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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant/Petitioner

vs.

CASE NO.: 91,717

CTC DEVELOPMENT CORPORATION, INC. and GREGORY UZDEVENES,

Plaintiff/Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
LOWER TRIBUNAL NO. 96-2976

PETITIONER'S JURISDICTIONAL BRIEF

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ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Miscellaneous

STATEMENT OF THE CASE AND FACTS

Respondent Gregory Uzdevenes, through his construction company, CTC Development Corporation, Inc. (collectively "CTC") designed and built a house for John and Annette Bray. App. 2.[1] As constructed by CTC, the house was located some four feet beyond a set back line in violation of restrictive covenants. The adjoining landowners filed suit against CTC and others seeking injunctive relief and compensatory damages. Uzdevenes and CTC demanded that Petitioner, State Farm Fire and Casualty Company ("State Farm") defend and indemnify them in the lawsuit as a result of a "Contractor's Policy" that was in effect between CTC and State Farm. State Farm declined coverage. After settling the underlying lawsuit, CTC and Uzdevenes filed this suit against State Farm. App. 2-3.

State Farm moved for summary judgment on the grounds that the injury caused to the adjoining landowners was not an "occurrence" within the terms of the insurance policy between CTC and State Farm. The trial court granted State Farm's motion and entered Summary Final Judgment against CTC. App. 4. CTC appealed the decision to the First District Court of Appeal, and the District Court reversed the trial court in a September 26, 1997 Opinion. App. 1-11. State Farm filed a timely motion for rehearing, which was denied without opinion on October 3, 1997. App. 12. The Petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed on October 31, 1997.

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[1] "App. ___" refers to the numbered page in Petitioner's Appendix, which is attached to this brief.

SUMMARY OF ARGUMENT

In Hardware Mut. Cas. Co. v. Gerrits, ***65*** So.2d 69 (Fla. 1953), this Court held that a builder's construction of a building over a permissible boundary line did not constitute an "accident" for purposes of insurance coverage. The facts of this case are substantially identical to those in Hardware Mutual. Despite the factual similarities between the two cases, however, the District Court expressly declined to follow Hardware Mutual and instead elected to follow one of its own decisions, Grissom v. Commercial Union Ins, Co., ***610*** So.2d 1299 (Fla. 1st DCA 1992), rev . denied, ***621*** So.2d 1065 (Fla. 1993), a case with markedly different facts from both this case and Hardware Mutual. The District Court elected to follow Grissom, rather than Hardware Mutual, not because it could meaningfully distinguish Hardware Mutual, but because it mistakenly believe that it was bound to follow Grissom under the doctrine of ***stare decisis.***

This Court has held that a decision expressly and directly conflicts with a prior decision from this Court when the decision reaches a different result from the prior Supreme Court case despite having substantially the same controlling facts. Because the District Court's decision in this case produced a different result on virtually the same facts as this Court's decision in Hardware Mutual, this Court has discretionary jurisdiction to review the District Court decision. Accordingly, this Court should exercise its discretionary jurisdiction and decide this case on the merits.

ARGUMENT

The Decision of the First District Court of Appeal Expressly and Directly Conflicts with the Decision of This Court in Hardware Mut. Cas. Co. v. Gerrits, 65 So.2d 69 (Fla. 1953).

In Hardware Mut. Cas. Co. v. Gerrits, 65 So.2d 69 (Fla. 1953), this Court held that a builder's construction of a building over a permissible boundary line did not constitute an "accident" for purposes of insurance coverage. The Hardware Mutual decision has stood, virtually unchallenged, for more than 40 years. The First District Court of Appeal below, however, expressly declined to follow the Hardware Mutual decision and instead elected to follow its own decision in Grissom v. Commercial Union Ins. Co., 610 So.2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So.2d 1065 (Fla. 1993), a case with markedly different facts from both this case and Hardware Mutual. By following its own decision rather than a controlling decision from this Court, the District Court misapplied the doctrine of *stare decisis* and created an express and direct conflict with this Court's decision in Hardware Mutual. This Court, therefore, has jurisdiction to review the District Court decision. See Art. V, § 3(b)(3), Fla. Const.

