IN THE
SUPREME COURT OF FLORIDA

Docket No. SC05-1295
D.C. Case No. 2D 03-134
L.T. CASE No. 01-5533 CA

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner/ Defendant,

v.

J.S.U.B., INC., as partner of FIRST HOME BUILDERS OF FLORIDA, a joint venture and LOGUE ENTERPRISES, INC., as partner of FIRST HOME BULDERS OF FLORIDA, a joint venture,

Respondent/Plaintiff.

BRIEF OF AMICUS CURIAE AMERISURE MUTUAL INSURANCE COMPANY IN SUPPORT OF PETITIONER UNITED STATES FIRE INSURANCE COMPANY

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PRELIMINARY STATEMENT

This appeal arises out of the Second District's holding that a CGL policy covers repair and replacement costs to an insured/general contractor's own work which results from a subcontractor's faulty workmanship. The Petitioner, United States Fire Insurance Company, was the defendant below, and shall be referred to herein as "U.S. Fire." Respondent, J.S.U.B., Inc., as partner of First Home Builders of Florida, a joint venture and Logue Enterprises, Inc., as partner of First Home Builders of Florida, a joint venture, shall be referred to herein as "JSUB." Amicus curiae Amerisure Mutual Insurance Company shall be referred to herein as "Amerisure." Commercial General Liability insurance coverage shall be referred to herein as "CGL."

Legal citations contained in this Brief are intended to conform to Florida Rule of Appellate Procedure 9.800 and The Bluebook: A Uniform System of Citation (Columbia Law Rev., et. al. 17th Ed. 2000).

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND INTEREST IN THE CASE

Pursuant to Florida Rule of Appellate Procedure 9.370(b), Amerisure provides the following statement of its identity and interest in the case: Amerisure is a regional property and casualty mutual insurance company which provides insurance for a variety of contractors, manufacturers and commercial programs. Amerisure is currently writing policies, including CGL policies, in several states including the State of Florida. Through *amicus curiae* participation, Amerisure seeks to assist this Court in deciding important insurance coverage issues.

This case raises an important issue regarding the interpretation of a standard ISO (Insurance Services Office) CGL policy, namely, whether coverage is afforded to an insured/general contractor for damage to the insured's *own* work or product that results from the faulty workmanship of a subcontractor. Amerisure is interested in this case because it has issued numerous CGL policies in the State of Florida and this Court's decision will have a substantial impact upon claims filed by Amerisure's Florida insureds, and upon the costs of insurance in the State of Florida.

SUMMARY OF ARGUMENT

CGL policies are not panaceas for unworkmanlike construction, defective products or irresponsible contractors. CGL policies cover tort liability for physical damage or bodily injury to third parties not for an insured's contractual liability to repair and replace the insured's own work or product resulting from the faulty workmanship of one of the insured's subcontractors. In concluding that a subcontractor's defective workmanship falls within the general contractor's CGL coverage, the District Court of Appeal of Florida, Second District ("Second District") ignored this Court's pronouncement in LaMarche v. Shelby Mut. Ins. Co., 390 So.2d 325, 326 (Fla. 1980) (herein "LeMarche"), a myriad of intermediate appellate court decisions following LeMarche and, if left intact, will conflate the function and intent of CGL coverage with that of a performance bond or product guarantor.

Florida, as with the majority of jurisdictions, recognizes that repair and replacement costs arising out of faulty workmanship or the use of defective materials is a risk properly borne by the insured/general contractor insofar it is the normal, predicable and expected consequence of general contracting, and does not constitute a fortuitous or accidental loss under a CGL policy. Conversely, sureties do guarantee the completion and quality of a contractor's work with attendant safeguards in place to ensure that if payment is made by a

surety the onus will ultimately fall upon the irresponsible contractor. This Court recognized this distinction in LeMarche, which, for more than two decades has remained viable Florida authority. The Second District's holding is irreconcilable with LeMarche, and, if affirmed, will have wide-sweeping, adverse consequences on those property and casualty insurers doing business in Florida as well as on policyholders.

