not commence until a breach of contract is known to exist. (See First Federal Sav. & Loan Ass'n v. Dade Fed. Sav. & Loan Ass'n, 403 So.2d 1097 (Fla. 5th DCA 1981); Kelly Tractor Co. v. Gurgiolo, 369 So.2d 992 (Fla. 3rd DCA 1979); Powell v. All, 352 So.2d 905 (Fla. 1st DCA 1977).)

The trial court granted Enterprise's motion for summary judgment on December 28, 1983, and the School Board appealed the summary judgment to the Second District Court of Appeals. On November 16, 1984, in the case of School Board of Pinellas County v. Enterprise, etc., the Second District Court of Appeals affirmed the lower court decision, citing Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983) and Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard, Architects/Planners,

Inc., 417 So.2d 703 (Fla. 2nd DCA 1982). Petitioner filed a Motion for Rehearing, which was denied on January 2, 1985.

(b) Petitioner entered into a contract ($4,180,400.00) on May 28, 1975, with Enterprise to construct Morgan Fitzgerald Middle School in Pinellas County, Florida. The school was substantially completed and accepted in September 1976.

The roof deck system at the school consisted of lightweight concrete and verlite mixture formed on top of galvanized corrugated sheet metal, with a built-up roof on top of the lightweight concrete. The adverse chemical reaction or corrosion can be observed only if the chlorides have had an opportunity to react with the galvanized sheet metal, and can only be seen from the underneath side of the roof deck.

The contract documents (plans and specifications) expressly prohibited the use of the chlorides in the lightweight concrete.

In September of 1977, School Board employee, Bob Witte, the Plant Foreman at the subject school, observed paint chippings on the metal ceiling in the gymnasium. On the floor beneath a portion of the gym ceiling, he observed a small amount of liquid on the gym floor, which he thought was related to a leaking ballast (part of a florescent light fixture). Enterprise was notified and erected a scaffolding to examine the metal deck and came to the conclusion and reported to the Board that what was observed was simply algae and mildew. Mr. Eicher, Vice President of Enterprise, took some material from the gym for analysis and advised Mr. Witte that the paint chips in the ceiling and the liquid discovered on the gym floor was caused by condensation on the steel decking related to the natural drying process of the insulated lightweight concrete. There was no further incident regarding what was observed in September of 1977, even though Mr. Witte continued to make routine observations of the gym roof deck.

The project architect, John Parrish, who prepared the plans and specifications for the construction of the Fitzgerald School, observed the condition, and concluded that what he

observed was paint chips, and that Mr. Witte's findings of fluid on the floor, which did not stain the floor, gave no reason to be alarmed. His analysis was that the moisture contained in the lightweight concrete was not able to escape upwards through the roof membrane, so it was escaping from underneath, causing condensation to form paint blisters on the bottom of the steel deck. He found no evidence of corrosive action, nor could he connect this early observation with definite corrosion found elsewhere in the building much later. Whatever he observed caused no continuous problem and disappeared; otherwise, the defective finish on the gym floor would not have been corrected (refinished). No further thought was given, nor did Enterprise report anything further to the Board regarding this unknown miniscule observation of paint blisters.

Mr. Buckman, the school principal, observed the paint chips and blisters and observed clear liquid (water) on the gym floor and was advised by Mr. Witte that Enterprise assured him there was no problem in the metal deck. He was also aware that whatever was observed discontinued of its own accord. No significance was attached to the chipped paint by anyone at that time.

Between May 22 and May 24, 1978, Mr. Bellows, an employee of the School Board's consulting architects, went to Morgan Fitzgerald, at the request of Mr. Witte, to observe something on the underside of the roof deck that aroused Mr. Witte's curiosity. During this observation, Mr. Bellows observed a white powdery substance on the underside of the roof deck in the Mechanical Room, not a brown oily substance and rust he had observed at Pinellas Park Senior High School in connection with corrosion which occurred at that school in December 1977. This white powdery substance was located in the Mechanical Room. The area observed in a school of about 420,000 square feet was very small (10 square feet) and barely visible from the floor some 10 feet below. Mr. Bellows attributed no significance to the substance, and concluded that it simply was dirt collecting on the metal roof deck. He further concluded there was no

appearance of rust or corrosion. He also reobserved the roof over the gym floor and, in fact, found no visible indications of powdery substance which he had seen in the Mechanical Room, nor did he observe any signs of rust or corrosion.

