IN THE SUPREME COURT IN AND FOR
THE STATE OF FLORIDA

Case No. 80, 899

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

v.

LONE STAR INDUSTRIES, INC.,

Respondent.

On Review From The Third District Court of Appeals
Decision Case No. 90-2498

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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INTRODUCTION

LIBERTY MUTUAL INSURANCE COMPANY (hereinafter "LIBERTY MUTUAL") seeks review of the Third District Court of Appeal's *per curiam* affirmance of a trial court order granting Partial Summary Judgment in favor of Respondent, LONE STAR INDUSTRIES, INC. (hereinafter "LONE STAR"). The trial court found that LIBERTY MUTUAL breached its duty to defend LONE STAR in connection with certain lawsuits brought against LONE STAR arising out of environmental contamination at a former wood treating facility.[1] The trial court did not determine the issue of LIBERTY MUTUAL's duty to indemnify LONE STAR, and thus the instant appeal deals substantively solely with LIBERTY MUTUAL's duty to defend LONE STAR, and the law applicable to defense obligations and not the duty to indemnify.

On September 22, 1992, the Third District affirmed the trial court's entry of a Partial Summary Judgment in a *per curiam* decision, relying on the Florida Supreme Court's decision in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.*, _____ So.2d _____ (Fla. Case No. 78-293, Opinion filed September 3, 1992 [17 FLW S579] ("*Dimmitt*"). The *Dimmitt* decision held that the "pollution exclusion" contained in Comprehensive General Liability insurance policies is ambiguous as a matter of law.

Thereafter, LIBERTY MUTUAL filed separate Motions for Certification to the Florida Supreme Court, and for Rehearing or Reconsideration which were denied by the Third District on November 10, 1992. On December 8, 1992, LIBERTY MUTUAL filed its Notice to Invoke Discretionary Jurisdiction. An Amended Notice was subsequently filed on December 10, 1992. LIBERTY MUTUAL seeks review of the Third District's affirmance of the trial court's decision based on Article V, §3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv).

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[1] These lawsuits, which will be referred to hereinafter as the "Miami Wood actions", are a collective reference to four lawsuits instituted against LONE STAR, as well as others, arising out of environmental contamination at a former wood treating facility. The Miami Wood actions include the *Clemente* action, the action brought by the Florida Department of Environmental Regulation, the *Futura* action, and the *Davidson* action.

SUMMARY OF ARGUMENT

In its Jurisdictional Brief,[2] LIBERTY MUTUAL asserts that the Supreme Court has discretionary jurisdiction to review this matter "because the decision of the District Court of Appeal in this case 'expressly and directly' conflicts with this Court's decision in *Dimmitt* ..." *See* LIBERTY MUTUAL's Brief at Page 2. LIBERTY MUTUAL argues that "conflict jurisdiction" exists because the decision of *Dimmitt* was improperly applied by the Third District in resolving the instant appeal. LIBERTY MUTUAL's asserted basis for invoking the jurisdiction of this Court is deficient on two grounds. First, conflict jurisdiction cannot exist in this matter as the purported "conflict" must appear from the face of the Third District's opinion. No such conflict can be gleaned from the "four corners" of the Third District's *per curiam* affirmance and LIBERTY MUTUAL's attempt to go into the court record behind the opinion is improper. Secondly, even if review of the record was proper to determine whether conflict jurisdiction exists, a review of that record would demonstrate that the Third District properly applied the rationale of *Dimmitt* in affirming the trial court's entry of a Partial Summary Judgment, finding that LIBERTY MUTUAL breached its duty to defend LONE STAR.

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[2] Hereinafter, references to LIBERTY MUTUAL'S Jurisdictional Brief shall be LIBERTY MUTUAL'S Brief."