This Court has held that it possesses jurisdiction to review a district court decision based upon an express and direct conflict when the District Court decision involves "the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court." Nielsen v. City of

Sarasota, 117 So.2d 731, 734 (Fla. 1960). See also Crosslev v. State, 596 So.2d 447, 449 (Fla. 1992) (Court had jurisdiction to review decision which reached opposite result from another decision despite similar controlling facts). The underlying facts of the cases need not be "virtually identical" as long as the cases cannot be meaningfully distinguished. See, e.g., Crossley, 596 So.2d at 449 (finding conflict even though controlling facts were not "virtually identical"); Mobley v. State, 143 So.2d 821, 823 (Fla. 1962) (finding conflict when the factual distinctions between the cases were "superficial").

Here, because even the District Court could not meaningfully distinguish this case from Hardware Mutual, the decisions are in direct conflict. In Hardware Mutual, a builder constructed a building so that it encroached upon a neighbor's property line. Hardware Mutual, 65 So.2d at 70. The neighbor sued for damages and the case ultimately settled. The builder's insurance company denied all liability, claiming that the decision to construct the building where it was located was not an "accident" within the terms of the builder's liability insurance policy. The builder subsequently filed suit against the insurance company seeking a declaratory judgment that the construction of the building was an accident. The trial court entered judgment in favor of the builder. Id. at 70.

This Court reversed. The Court held that the location of the building was not an accident, but rather was based upon a mistake of fact. According to the Court, "[a]n effect which is the natural and probable consequence of an act or course of

action is not an ***accident."*** Id. at 70. (emphasis in original). Because the builder "deliberately and designedly (although erroneously) located the building" where it was ultimately constructed, the Court held that the builder's actions did not meet the plain meaning of an "accident." Id. at 71. Accordingly, this Court held that the builder's actions were not covered by his liability insurance policy. Id.

As demonstrated by the District Court's own opinion, the controlling facts of this case are substantially identical. In both **cases,** the builder intentionally constructed the building in a particular location, but in both cases the buildings were mistakenly located outside of a permissible boundary line. App. 2; Hardware Mutual, 65 So.2d at 70-71.[2] In both instances, the builders were sued by neighbors, the builders settled the suits, and the builders in turn sued their insurance companies for indemnification. App. 2-3; Hardware Mutual, 65 So.2d at 70. Finally, as the District Court expressly recognized in its Opinion, there was no "meaningful difference" between the language contained in the various insurance policies in question. App. 5.

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[2] In Hardware Mutual, the building was constructed so that it encroached upon a neighbor's property line, while in this case the building encroached upon a set off line mandated by a restrictive covenant. The difference, however, is immaterial. In both **cases,** the construction crossed permissible boundary lines, thereby causing damage to neighbors. See Moblev v. State, 143 So.2d 821, 823 (Fla. 1962) (Supreme Court jurisdiction not defeated by "superficial" distinctions).

Despite the striking similarities between this case and Hardware Mutual, the District Court declined to follow Hardware Mutual and instead followed Grissom v. Commercial Union Ins. Co., 610 So.2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So.2d 1065 (Fla. 1993). The facts in Grissom, however, are completely distinguishable from those in this case (and Hardware Mutual). In Grissom, a property owner allegedly "intentionally filled and elevated a natural watercourse across his land." Id. at 1301. As a result of his actions, water allegedly backed up and flooded a neighboring church. Id. The trustees of the church sued Grissom. Grissom sought a defense and indemnification from his insurer, but the insurer declined coverage. Grissom ultimately sued his insurance company. In reversing a final judgment in favor of the insurer, the First District Court of Appeal held that Grissom's actions constituted an "occurrence" because his actions caused "an unexpected or unintended injury or damage." Id. at 1306.

The District Court below made no effort to distinguish this case from Hardware Mutual or to reconcile the facts of this case to those in Grissom. Instead, the sole reason the District Court elected to follow Grissom was "because of the requirements of ***stare*** *decisis*." App. 5. Contrary to the District Court's holding, however, when a District Court decision is arguably inconsistent with a prior decision from this Court, ***stare decisis*** requires the District Court to follow the decision from this

Court. See State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976) ("[w]here an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise"); Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973) (District Courts are "bound to follow the case law set forth by this Court").

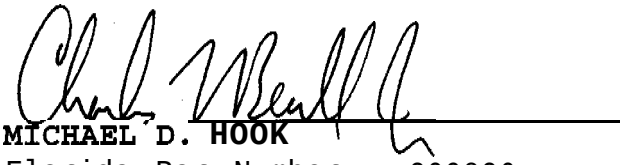
This Court, therefore, should exercise its discretion to accept jurisdiction and review this case on the merits for at least two reasons. First, the District Court decision in this case, if allowed to stand, directly conflicts with a prior decision of this Court on an important issue regarding insurance coverage. Second, because the District Court incorrectly applied the doctrine of stare *decisis* in reaching its decision, this Court should quash the District Court decision to avoid almost certain confusion from the District and trial courts on this issue.