At the same time, Mr. Parrish conducted an observation in the Mechanical Room. He also observed the same white powdery substance, together with some grayish discoloration on the underside of the sheet metal, to all of which he attached no great significance. Mr. Eicher of Enterprise also was in the Mechanical Room at about this time and he recorded no evidence of corrosion or rust.

Since there was no evidence of pitting, rusting or corrosion, it was decided that no samples (by cutting into the roof from above and violating the roof bond) would be taken and that Mr. Witte was to keep an eye on the roof deck in the Mechanical Room. There was no progression of what had been observed in the Mechanical Room.

On May 24, 1978, Mr. Bellows wrote a memo to Mr. Johannessen, the School Board Architect, indicating that he suspected that the condition at Morgan Fitzgerald might be similar to a problem found at Pinellas Park High School. But he stated that the condition which he observed in the Mechanical Room could have been related to other conditions and totally unrelated to the roof problem found at Pinellas Park High School.

In reaction (maybe overreaction) to Mr. Bellow's memo and without any investigation, Mr. Johannessen, who never went to observe the roof deck at Morgan Fitzgerald and who was motivated by his concern about Pinellas Park High School, advised Superintendent Sakkis, who also had not been to the school, of these suspicious observations, who, in turn, routinely reported to the School Board what had been observed by Mr. Bellows. However, no defect in 1977 or May 1978--either latent or patent--was observed at the two locations. The key to this case and the one fact that distinguished it from Kelley is that whatever was observed on May 22-24 was not an obvious defect to put the Board on notice (like the obvious defect found in

Kelley--a leaking roof. There were various versions of what was observed, but no one concluded the roof was defective. The Board's knowledge whether the roof was defective for statute of limitations purposes rose to no higher level than the information given them by Mr. Bellows via Johannessen and Sakkis. Mr. Bellows didn't know that roof was defective, so the Board could not. Whatever was observed by Witte, Bellows, Parrish and the school Principal was neither severe, persistent or continuous.

On or about July 1, 1981, Mr. Witte observed 2500-3000 square feet of pitting, rust and corrosion in a part of the building different from the Mechanical Room at Morgan Fitzgerald. Large portions of the steel deck cannot be observed because ceiling tile is installed below the steel decking. After he reported his finding, the School Board, on or about July 13, 1981, engaged the services of Law Engineering to test for suspected corrosion of that portion of the roof deck found by Mr. Witte to be corroded. On January 13, 1982, Law concluded that part of the roof was deteriorating because chlorides had been introduced in the lightweight concrete used in the construction of the roof structure, and the Board was advised that the process of corrosion had begun.

On April 14, 1982, the School Board entered into a contract with Anderson Parrish Associates in order to determine what corrective measures, if any, would be necessary to replace or repair certain portions of the roof at Morgan Fitzgerald. Sometime later, they estimated the cost to repair the roof exceeded $500,000.

By coincidence, on May 25, 1982, four years and one day after the aforementioned School Board meeting of May 24, 1978, the School Board instituted action against Enterprise.

Based upon these facts, the trial court found that the School Board had "a leaking roof" and, based upon Kelley v. School Board of Seminole County[2], 435 So.2d 804 (Fla. 1983), concluded that, as a matter of law, the School Board knew that it

2. Erroneously cited as School Board of Seminole County v. G.A.F. Corp., 413 So.2d 1208.

had a defective "leaking" roof and entered Summary Judgment holding that the Board was barred by §95.11(3)(c), Fla. Stat.

No one testified the roof "leaked," or that corrosion had set in during May 1977, as found by Judge Driver (see appendix). These are merely the Court's interpretations or inferences from the facts as outlined above. The facts do not bear out the Court's findings nor legal conclusion. The District Court committed error by affirming the decision of the lower court.

On Motion for Summary Judgment, Enterprise failed to conclusively[3] establish that the breaking blisters observed in September 1977, and the white powdery substance or other versions of what was observed in the Mechanical Room on May 22-24 amounted to a latent defect or any defect. There is no evidence that the galvanized roof deck in the Mechanical Room suffered any deterioration in 1978, 1981 or at the present time. Nor is there any evidence to connect that what was observed in the gymnasium and/or Mechanical Room with the kind of rusting roof discovered in another part of the building in July of 1981, which, through laboratory testing, established that chlorides had been found in the lightweight concrete in that particular part of the building.