Thus, for the reasons set forth herein, Amerisure urges this Court to reverse the decision of the Second District and affirm the holding of the trial court in favor of U. S. Fire.

ARGUMENT

I. THE FUNCTION AND INTENT OF A CGL POLICY

The function of CGL insurance is to provide protection for personal injury or for property damage caused by a completed product, not for the repair and replacement of the product. LaMarche, 390 So.2d at 326. CGL coverage "is for tort liability for physical damages to others and ***not*** for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained for." LeMarche citing, Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 405 A.2d 788 (N.J. 1979) quoting, Dean Henderson, Insurance Protection for Products Liability and Completed-Operations What Every Lawyer Should Know, 50

Neb. L. Rev. 415, 441 (1971) (hereinafter "Henderson article") (emphasis added). "The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself." Id.

"A [CGL] policy is not intended to protect business owners against every risk of operating a business", nor was it ever intended to serve as a guarantee of the quality of an insured's product or work or to perform a similar function of a performance bond. Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74, 78 (Mo. Banc. 1998) citing, Weedo, 405 A.2d at 791-92.[1] LeMarche by adopting the reasoning of Weedo clearly recognized the function of a CGL policy as protecting against accidents or fortuitous losses[2] causing injury to other persons or property.

Here, insofar as U.S. Fire acknowledged coverage for third-party damage to items that the homeowners added to the homes, the only property that was affected by the faulty workmanship were the very homes JSUB (as

[1] Accord, Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Cos., 246 F.3d 1132 (8th Cir 2001)(Iowa law); Travelers Ins. Co. of Illinois v. Eljer, Inc., 197 Ill.2d 278, 314, 757 N.E.2d 281 (Ill. 2001); Amerisure, Inc. v. Wurster Constr. Co., Inc., 818 N.E.2d 998 (Ind. Ct. App. 2004); Viking Constr. Mgt. v. Liberty Mut. Ins. Co., 358 Ill.App.3d 34, 831 N.E.2d 1 (1st Dist. 2005).

[2] Every liability policy contains an unnamed exclusion – the loss must be fortuitous. Intermetal Mexicana, S.A. v. Ins. Co. of North America, 866 F.2d 71, 75 (3rd Cir. 1989) (Pennsylvania law).

general contractor) was contractually obligated to build in a workmanlike manner. Thus, JSUB's claim for CGL coverage seeks to recover those economic damages that arise out JSUB's failure to construct the homes in accordance with its contractual obligations. In concluding that a construction defect claim predicated on a subcontractor's work is covered under a CGL policy, the Second District's holding significantly departs from established Florida law, the majority of jurisdictions to have addressed this issue, and the function and intent of CGL coverage. Thus, the Second District's holding should be reversed.

II. DAMAGE TO THE INSURED'S OWN WORK RESULTING FROM A SUBCONTRACTOR'S FAULTY CONSTRUCTION DOES NOT QUALIFY AS "PROPERTY DAMAGE" CAUSED BY AN "OCCURRENCE"

A. Florida Law Does Not Recognize Construction Defects As Being Accidental or Fortuitous.

Despite the Second District's aberration, Florida jurisprudence has steadfastly interpreted CGL coverage in accordance with its function and intent, i.e., costs associated with the repair and replacement of the insured's own work or product are neither accidental nor fortuitous. LeMarche, supra, 390 So.2d at 326 (Fla. 1980); Home Owners Warr. Corp. v. Hanover Ins. Co., 683 So.2d 527, 529 (Fla. 3rd DCA 1996); Lassiter Constr. Co., Inc. v. Amer. States Ins. Co., 699 So.2d 768 (Fla. 4th DCA 1997); Auto Owners Ins. Co. v.