ARGUMENT

A. THIS COURT LACKS CONFLICT JURISDICTION TO REVIEW THE THIRD DISTRICT'S DECISION AS THERE IS NO CONFLICT ON THE FACE OF THE THIRD DISTRICT'S OPINION WITH THIS COURT'S DECISION IN *DIMMITT CHEVROLET, INC. V. SOUTHEASTERN FIDELITY INSURANCE CORPORATION*, CASE NO. 78,293, 17 FLW S79 (September 3, 1992)

Generally speaking, there are two situations in which conflict jurisdiction exists:

1. Where an announced rule of law conflicts with other appellate expressions of law, or

2. Where a rule of law is applied to produce a different result in a case which involves substantially the same controlling facts as the prior case.

City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632, 633 (Fla. 1976) (J. England, concurring). A corollary to the second situation mentioned above which justifies the exercise of conflict jurisdiction has apparently been recognized where an appellate court misapplies the decision of another appellate court or the Florida Supreme Court. *See, e.g., Spivey v. Bataglia*, 258 So.2d 815 (Fla. 1972); *Sacks v. Sacks*, 267 So.2d 73 (Fla. 1972). LIBERTY MUTUAL apparently seeks to invoke this Court's jurisdiction under this corollary by arguing that the Third District's affirmance misapplied the Supreme Court's ruling in *Dimmitt*.[3]

In support of its assertion that the Third District's decision expressly and directly conflicts with the Supreme Court's decision in *Dimmitt*, LIBERTY MUTUAL asserts that "the record before the District Court of Appeal and the Circuit Court clearly establish that LONE STAR was the cause of the polluting releases in this case and that it fully intended and was aware of these releases."[4] *See* LIBERTY MUTUAL's Brief at Page 5 (emphasis in original). LIBERTY MUTUAL's own assertions demonstrate the flaw in its argument to invoke the jurisdiction of this Court. In order to determine whether or not a conflict exists between the Third District Court's opinion in the instant case and the Supreme Court's decision in *Dimmitt*, it is necessary to go into the record before the District Court of Appeal. *See* generally LIBERTY MUTUAL's Brief at Pages 4-6.

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[3] In fact, the Third District correctly applied *Dimmitt* in deciding the instant appeal. This issue will be addressed in the next section of this Brief.

[4] LIBERTY MUTUAL's substantive point is that in *Dimmitt* the insured was not the cause of the pollution.

LIBERTY MUTUAL's attempt to go behind the District Court's opinion and into the record on appeal in order to establish conflict jurisdiction is wholly improper. In determining whether or not a "conflict" exists to justify jurisdiction, the Supreme Court has stated that it is limited to the facts which appear on the face of the opinion. *Hardee v. State*, 534 So.2d 706 (Fla. 1988), citing *White Construction Company v. Dupont*, 455 So.2d 1026 (Fla. 1984). As Justice Ehrlich stated in his dissent in the *White Construction* case, "the conflict between the decisions of two district courts must appear within the four corners of each opinion. No longer are we permitted to go back into the record proper in order to make this determination." *Id.* at 1031.

The Third District's *per curiam* affirmance in the instant case states the following:[5]

> ... Based on the Florida Supreme Court's ruling in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, _____ So.2d _____ (Fla., Case No. 78-293, opinion filed Sept. 3, 1992) [17 FLW S579] that the term "sudden and accidental" as contained in the pollution exclusion clause is ambiguous as a matter of law, and we hereby affirm.

It is obvious that from a review limited to the four corners of the Third District's opinion, that it is impossible to tell whether there was a misapplication of this Court's decision in *Dimmitt*. As such, this Court lacks conflict jurisdiction. *Hardee v. State, Supra,* at 708. Although the District Court need not expressly identify a conflict, the basis for finding a conflict must appear from the court's opinion. *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981). Since no conflict jurisdiction can be ascertained from the face of the Third District Court's opinion, this appeal is improvident and should be dismissed.[6]

B. THE THIRD DISTRICT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *DIMMITT*

Even assuming arguendo that a review of the record on appeal is allowed to determine conflict jurisdiction, LIBERTY MUTUAL's argument that the Third District's decision conflicts with the decision of this Court in *Dimmitt* is incorrect and merely rehashes the same tired arguments rejected by the Third District.