There were reasonable explanations (leaking ballast, mildew, dirt, condensation), other than a defect theory (either latent or patent), which accounts for the various observations described above, so it is impossible for the School Board to have known for Summary Judgment purposes that it had a defective roof deck, either in September 1977 or May 22-24, 1978.

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3. A Motion for Summary Judgment may not be based upon inference of suspicion, Graff v. McNeil, 322 So.2d 40 (Fla. 1st DCA 1975). Where there is a genuine issue of material fact where reasonable men might have different inferences and deductions to reach different conclusions, summary judgment is precluded. If the evidence raises the slightest doubt on an issue of material fact, even if is conflicting, or if it permits different reasonable inferences, or if it tends to prove the issue, the evidence must be submitted to a jury. Bess v. 17545 Collins Ave., Inc., 98 So.2d 490 (Fla. 1957); Williams v. City of Lake City, 62 So.2d 732 (Fla. 1953). The appellate court should indulge all proper inferences in favor of the party against whom Summary Judgment was entered. Spencer v. Halifax Hosptial Dist., 242 So.2d 143 (Fla. 1st DCA 1970).

Unlike the leaking roof cases[4], there were no further incidents concerning the two areas of the school described above. There was no evidence that the white powder in the Mechanical Room was spreading, persistent or continuous or causing irreparable damage.

WRIT OF MANDAMUS

3. Petitioner applies for a Writ of Mandamus directing the Respondents, the named judges of the Second District Court of Appeals, to fulfill their duties under law, and in support thereof, says:

(a) Petitioner is the Plaintiff/Appellant in the action styled School Board of Pinellas Co. v. Enterprise Building Corp. in the 6th Judicial Circuit for Pinellas County, Case No. 82-6192-7; and Second District Court of Appeal Case No. 84-117.

(b) Petitioner is a body corporate pursuant to Chapter 230, Fla. Stat., and created by article IX, section 4 of the Florida Constitution, and is required to provide public education to the residents of Pinellas County, Florida.

(c) Defendant/Respondent, Enterprise Building Corporation, is a Florida corporation engaged in the construction business in the State of Florida.

(d) This Court has jurisdiction of this Petition for Writ of Mandamus under article V, section 3(b)(8), Florida Constitution and Rule 9.100 (a) and (b), Fla.R.App.P.

(e) Petitioner desires Respondent to perform the ministerial act of the proper exercise of its appellate jurisdiction and in support thereof says:

(1). On December 28, 1982, the trial Court granted Enterprise's Motion for Summary Judgment, and the School Board appealed to the Second DCA. On November 16, 1984, the Second DCA per curiam affirmed the Summary Judgment on the basis of Kelley

4. Kelley V. School Board of Seminole Co., 435 So.2d 805 (Fla. 1984); Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard, Architect/Planners, Inc., 417 So.2d 703 (Fla. 2nd DCA 1982); K/F Dev. & Invest. Corp v. Williamson Crane & Dozer Corp., 367 So.2d 1078 (Fla. 3rd DCA 1979).

v. School Board of Seminole County, 435 So.2d 805 (Fla. 1984); and Havatampa Corp. v. McElvy, Jennewein, 417 So.2d 703 (Fla. 2nd DCA 1982). [Note: Hereafter referred to as "Kelley" and "Havatampa," respectively.]

(2). On January 2, 1985, the Second District Court of Appeal denied the School Board's Motion for Rehearing.

(3). The Second District Court of Appeal has refused to exercise its jurisdiction on an issue of vital public importance. It refused to render an opinion explaining why it extended the statute of limitations for construction defects, from the present rule that it runs from the time a plaintiff knows his roof is leaking, to a case involving latent defects where there is only suspicion that the plaintiff might be experiencing a latent defect.