Tripp Constr., Inc., 737 So.2d 600, 601 (Fla. 3rd DCA 1999); Aetna Cas. & Sur. Co. of America v. Deluxe Sys., Inc. of Florida, 711 So.2d 1293, 1296 (Fla. 4th DCA 1998); Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F.Supp.2d 1248, 1262 (M.D. Fla. 2002). Indeed, all Florida intermediate appellate courts to have addressed this issue, save one, have followed LeMarche.

CGL coverage is founded on the fundamental tenet of fortuity; it does not afford coverage for contractual liability of the insured's economic loss arising out of construction deficiencies or product failure that does not result in tort liability. LeMarche, quoting, Weedo, supra, and Henderson article, 50 Neb. L. Rev. 415, 441 (1971). Whereas accidents are uncontrolled and unanticipated events by their very nature, the failure to properly construct a building or home is well within the ambit and control of the general contractor insured. These fundamental concepts have been Florida mainstays for more than two decades, and have aligned Florida with the majority position on these issues.[3]

[3] See e.g., United States Fid. & Guar. Co. v. Warwick Dev. Co., Inc., 446 So.2d 1021 (Ala. 1984); Hartford Cas. Co. v. Cruse, 938 F.2d 601 (5th Cir 1991) (Texas law); Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Cos., 246 F.3d 1132, 1137 (8th Cir. 2001) (Iowa law); Travelers Ind. Co. v. Millers Building Corp., 142 Fed. Appx. 147, 149 (4th Cir. 2005) (Virginia law); Auto-Owners Ins. Co. v. Home Pride Cos., Inc., 684 N.W.2d 571, 578-580 (Neb. 2004); ACS Constr. Co., Inc. v. CGU, 332 F.3d 885 (5th Cir. 2003)

Despite the Second District's intimation, LeMarche is not an anachronism. LaMarche remains viable in articulating Florida law with respect to the uncovered nature of the incident of defective workmanship. Indeed, despite evolving language in the CGL coverage form, the core principles of LeMarche have been embraced by a multitude of intermediate appellate courts, two of which have expressly rejected JSUB's subcontractor nuance in emphasizing the boundaries between business risks and "occurrences" giving rise to insurable liability.

(Mississippi law); The Burlington Ins. Co. v. Oceanic Design and Constr., Inc., 383 F.3d 940 (9th Cir. 2004) (Hawaii law); Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74, 77 (Mo. banc. 1998); Viking Constr. Mgt. v. Liberty Mut. Ins. Co., 358 Ill.App.3d 34, 831 N.E.2d 1 (1st Dist. 2005); Pursell Constr., Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 71 (Iowa 1999); L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 25854, 366 S.C. 117, 121, 621 S.E.2d 33 (S.C. 2004); Erie Ins. Prop. and Cas. Co. v. Pioneer Home Improvement, Inc., 526 S.E.2d 28 (W. Va. 1999); Fuller Co. v. USF & G, 200 A.D.2d 255, 260, 613 N.Y.S 2d 152 (Sup. Ct. App. Div. 1st Dept. 1994); American Fire & Cas. Co. v. Broeren Russo Const., 54 F.Supp.2d 842 (C.D. Ill. 1999); Heile v. Herrmann, 136 Ohio App. 3d 351, 736 N.E.2d 566 (Ohio Ct. App. 1999); Hawkeye-Security Ins. Co. v. Davis, 6 S.W.3d 419, 426 (Mo. App. S.D. 1999); Cincinnati Ins. Co. v. Venetian Terrazzo, Inc., 198 F.Supp.2d 1074 (E.D. Mo. 2001); McAllister v. Peerless Ins. Co., 474 A.2d 1033, 1036-1037 (N.H. 1984); Vernon Williams & Son Constr. Co. v. Continental Ins. Co., 591 S.W.2d 760, 762-764 (Tenn. 1979); Hartford Acc. & Indem. Co. v. A.P. Reale & Sons Inc., 644 N.Y.S.2d 442 (N.Y. App. Div. 1996); and Amerisure, Inc. v. Wurster Constr. Co. Inc., 818 N.E.2d 998, 1004-005 (Ind. Ct. App. 2004). See also, James T. Hendrick & James P. Wiezel, The New Commercial General Liability Forms – An Introduction and Critique, 36 F Ed'n Ins. & Corp. Couns. Q. 319, 322, n.6 quoting, George H. Tinker, Comprehensive General Liability Insurance – Perspective and Overview, 25 Fed. Ins. Couns. Q 217, 224 (Spring 1975).