CONCLUSION

Because the District Court in this case reached a different result in this case from the result reached by this Court in Hardware Mutual, a case with substantially the same controlling facts, this Court has discretionary jurisdiction to review the District Court decision. This Court, therefore, should exercise

its discretionary jurisdiction, reaffirm the holding in Hardware Mutual, and quash the District Court decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Louis K. Rosenbloum, Esquire, One** Pensacola Plaza, Suite 212, 125 West Romana Street, Pensacola, FL 32501, and to **Stephen** H. Echsner, **Esquire,** Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., 316 South Baylen Street, Pensacola, FL 32501 by **hand delivery** this 7th day of November, 1997.

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Appendix

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CTC DEVELOPMENT CORPORATION, INC. and GREGORY UZDEVENES,

Appellants,

v.

STATE FARM FIRE AND CXSUALTY COMPANY,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 96-2976

Opinion filed August 26, 1997.

An appeal from the Circuit Court for Escambia County. Nickolas P. Geeker, Judge.

Louis K. Rosenbloum and Stephen H. *Echsner* of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for Appellants.

Michael D. Hook and Charles F. Beall, Jr. of Moore, Hill, Westmoreland, Hook & Bolton, P.A., Pensacola, for Appellee.

PER CURIAM.

CTC Development Corporation, Inc. (CTC), and Gregory Uzdevenes (Uzdevenes) appeal a final summary judgment entered in favor of State Farm Fire and Casualty Company (State Farm), appellee. CTC and Uzdevenes, who are the insureds under a "Contractor's Policy" issued by State Farm, contend the trial court erred in ruling that,

as a matter of law, the appellants' mistaken construction of a residence beyond the set back lines of the lot was not an insurable "occurrence" within the meaning of the policy. We agree and reverse.

Uzdevenes, an architect, designed and constructed a residence through his wholly-owned construction company, CTC, for John and Annette Bray. The lot upon which the house was built was subject to certain restrictive covenants which required that the house be situated at least 15 feet from the side lot lines. The house as constructed was located four feet beyond the easterly set back line in violation of the restrictive covenants. Uzdevenes claimed that he built the Bray residence under the mistaken assumption that-the homeowners association had approved his request for a variance from the set back line requirements.

Finley and Judy Holmes, who owned the property adjoining the Bray residence, filed suit during construction of the Bray residence against Uzdevenes, CTC, the Brays and AmSouth Bank of Florida, the construction lender, seeking an injunction and compensatory damages. Uzdevenes and CTC called upon State Farm to defend the Holmes' complaint and to indemnify them for the damages claimed by the Holmes. State Farm declined to defend and denied coverage for this incident. Ultimately, the Holmes' suit was settled by Uzdevenes and CTC jointly paying $22,500 to the Holmes. In addition, CTC and Uzdevenes incurred $29,400 in attorney's fees and other defense costs.

Uzdevenes and CTC filed suit against State Farm seeking

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damages against the insurer based upon its failure to defend the Holmes' action and to indemnify Uzdevenes and CTC for their losses. In its answer, among other things, State Farm denied any defense or coverage obligations under the policy, contending that the damages claimed by the Holmes did "not constitute property damage caused by an occurrence" or an "accident" under the terms of the policy.

State Farms policy which is the subject of the instant action is entitled a "Contractor's Policy." For an annual policy premium of $5,927, the policy provided business liability insurance coverage of $500,000 and other coverages up to $1,000,000 to CTC as the named insured and to Uzdevenes as an executive officer of the named insured. Under the policy, the "Comprehensive Business Liability" coverage obligates the insurer to:

> pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies. . . . This insurance applies only:
>
> 1. to bodily injury or property damage caused by an occurrence which takes place in the coverage territory during the policy period.

"Occurrence" is defined in the policy as follows:

> a. an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage; or
>
> b. the commission of an offense, or a series of similar or related offenses, which results in personal injury or advertising injury.
>
> For purposes of this definition bodily injury or property damage resulting from the use of reasonable force to protect persons or

000003

property will be considered an **accident.**[1]

The term "accident" is not defined in the policy. The policy contains the following exclusion, among others, stating that business liability coverage does not apply:

> 1. to **bodily injury** or **property damage:**
>
> a. expected or intended from the standpoint of the insured; or
>
> b. to any person or property which is the result of willful and malicious acts of the insured.