(4). The record of this case shows that the roof defect in the school constructed by Enterprise was latent, whereas the roof defects in the Kelley and Havatampa case were patent, a distinction recognized in §95.11(c)(3), Fla. Stat. Kelley recognizes specifically that "leaking roofs" are obvious and thus a patent defect. The per curiam affirmance, citing only Kelley and Havatampa, without an opinion, amounts to a denial of equal protection and due process under the Constitution. A Court may not refuse to adjudicate an issue within its jurisdiction. Cooper v. Hon. Jon Gordon, 389 So.2d 318 (Fla. 3rd DCA 1980).

The instant case, as it stands in the Second District Court of Appeal, violates the public policy against premature and excessive litigation. The rule of law requires a plaintiff to file suit if he has accepted a building from the contractor within four years from acceptance if the building contains superficial blemishes on the visible surfaces of the building. This is the factual situation confronting the School Board. It accepted a school building from Enterprise, four years elapsed, and there were external blemishes (white powder and paint chips on a metal roof deck) that were trivial in scope compared to the hundreds of thousands of square feet of building. Nevertheless, the Courts below charged the School Board with notice of latent

defects in the roof deck because blemishes, which were not necessarily symptomatic of corrosion, were visible on the exposed ceiling. Other areas of the building may develop signs of corrosion in the future, but the Board is foreclosed to bring an action against the contractor and surety pursuant to the decision approved by the Second District Court of Appeal. Only one-third of the roof is currently showing signs of corrosion, but in the future, new physical evidence of corrosion which may be verified by chemical analysis will not be actionable because the Second District Court of Appeal approved the trial court's opinion.

It should not be the policy of this State to require a School Board to sue a contractor every time a newly constructed public building evidences a slight blemish. All major new buildings show some blemishes or imperfections. For example, in the construction of Osceola Middle School (Pinellas County) just completed, the "punch list" contains 3,000 items of imperfections.

(5). This Court has taken jurisdiction before where the Second District Court of Appeal has "created some uncertainty" in an area of the law. St. Petersburg Bank & Trust v. Hamm, 414 So.2d 1071, 1074 (Fla. 1982). The Court's unwarranted extension of Kelley and Havatampa creates great uncertainty in the area of construction litigation law. And, if the Second District Court of Appeal's reasoning in this case remains unexpressed (other than the cryptic referral to Kelley and Havatampa), there will be an increase in premature litigation, filed by school boards who note trivial blemishes on their new buildings, but who are fearful of the four-year limitation period being applied to finding slight building imperfections.

(6). The duty of the Second District Court of Appeal to elucidate its reasoning in expanding the rule in Kelley and Havatampa, as described above, by extending those cases to cover future cases involving latent defects, cannot be avoided by publishing a per curiam affirmance without opinion.

(7). The duty of the Second District Court of Appeal to render an opinion in this case is, under the outlined circumstance, mandatory, not discretionary.

(8). The Petitioner will continue to sustain injury and damage to this building and other buildings constructed at the same time if the Court refuses to grant this Writ and the Petitioner has no other clear and complete remedy. The Board is now charged with knowledge that its buildings are experiencing some problems with the roofs, but has not experienced any real damage, but will be called upon to commence unnecessary repairs and file suit to recover for the same.

(9). The Supreme Court has power to issue all writs necessary to complete its jurisdiction. City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981).

WHEREFORE, the Petitioner requests the Court to issue a Writ of Mandamus requiring Respondents to issue a written opinion explaining their reasoning behind their extension of Kelley and Havatampa to the facts of the instant case.

CLASS OF CONSTUTITONAL OFFICERS

4. Petitioner, School Board, requests this Court to exercise its jurisdiction under the Constitution, article V section 3(b)(3), which provides that this Court may review a decision of the District Court of Appeal that "expressly affects a class of constitutional or state officers." School Board Members are constitutional officers under article IX, section 4 of the Constitution; the Superintendent of Schools is a constitutional officer under article IX, section 5.

Jurisdiction in the instant case is conferred upon the Supreme Court pursuant to article V, section 3(b)(3), of the Constutition, as interpreted by this Court in the lead case of Florida State Board of Health v. Lewis, 149 So.2d 41 (1963). The Court held:

> The obvious purpose of [this] constitutional provision was to authorize this Court to review decisions which, in the ultimate, would affect all constitutional or state officers exercising the same powers, even though only one of such officers might be involved in the particular litigation.