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[5] The first sentence of the Third District's *per curiam* affirmance merely states that LIBERTY MUTUAL was appealing a non-final order granting LONE STAR's Motion for Partial Summary Judgment.

[6] LIBERTY MUTUAL also argues that the Third District's opinion in the instant case conflicts with the Third District's decision in *Consolidated Mutual Ins. Co. v. Ivy Liquor*, 185 So.2d 187 (Fla. 3d DCA 1966) cert. den., 189 So.2d 633 (Fla. 1966). *See* Petitioner's Jurisdictional Brief at Page 6, n.2. As no conflict appears on the face of the Third District's opinion with the decision in *Ivy* case, this asserted basis for jurisdiction also fails.

As it contended in the District Court, LIBERTY MUTUAL contends that "the discharge of contaminants were committed by LONE STAR 'wantonly, wilfully' that LONE STAR 'knew' of the discharge of pollution and that LONE STAR 'knowingly' allowed its sites to be used as a dump for 'dangerous chemical waste'." *See* LIBERTY MUTUAL's Brief at Page 6. LIBERTY MUTUAL then argues that these allegations of intentional discharge fall squarely within the scope of the pollution exclusion defined by the Supreme Court in *Dimmitt*.[7]

The allegations contained in the *Clemente* Complaint cited in LIBERTY MUTUAL's Brief miscategorize the true allegations of the underlying Complaints by selecting words from a single paragraph of the *Clemente* Complaint, found in the third count at the tail end of that Complaint, as proof that all of the underlying complaints paint LONE STAR as an intentional polluter, and thus outside of *Dimmitt*'s scope. *See* LIBERTY MUTUAL's Brief at Pages 5-6. However, under settled law, if a complaint against the policy holder contains allegations of fact or claims partially within and partially outside the scope of coverage, the insurance company must defend the entire suit. *See, e.g., American Hardware Mutual Co. v. Miami Leasing and Rentals, Inc.*, 362 So.2d 28, 29 (Fla. 3d DCA 1978). This principle was reaffirmed recently by the First District in *Grissom v. Commercial Union Insurance Company*, 18 FLW D113 (Fla. 1st DCA December 22, 1992) ("If the Complaint alleges facts partially within and partially outside the coverage of the policy, the insurer is obligated to defend the entire suite.") (emphasis added). The vast majority of the counts in the *Clemente* Complaint, as well as all of the allegations of the Complaints in *The Florida Department of Environmental Regulation*, *Futura* and *Davidson* actions contain no allegations remotely portraying LONE STAR as an intentional polluter.[8] Based on the foregoing, it is clear that the Third District's decision is not

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[7] LIBERTY MUTUAL also argues that these allegations are "borne out by the facts in this case ..." LIBERTY MUTUAL's Brief at Page 6. This argument is completely disingenuous in that LIBERTY MUTUAL conceded at the oral argument before the Third District that the so-called "facts of record" are not germane in determining whether an insurance carrier owes its policy holder a duty to defend. Florida law is abundantly clear that the allegations in the Complaint, not the actual facts of the underlying case, control an insurance company's obligation to defend. The actual facts of the underlying case are relevant only to the duty to indemnify.

[8] The question before the Third District and this Court is whether or not LONE STAR is owed a duty to defend by LIBERTY MUTUAL. Neither the trial court nor the Appellate Court decided the issue of whether LIBERTY MUTUAL had a duty to indemnify LONE STAR. The issue in *Dimmitt* was the duty to indemnify. This dichotomy, is pointedly ignored by LIBERTY MUTUAL, as is the fact that whether a particular release of a pollutant is expected or intended, must be viewed from the subjective standpoint of the policy holder. *See, Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guaranty Co.*, 668 F.Supp. 1541 (S.D. Fla. 1987). Clearly, this factual determination must be made by the trial court, and not on appeal, and is not presently ripe for decision given the fact that there has been no trial on this issue.

at all inconsistent with the Supreme Court's decision in *Dimmitt*. As a result, even if this Court were to go behind the District Court's opinion to review the record in order to determine whether a conflict jurisdiction exists, no such conflict does exist.