State Farm moved for summary judgment arguing that under Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953), the construction of the Bray home beyond the set back line resulting in damage to the Holmes did not constitute an "accident" within the meaning of its liability policy because the construction was an intentional act. The trial court agreed and granted summary judgment. This appeal followed.

This case is controlled by the earlier decision of this court in Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992), rev. denied, 621 So. 2d 1065 (Fla. 1993). For that reason, the case must be reversed. We also feel that the result reached here is an acceptable one considering the terms and language of the insurance policy at issue. In short, it is reasonable to conclude that the injury endured by Finley and Judy Holmes fits into the policy's coverage of "property damage" caused

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[1] In the State Farm policy, defined terms are printed in boid type face.

000004

by an **"occurrence"** defined as an "accident."

We would also point out, however, that notwithstanding the explanation set out in Grissom, we do not agree that there is a meaningful difference in -the policy provisions in Grissom and those involved in Hardware Mut. Casualty Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953). We cannot state that there is a meaningful difference in **language** between an "accident" and an "occurrence" defined as an "accident." However, because of the requirements of stare ***decisis,*** the dictates of the Grissom **case apply** here.

Reversed and remanded for proceedings consistent: with this opinion.

JOANOS and WOLF, JJ., concur; VAN NORTWICK, J., concurring specially with written opinion.

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VAN NORTWICX, J., concurring specially.

I agree with the majority that Grissom v. Commercial Union Ins. co., 610 So. 2d 1299 (Fla. 1st DCA 1992), compels that we reverse here. I write- separately because I disagree with the majority's conclusion that there is not a meaningful distinction between the applicable insurance policy provisions in the instant case and in Grissom and the policy provisions in Hardward Mut. Cas. , v. errits, 65 So. 69 (Fla. 1953).

The central question posed by this case is whether, under the instant policy language, the mistaken construction of a house in violation of a set back line requirement constitutes an "accident" or "occurrence." Few insurance policy terms have provoked more controversy in litigation than the word "accident." See Appleman, Insurance Law and Practice (Berdal ed.), § 4492 (Appleman). As this court has recognized, "[a]s used in various types of insurance policies, the term 'accident' . . . has been given various meanings, with no indication of uniform agreement on a single accepted definition." Grissom, 610 So. 2d at 1304. Professor Appleman explains that, as a result of this ambiguity, over the last 20 *years* insurance carriers have revised the language in comprehensive general liability policies by substituting the word "occurrence" for "accident" and, generally, by defining "occurrence" to mean "an accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Appleman at § 4492. According to Appleman, used in this

manner, the meaning of "accident" provides coverage not only for an accidental event, but also for the unexpected injury or damage resulting from an intentional act. Id. As a result, under this policy language, if the resulting damages can be viewed as unintended by a fact-finder, the event constitutes an "accident" for purposes of the liability insurance policy. Id. at ¶ 4492.02.

The policy language in Gerrits, upon which the appellee relies, is an example of the ambiguous use of the term "accident" discussed by Appleman, In Gerritg, the insured constructed a building, locating it on the lot based upon a survey. The owner of an adjacent property brought suit claiming the insured's building encroached upon his property. The insured sought coverage tinder his liability insurance policy claiming that his construction of the building in a location encroaching on an adjacent lot was based on an erroneous survey and constituted an "accident" under the policy.

The policy in Gerrits provided, in pertinent part, as follows:

> Coverage B. *Property Damage Liability.* To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the hazards hereinafter defined. (emphasis added).

Gerrits, 65 So. 2d at 70. Significantly, the Gerrits policy did not define "accident." In holding that the insured's construction of the building was not an "accident" within the insurance policy, the Gerrits court in effect defined the term "accident" for the

000007

purposes of coverage under the policy, explaining:

> An effect which is the natural and probable consequence of an act or course of action is not an accident. The effect which was the natural and probable consequence of [the insured's] act in erecting the building was the encroachment on the adjoining property.

Id. at 70-71.

In Grissom, this court addressed insurance policy language markedly different from the Gerrits policy, but similar to the policy at bar. The Grissom court held that the term "accident," as defined in the policy, included "an unexpected or unintended injury. or damage that results from a known cause." 610 So. 2d at 1306. In Grissom, the insured property owner allegedly altered the natural water course across his property causing drainage problems that resulted in the flooding of the adjoining landowner's property. Adjoining and upstream landowners sought to recover against the insured, who sought defense- and indemnification from his insurance carrier. The subject insurance policy insured the property owner for damages caused by an "occurrence." "Occurrence" was defined in the policy as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . ." Id. at 1304.