Initially, in Home Owners Warranty Corp. v. Hanover Ins. Co., 683 So.2d 527 (Fla. 3rd DCA 1996), a condominium association filed suit against the insured/developer for construction deficiencies. In rejecting the insured's contention that deficiencies in the subcontractor's work distinguished LeMarche, the Third District concluded that the claim fell outside the CGL policy's basic insuring agreement insofar as "the policy in question does not cover an accident of faulty workmanship, but rather faulty workmanship which causes an accident." Home Owners, 683 So.2d at 529 quoting, Weedo, supra, 405 A.2d at 791, 796.

Similarly, in Lassiter Constr. Co., Inc., v. Amer. States Ins. Co., 699 So.2d 768 (Fla. 4th DCA 1997), the Fourth District addressed whether repair and replacement costs to a subcontractors' work triggered coverage under the general contractor's CGL policy. Relying on LeMarche and Home Owners, the Fourth District concluded, "[w]e agree with the insurer that the exclusions relied on by the insured, some of which do have exceptions for work performed by subcontractors, *cannot create coverage where there is no coverage in the first place.*" Id. at 770 (emphasis added).

Florida's federal courts have also weighed in on the issue. In Auto Owners Ins. Co. v. Travelers Cas. & Sur., 227 F.Supp.2d 1248 (M.D. Fla. 2002) a surety, who had paid claims on behalf of the insured/general

contractor, sought coverage under the insured's CGL policy arguing that the accident of defective work performed by subcontractors triggered the CGL carrier's obligations. In relying on LeMarche, Home Owners and Lassiter, the Middle District rejected the argument concluding that "[t]he CGL policies issued by [insurers] do not provide coverage for defective workmanship under either theory advanced." Auto Owners, 227 F.Supp.2d at 1263.[4]

Other courts agree that CGL polices do not cover a general contractor for defective workmanship irrespective of whether the defect in question was caused by its subcontractor. The general contractor has a contractual duty to build a structure in a workmanlike manner and cannot pass its costs of doing business onto its insurer. In Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co., 246 F.3d 1132 (8th Cir. 2001) (Iowa law), the insured was sued for breach of contract and negligence arising out of its construction of a parking lot. In rejecting the insured's argument that a third-party' involvement could change non-accidental conduct into an "accident", the Eighth Circuit concluded "defective workmanship, regardless of who is responsible for the defect, cannot be characterized as an accident…" Accord, Travelers Ind. Co. of America v. Miller Building Corp., 142 Fed.Appx. 147 (4th Cir. 2005)

[4] But see, Essex Builders Group, Inc. v. OneBeacon Insurance Co., et al., 2005 WL 3981766 (M.D. Fla. 2005) (relying on JSUB in rejecting OneBeacon's narrow interpretation of the "legally obligated to pay" clause).

(Virginia law) (holding that faulty workmanship was not an "occurrence" and the subcontractor exception to the "Your Work" exclusion did not create coverage); and Cincinnati Ins. Co. v. Venetian Terrazzo, Inc., 198 F.Supp.2d 1074 (E.D. Mo. 2001) (faulty construction of another party does not qualify as an "occurrence").

Respectfully, the Second District's analysis is wrong: faulty workmanship, irrespective of whether it was that of a subcontractor, cannot be characterized as an accident – particularly with respect to the liability of a general contractor. The general contractor is responsible for the entire project and is contractually obligated to ensure that the entire project is completed in a workmanlike manner. The general contractor's recourse is against the subcontractor, not to pass its economic loss to its CGL insurer. All told, a subcontractor's failure to construct its portion of a facility in a workmanlike manner cannot convert an otherwise non-fortuitous loss into an "occurrence." Thus, the Second District's decision should be reversed in favor of LeMarche and its progeny.