The word "class," as used in the constitutional provision (Florida Constitution article V section 3(b)(3), has been construed by the Supreme Court as meaning two or more constitutional or state officers who separately and independently exercise the same powers of government. Florida State Board of Health v. Lewis, supra. For example, decisions involving all superintendents of public instruction, all sheriffs, or all taxing officials are within the meaning of the provision, because of the effect of such decisions on public education, law enforcement, and public finances, respectively. Lake v. Lake, 103 So.2d 639 (Fla. 1958); Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965); Tyson v. Lanier, 156 So.2d 833 (Fla. 1963).

The Supreme Court also granted jurisdiction to review a decision involving Petitioner in a case affecting constutional officers in School Board of Pinellas County v. Noble, 372 So.2d 1111 (Fla. 1979).

In order to vest the Supreme Court with jurisdiction under article V, section 3(b)(3), a lower court's decision must directly and, in some way, exclusively, affect the duties, powers, validity, formation, termination, or regulation of a particular class of such officers. Such decision may be that in a case where the class or members thereof are directly involved as parties. Or the decision may be that in which no member of the class is a party if the decision generally affects the entire class in some way unrelated to the specific facts of that case. Spradley v. State, 293 So.2d 697 (Fla. 1974).

This Petition will establish that the decision herein sought to be reviewed is sufficiently broad in scope that it will affect all school boards throughout the State of Florida.

The School Board as a class of constitutional officers is bound by the Second District Court of Appeal's interpretation of Kelley v. Seminole County, supra. That Court approved this

principle as applied to school boards, saying: Kelley teaches school boards that when their attention is called, or may be called, to a defect, regardless whether it is minor, causes damage or its cause can be determined, in a school building, the board "has an affirmative duty to ascertain the nature of the specific defect if [the Board] intends to file its complaint within four years from the date that its attention is attracted to the fact that 'something' of a known or unknown nature is wrong with the roof," even though the "something" is miniscule or minute.

What this rule says is that the slightest blemish, spot, crack in its public school building will put the school board on notice under §95.11(3)(c), regardless of damage or cause that they have an immediate "affirmative duty" to ascertain (by spending public tax money) the nature of the specific defect. Note that the contractor is not called upon to spend his money, but the Board is required to do so under the above principle.

This rule of law affects every School Board in the State and, if ignored, will result in actions involving construction contracts being barred by §95.11(3)(c), Fla. Stat. Based upon this rule, each school board member may be subject to disciplinary action for failure to perform an "affirmative duty" required by law.

The decision will also require school boards and superintendents to fulfill their duties under law by conducting extensive engineering/scientific studies of all new buildings to discover all actionable claims against the construction contractor and the architect at the slightest sign of "trouble." These extensive studies will be required every time a school is built because all large projects show blemishes of some kind and degree upon completion. And, to fulfill their responsibilities under law, these constutitional officers must take all action reasonably necessary to preserve their right of action against contractors and architects for defects in school construction. Prior law did not require in-depth engineering or chemical

testing to discover the latent causation, if any, of a trivial blemish in a new building.

In fulfilling their expanded responsibility to test and inspect for the latent defect causes of trivial blemishes in new school construction, these constitutonal officers are exclusively affected by said decision in that they are required to budget for and assess millage in order to raise the funds necessary to accomplish these additional tasks, and only they can accomplish this budget and millage assessment under the procedure prescribed in Chapter 237, Fla. Stat., (see, e.g., §§237.041, .061, .071, .081, .091 and .101, Fla. Stat.).

Thus, the Second District Court of Appeal's decision expressly affects a class of constitutional officers because the school board members and superintendents of the State of Florida now have an "affirmative duty" to ascertain the nature of minor imperfections in school buildings where such duty did not exist before and where the contractor (under the specifications) had the duty and responsibility to determine the cause of construction problems.

The School Board, in bringing this Petition to the Court, is aware of the 1980 Constitutional Amendment and the holding in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), which provides:

> The Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state, rendered without an opinion, regardless of whether they are accompanied by a dissenting or concurring opinion when the basis for such review is alleged conflict of that decision with the decision of another district court of appeal or of the Supreme Court. (emphasis supplied)

The Jenkins case, supra, applied to discretionary writs involving conflict between a prior decisions of the Supreme Court or districts, and not to decisions affecting constitutional or state officers. Our research reveals no such case has been decided, except that cited infra, pg. 9 and 10. One case, involving constitutonal officers, has been "certified" to the

Supreme Court under §9.030(a)(2)(A)(iii) and (iv). Hamilton v. Davis, 427 So.2d 1139 (Fla. 5th DCA 1983).