In Grissom, the trial court agreed with the insurer that the insured's action in altering the water course across his property was intentional and therefore was not an "accident." On appeal, this court found the term "accident" ambiguous and construed the

policy in a light most favorable to the insured following

> the settled rule that insurance policies are to be construed liberally in favor of the insured and strictly against the insurer, and that whenever the language is susceptible of two or more constructions, the court must adopt that which is most favorable to the insured.

Id. at 1304 (citation omitted). This court then construed the term "occurrence" under the Grissom policy to apply to any bodily injury or property damage inflicted by the insured on a third party where the insured does not intend to cause any harm to the third party, even though damages are caused by the insured's intentional acts and are reasonably foreseeable by the insured. Id. at 1305. The policy language was interpreted to exclude from coverage only an event where the resulting bodily injury or property damage was expected or intended by the insured. Id. at 1306. Accordingly, although the insured's intentional alteration of the water course across his property was not accidental, the flooding and damage to the adjoining landowner's property was neither expected or intended from the insured's standpoint and therefore constituted a covered "accident" within the policy definition of the term "occurrence." Id. at 1307.

I recognize that the policy definition of "occurrence" here appears somewhat different than the policy language in ~~Grissom.~~ The Grissom policy, as well as the model policies discussed by Appleman, define "occurrence" to mean "an accident , . . which results in bodily injury or property damage neither expected or intended from the standpoint of the injured. . . ." Grissom, 6i0

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So. 2d at 1304; see Appleman at § 4492. The State Farm policy here reaches the same point by placing similar language in the exclusionary provision, which excludes coverage for bodily injury and property damage "expected or intended from the standpoint of the insured." It is clear that, when the State Farm policy definition of "occurrence" is read together with this exclusionary provision,[1] the effect of the policy language in the instant case is identical to that in Grissom. See also Spengler v. State Farm & Cas. Co., 568 So. 2d 1293, 1295 (Fla. 1st DCA 1990)(coverage exclusion for bodily injury or property damage "which is either expected or intended by an insured" did not apply where insured intended to shoot supposed burglar but actually shot girlfriend instead, because liability under policy should not be precluded for an expected or intended act which... results in unexpected or

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[1]As stated in section 627.419(1), Florida Statutes (1995), governing construction of policies:

> Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto.

See e.g. Price v. Southern Home Ins. Co. of the Carolinas, 100 Fla. 338, 129 So. 748 (1930). Thus, we are obligated to adopt the construction of the policy which will give effect to the whole instrument and to each of its various parts and provisions. Miller Elec. Co. v. Employers Liab. Assurance Corp., 171 So. 2d 40 (Fla. 1st DCA 1965). The interpretation here is also consistent with the purpose of the exclusionary provision. The exclusionary clause "marks the boundary of the coverage of the policy . . ." New Hampshire Ins. Co. v. Carter, 359 So. 2d 52, 54 (Fla. 1st DCA 1978). Further, the object of the exclusionary clause is to exclude that which would otherwise be included within the policy coverage, so as to prevent misinterpretation. Appleman at § 7387.

unintended injury).

Here and in Grissom, unlike the insurance policy in Gerrits, the policy covers injury or damage "caused by an occurrence" and defines "occurrence" to include injury or damage which was neither expected nor intended by the injured. As recognized by Appleman, this modified policy language provides broader coverage for the injured than the Gerrits definition of "accident," which limited coverage to injury or damage caused by an accidental event. Appleman at § 4492; see also Grissom, 610 So. 2d at 1305-06. Because the parties in Grissom and in the instant case contractually provided for insurance coverage broader than that provided in the Gerrits policy, I find the coverage provisions of the policy in Gerrits clearly distinguishable from the provisions in Grissom and the instant case.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

October 3, 1997

CASE NO: 96-02976

L.T. CASE NO. 95-1567-CA-01

CTC Development Corporation, Inc., et al
Appellant(s),

v.

State Farm Fire and Casualty Company
Appellee(s).

BY ORDER OF THE COURT:

Appellee's motion for rehearing, filed September 10, 1997, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler, Clerk

By: Sondra Joiner
Deputy Clerk

Copies:

Stephen H. Echsner
Michael D. Hook

Louis K. Rosenbloum
Charles F. Beall, Jr.