B. The Second District's Holding is Irreconcilable With LaMarche and Its Progeny.

The Second District's decision in JSUB, Inc. v. U. S. Fire Ins. Co., 906 So.2d 303 (Fla. 2nd DCA 2005) is fatally flawed, offends the doctrine of *stare decisis*, ignores a myriad of factually-akin, intermediate appellate decisions

and merits reversal. As explored above, LeMarche established the "law of the land" in Florida with respect to the natural and foreseeable nature of faulty construction and the inability of such claims to trigger CGL coverage. In ignoring the precepts of LeMarche in favor of an untenable reading of State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So.2d 1072 (Fla. 1998) ("CTC"), the Second District erred.

Cognizant that LeMarche had addressed, at least to some degree, the issues at bar, the Second District sought to distinguish LeMarche on two bases. First, it intimated that the adoption of the term "occurrence" in the post-1986 ISO policy form expanded CGL coverage. Second, the Second District concluded that policy exclusions not contained in the LeMarche policy supported its expansive reading of the "occurrence" definition. Neither distinction merits a departure from LeMarche insofar as this Court's holding was grounded in the function and intent of CGL coverage and public policy considerations unbound by particular policy language, and insofar as both LeMarche and CTC pronounced: "exclusionary clauses cannot be relied upon to create coverage." CTC, 720 So.2d at 1074.

Rather than embrace LeMarche, the Second District relied on CTC, where, unlike the present context, the insured did not seek coverage for damages to its own work or product arising from faulty workmanship, but

rather sought amounts attributable to tearing down a home which encroached upon *a third-party's property*. CTC, 720 So.2d at 1073. In ultimately expanding the definition of "accident" (when undefined in the policy), this Court did so in the limited context of unintended or unexpected *third-party* "property damage" arising out of the insured's intentional act. In so doing, this Court neither substantively discussed, let alone overruled, LeMache, nor did it conclude that faulty workmanship was accidental. This Court's holding in CTC does not conflict with LeMarche, but rather, amplifies the function and intent of CGL coverage requiring *third-party* damage or injury.

The Second District's strained interpretation of CTC is particularly troubling considering its reliance on LeMarche to espouse certain principles it ignored in JSUB. In Auto-Owners Ins. Co. v. Marvin Dev. Corp., 805 So.2d 888, 892-93 (Fla. 2nd DCA 2001), the insured was sued for its constructing a home on an unsuitable lot which caused settling and deterioration to the home. The insured admitted construction of the home, but claimed it was unaware of debris buried beneath the surface which allegedly causing settling. Id. at 890. In reversing the trial court's judgment in favor of the insured, the Second District stated:

> We also note that Auto Owners' [CGL] insurance policies were not warranty policies providing coverage for the construction deficiencies or defective workmanship. Comprehensive liability policies generally

> do not provide coverage to a contractor for deficiencies in its own work.

Id. at 892-93.

Insofar as CTC did not address the issue of whether faulty workmanship resulting in economic loss could fall within the basic insuring agreement of a CGL policy, the Second District erred in expanding the definition of "accident" to encompass a contractor's faulty construction. Indeed, to interpret "accident", and therefore "occurrence", as comprising faulty workmanship disputes not only violates the concept of "fortuity" - the basic tenet of CGL coverage – but unfairly expands the scope of the CGL insurer's liability to encompass the insurer's *contractual* liability and the economic losses flowing therefrom.

LeMarche remains viable and should have continued to serve as the guiding light for the Second District. Amerisure urges this Court to reverse the decision of the Second District and affirm the holding of the trial court in favor of U.S. Fire.