In support of the Board's position that the Court may exercise jurisdiction in this case, please refer to the recent case of White Const. Co., Inc. v. DuPont, 455 So.2d 1026 (Fla. 1984), wherein the majority of the Court accepted jurisdiction on the basis of conflict between the District Court's decision and an opinion of the Supreme Court[5] and other district courts of appeal on the same point of law. The Supreme Court entertained White Construction Company's petition for discretionary review (conflict), even though the First District Court of Appeal per curiam affirmed the trial court's judgment on the punitive damages question. The District Court of Appeals reversed a portion of the judgment with opinion, and remanded that portion to the lower court for a new trial. The District Court had affirmed, without opinion, the point raised by the Petitioner before the Supreme Court with respect to whether the issue of punitive damages was improperly submitted to the jury and whether the trial court committed harmless error by admitting evidence of subsequent brake repairs to the vehicle causing the accident. The Supreme Court held it had conflict jurisdiction to review the question of punitive damages, even though no opinion (in effect a P.C.A.) was rendered by the District Court of Appeal on the subject of punitive damages.

Also, in the case of Jollie v. State, 405 So.2d 418 (1981), the Supreme Court carved out an exception to the Jenkins rule. In Jollie, supra, the Court noted that, prior to the 1980 constitutional amendment, a PCA opinion which referenced another district court opinion which the Supreme Court had reversed or quashed, was prima facia grounds for conflict jurisdiction under Article V, §3(b)(3). This long-standing policy decision was in effect well before the "record proper" doctrine was conceived and adopted in Foley v. Weaver Drugs, Inc., 177 So.2d 221 (1965). The Court went on to say:

5. City of Miami Beach v. Wolfe, 83 So.2d 774 (Fla. 1955).

> Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. [e.g., Kelley v. School Board of Seminole Co.] We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending in review or has been reversed by this court continues to constitute prima facia express conflict and allows this court to exercise its jurisdiction. The situation presented in this cause ordinarily applies only to a limited class of cases. (emphasis supplied)

Toby Buel wrote an article which appears in 25 Florida Bar Journal 849, at 850 (1982), which compared the "record proper" from Foley, supra, with the "public record" statement in Jollie, and found great similarities. He said:

> The linchpin in Foley was 'record proper,' as is 'public record actions' to Jollie. The two phrases show striking similarities under analysis. 'Action' does little to modify 'public record,' because its very purpose is to report judicial labor's results (actions). The public nature of the records does little to distinguish the action referenced, for almost all records of the courts are public and all that affect statewide jurisprudence are, of necessity, public record.

It is obvious that if a case can be made that the District Court of Appeal's PCA and the Supreme Court's own records appear to conflict, the Supreme Court may exercise jurisdiction.

Justice B. K. Roberts thinks that the failure of the District Court of Appeal to issue an opinion, if shown to be prejudicial, may be tantamount to a denial of constitutional equal protection. He said in an interview:

> There is a potential violation of equal protection at the district court level if failure to write an opinion can be shown to prejudice or aid appellants in obtaining review. Under Lake, for example, failure to write an opinion could have deprived a litigant of even a possibility of review except in circumstances of extreme injustice. Under Foley, an absence of opinion may prejudicially aid in obtaining review by the supreme court. (XXIX U. Fla. L. Rev. at 350 n. 114)

We are also mindful of Judge Alderman's dissenting opinion in Jollie, supra. He said:

> The Court's decision is a challenge to the ingenuity of lawyers and prompts me to repeat the words of Judge Thornal: 'If I were a practicing lawyer in Florida, I would never again accept with finality a decision of the district court.' Id. at p. 424.

But in answer to Judge Alderman's word of caution to the majority, district courts can be wrong in applying principles of law or cases (e.g., Kelley) to factual situations which are totally irrelevant for that principle of law which may prejudice the litigants.