Likewise, LIBERTY MUTUAL's assertion that the Third District's opinion conflicts with the Third District's decision in *Consolidated Mutual Ins. Co. v. Ivy Liquors, Inc., supra*, is also incorrect.[9] LIBERTY MUTUAL argues in reliance upon *Ivy* that the absence of any allegation that the subject environmental releases were "unexpected" establishes that there is no coverage for the complaints in the Miami Wood actions. *See* LIBERTY MUTUAL's Brief at Page 6, n. 2. This argument has been rejected by numerous courts. The Comprehensive General Liability policy at issue does not require an allegation that the harm caused is within the sudden and accidental exception to the pollution exclusion.

The courts which have addressed LIBERTY MUTUAL's contention have flatly rejected the proposition that an insurance company's duty to defend depends upon the exact phraseology or degree of detail contained in the underlying complaint. These courts hold that the insurance company has the duty to look behind a third party's allegations to penalize whether coverage is possible. *See, e.g., Detroit Edison Co. v. Michigan Mutual Insurance Co.*, 102 Mich.App. 136, 301 N.W.2d 832, 835 (Mich. Ct. App. 1980).

A rule such as the one asserted by LIBERTY MUTUAL would unfairly permit an insurance company to "construct a formal fortress of the third party's pleadings and retreat behind its walls," *Gray v. Zurich Insurance Co.*, 54 Cal.Rptr. 104, 419 T.2d 168, 176 (Cal. 1966). Additionally, such a rule would allow the "third party [to be] the arbiter of the policy's coverage." *Id.*; *see also Sheppard Marine Construction Co. v. Maryland Casualty Co.*, 73 Mich. App. 62, 250 N.W.2d 541 (Mich. Ct. App. 1976).

In the context of the "pollution exclusion", courts agree that the duty to defend can exist despite the fact that the complaint against the insured does not use the words "sudden and accidental". For example, in *Travelers Indemnity Co. v. Dingwell*, 414 A.2d 220 (Me. 1980), three insurance companies filed a declaratory judgment action seeking a determination of their rights and obligations under their respective insurance contracts. Like LIBERTY MUTUAL, the insurance companies argued that no duty to defend

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[9] In *Ivy*, the insured brought an action against its insurer to recover the amount of a judgment recovered against the insured by a customer for injuries sustained by the customer, when the customer was assaulted by the insured's manager. *Id.* at 188. Unlike the instant case, all of the allegations against the insured in *Ivy* were based on intentional acts.

existed because the complaint against the policy holders did not specifically allege "sudden and accidental" releases.

The court rejected the insurance companies' argument and found a duty to defend, holding that a policy holder's entitlement to a defense is not dependent on the caprice of the plaintiff's draftsmanship but rather on the potential shown in the complaint that the allegations may entitle the policy holder to coverage. *Id.* at 226; *see also Jonesville Products, Inc. v. Transamerica Insurance Group*, 156 Mich. App. 508, 402 N.W.2d 46 (Mich. Ct. App. 1986).

CONCLUSION

As no conflict between the Third District's opinion and this Court's decision in *Dimmitt* can be ascertained from the face of the Third District's opinion, there can be no conflict jurisdiction. Resort to the record on appeal to determine if a conflict exists would be improper. In any event, even if this Court were to go beyond the Third District's opinion and review the underlying record, it is clear that the Third District's opinion is consistent and not in conflict with this Court's decision in *Dimmitt* and therefore this appeal should be dismissed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of January, 1993 to all parties on the attached Service List.

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