III. TO ALLOW COVERAGE FOR CONSTRUCTION DEFECT CLAIMS WILL CHANGE THE NATURE OF AN "OCCURRENCE" UNDER A CGL POLICY AND CONVERT CGL COVERAGE INTO A PERFORMANCE BOND

While a CGL policy does not insure the "contractual liability of the insured for economic loss because the product or completed work is not that

for which the damaged person bargained",[5] standard industry requirements ensure that an innocent homeowner ultimately receive the benefit of its bargain. Indeed, "a surety is obligated to repair and replace the faulty or defective construction." Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp.2d 1248, 1265 (M.D. Fla. 2002). The very purpose of the performance bond is to "guarantee the completion of the contract upon default." Id. citing, Amer. Home Assur. v. Larkin Gen. Hosp., 593 So.2d 195, 197 (Fla. 1992). The Second District's holding notwithstanding, a surety's liability and a CGL's liability are not co-extensive. In fact, CGL insurers and sureties differ significantly in the protections they afford in the construction context. Unlike a CGL insurer, a surety enters into the contractual risk with the knowledge that it has a variety of legal rights if it is called upon to pay under the bond, including a super-priority right to any remaining contractor funds and the right to reimbursed by the bond principal. Also, a surety responds only if the bond principal cannot or will not. These protections are in place to ensure that sureties do not become unwitting partners to irresponsible, unscrupulous or incompetent contractors or tradesmen, and ultimately serve to transfer the burden of such faulty workmanship onto the contractor.

[5] Home Owners Warr. Corp. v. Hanover Ins. Co., 683 So.2d 527, 529 (DCA 3rd Dist. 1996).

A CGL insurer, affording tort liability coverage, has none of these protections. Indeed several courts, including this Court, have recognized the public policy concerns in permitting construction defect coverage, namely:

> To interpret the policy as providing coverage for construction deficiencies, as asserted by the petitioners and a minority of states, would enable a contractor to receive initial payment for the work from the homeowner, then receive subsequent payment from his insurance company to repair and correct deficiencies in his own work.

LeMarche, 390 So.2d at 326.[6]

Should the Second District's decision be permitted to stand, the function and intent of CGL coverage will be unwritten providing irresponsible contractors or tradesmen a safe-harbor whereby their CGL carriers will be called upon to guarantee the completion and quality of their work without any concomitant recourse against the defaulting contractor. This, in turn, will result in numerous construction defect claims being filed in Florida, which will likely result in an accompanying increase in CGL premiums for those insurers that elect to stay in the Florida marketplace. Such an increase in

[6] Accord, Jim Johnson Homes, Inc. v. Mid-Continent Cas. Co., 244 F.Supp.2d 706, 715 (N.D. Tex. 2003); George A. Fuller Co. v. USF&G, 613 N.Y.S.2d 152, 155 (N.Y. App. Div. 1994); Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74, 77 (Mo. banc. 1998); WDC Venture v. Hartford Acc. & Indem. Co., 938 F.Supp.671, 679 (D. Haw. 1996); Henderson article, 50 Neb. L. Rev. 415, 441 (1971).

policy premiums will result in such CGL coverage being made unaffordable to certain contractors, just one of many adverse and unintended consequences.

CGL carriers and sureties serve distinct, yet essential functions in the construction context. CGL carriers do not construct homes nor do they receive a premium to guarantee the completion and quality of construction work. Thus, the law does not support the creation of construction defect coverage.

CONCLUSION

For the foregoing reasons, Amerisure Mutual Insurance Company respectfully requests that this Honorable Court reverse the Second District's decision in JSUB v. U.S. Fire, 906 So.2d 303 (Fla. 2nd DCA 2005), conclude that damage to an insured's own work arising out a subcontractor's faulty workmanship does not qualify as an "occurrence" under a CGL policy and, by so holding, reaffirm LeMarche and its progeny as the law of Florida.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), the undersigned counsel certifies that this Brief is printed in Times New Roman 14-point font.

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