The School Board does not feel that the majority opinion in Jollie is now a challenge to an attorney's ingenuity to obtain Supreme Court jurisdiction. The Board does not file this Petition ingeniously. The Board simply feels that the District Court misapplied a principle of law (Kelley) to a set of facts totally unrelated to that principle, which affects a class of constitutional officers and when an injustice occurs, this denies the Board equal protection. Justice Adkins "hit the nail on the head" when he said in Jenkins, supra:

> There will be occasions when a 'Per Curiam Affirmed' decision will cite another case. In some instances the cited case had admittedly been in conflict with other decisions, but, because of the failure of the parties to seek our jurisdiction, the law remained unsettled. Under the construction of the present constitutional amendment, the law will remain unsettled. A heavy case load does not justify our spawning confusion in the judicial system. (emphasis supplied)

The Board does not want the issue presented herein to remain unsettled.

The School Board recognizes that "opinion" of the District Court of Appeal has the effect of finality, but this Court has power and duty under the Constitution and its rules to correct injustice by issuing a discretionary writ or has the power to remand the case to the District Court of Appeal to write

an appropriate opinion to explain its position. The Supreme Court has the inherent judicial power to correct judicial error. Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978).

Jenkins and the dissent in Jollie and White Const. Co. cases, supra, provide the rationale ("the staggering case load") for the Supreme Court's urging the legislature and public to adopt the 1980 article V constitutional amendment.

The Court may be concerned that, by accepting jurisdiction in the instant case, the floodgates will be opened and the Court will be "staggered" by more litigation than it can handle. The Court ought to review its own records to determine whether it will be inundated with petitions for discretionary review in cases involving a class of constitutional officers. The Supreme Court's own records over the last several years will indicate whether this is a potential danger or not. Our research indicates that the number of cases will be miniscule.

As indicated earlier, the importance of the question raised by this case far exceeds the mere resolution of litigation between the School Board and Enterprise. The decision of the Second District Court of Appeal creates a fundamental uncertainty regarding the application of statutes of limitations to the school boards of this State who are currently engaged in a massive construction program. This School Board alone has $60 million worth of construction under way, much of it now will involve potential litigation. Multiply that times the number of school boards which will be bound by the decision of the Second District Court of Appeal. [Construction of public buildings is not of the same quality as in the past (i.e., the Judicial Building in Pinellas County). Perhaps awarding a contract to the low bidder is a factor.]

Florida is one of the fastest growing states in the country, and because the construction industry must provide the facilities for that growth, the application of the statute of limitations to those engaged in the construction industry and taxpayers who pay for this work is a timely topic for further discussion by the courts. Perhaps the time is now.

With all due respect, the Supreme Court, in its opinion in the Kelley case, supra, did not go far enough in dealing with the question of "latent defects," and may not have intended to do so. But pursuant to the rule announced by the trial court and adopted by the Second District Court of Appeal, it will now be the policy of this State to encourage school boards to file suit against each design and construction entity involved in the construction of a building, be it a large construction project or not, where the Board, through its employees, observes paint peeling, a spot, a tiny crack or any other minor imperfection. Will every spot, crack or observation of white powder on a galvanized roof deck place a school board on notice that it has substantial latent defect occurring in its building? Without the above understanding of the reality of the construction business, the courts will be engulfed in construction litigation because the Board and other governmental agencies will have no choice but to file an action against the contractor, subcontractor, design professional, sureties and the like, upon each and every appearance of a blemish, spot, no matter how slight, within four years from such observation, regardless of cause or damage.

And the rule of law, as approved by the Second District Court of Appeals, could lead to real abuses. Literally thousands of documents are generated during the construction of a large project. For example, a field note could reference a crack, a blemish or other slight imperfection, which at the time causes no concern, but under the stated rule, triggers a statute of limitations. The instant case is a perfect example of what an innocent memo filed in any employee's (i.e., principal) office (required by public records law) may have on a case when litigation is instituted. Contractors and sureties are going to want to conduct intensive investigations into files of governmental agencies in the hopes of finding some insignificant sign of trouble early during construction, which was overlooked or forgotten years later, in order to avoid responsibility. It cannot be emphasized enough that it is not unusual for years to pass before a construction defect (latent) will surface.

Your Petitioner is not requesting the Court to accept jurisdiction in a routine case. As this Petition will indicate, there is a lack of clear and decisive opinions touching on the question when a latent defect triggers a statute of limitations. The question was squarely put to the Second District Court of Appeal, but the Board was denied an opinion it deserved. The failure to give correct direction will cause school boards and other governmental agencies to institute expensive, lengthy litigation which will exhaust time and money for the litigants and the courts.

Even though the Second District Court of Appeal PCA'd the trial court's opinion, both will be widely distributed through the Florida School Board Attorneys' Association and made available to school districts and colleges in the State. The case has state-wide implications.

The Court should also note that the State of Florida, in recent times, is witnessing the unprecedented growth of new construction, along with many failures (e.g., the collapse of a condo on Florida's east coast, a recent partial collapse in Tampa of a multimillion dollar structure, the $1,700,000 roof loss at Pinellas Park Sr. High).

Instead of the harsh rule adopted by the District Court of Appeal in this case, a better reasoned rule could have been issued, such as:

> In cases involving a latent defect in the construction of a public building, the appropriate statute of limitations begins to run when the School Board is put on notice that evidence of a defect in the structure is readily apparent, which is persistent, continuous and causes irreparable damage.

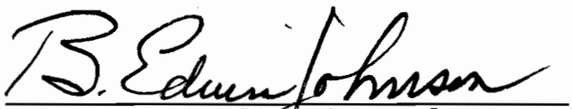
Although the Board, in the instant case, could make the argument that the decision by the Second District Court of Appeal in adopting the lower court's opinion conflicts with Petroleum Products Corp. v. Clark, 248 So.2d 196 (Fla. 4th DCA 1971); Perez v. Universal Engineering Corp., 413 So.2d 75 (Fla. 3rd DCA 1982); Copeland v. Armstrong Cork Co., 447 So.2d 922 (Fla. 3rd DCA

1984), it is the School Board's position that the application of a patent defect case (leaky roofs), Kelley v. School Board of Seminole County, supra, Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard, Architects/Planners, Inc., supra, and K/F Dev. & Inv. v. Williamson Crane & Dozer, supra, does not conflict, but simply has no application to the facts of the instant case. Obviously, our case does not involve a leaking roof.

The rule of law announced in Perez v. Universal Engineering Corp., supra, is well reasoned in holding that in a latent defect case, the plaintiff, through the exercise of reasonable diligence, should have known that he had a cause of action against the defendant, is one of fact which should be left to the jury upon a complete trial of the issues. Ours is a case which falls within this rule.

The Board submits that the misapplication of a rule of law announced in Kelley v. School Board of Seminole County by the Supreme Court on facts totally different than those found in Kelley is a fundamental error. The Second District Court's decision expressly affects a class of constitutional officers. The Second District Court of Appeal's PCA adopted the lower court's opinion, which cited Kelley v. School Board of Seminole County as being the controlling authority as to the facts of our case. The District Court of Appeal adopted the lower court's opinion regarding its interpretation of Kelley, and that became an "express" opinion of the District Court of Appeal which affected a class of constitutional officers sufficient for the Supreme Court to exercise jurisdiction in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U. S. Mail this 1st day of February, 1985, to: DEBORAH M. PARIS, ESQ., 505 S. Magnolia Avenue, Tampa, FL 33606; WILLIAM A. SCHNEIKART, ESQ., P. O. Box 14034, St. Petersburg, FL 33733; CARL MOTES, ESQ., P. O. Box 633, Orlando, FL 32802; KENNETH L. OLSEN, ESQ., 711 N. Florida Avenue, Suite 310, Tampa, FL 33602; ALFRED E. FROH, ESQ., 600 Bypass Drive, Suite 200, Clearwater, FL 33516; JERRY L. NEWMAN, ESQ., P. O. Box 2378, Tampa, FL 33601; RICK A. MATTSON, ESQ., P. O. Box 14373, St. Petersburg, FL 33733; JAMES W. HOLTON, ESQ., 1901 Ninth Street N., St. Petersburg, FL 33704; and JOSEPH P. McNULTY, ESQ., Suite 402, The Legal Building, 447 Third Avenue N., St. Petersburg, FL 33701 and hand delivered to Clerk of the Second District Court of Appeal, Lakeland, FL.

B. EDWIN JOHNSON