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IN THE SUPREME COURT OF FLORIDA

UNITED STATES FIRE
INSURANCE COMPANY, a
corporation,

Petitioner,

vs.

CASE NO.: SC05-1295
2nd DCA Case No.: 2D-03-0134
Lee Co. Case No.: 01-5533CA

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,

Respondents.
_____//

APPLICATION FOR DISCRETIONARY REVIEW OF A
DECISION OF THE SECOND DISTRICT COURT OF APPEAL

RESPONDENTS, 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, CORRECTED ANSWER BRIEF OF RESPONDENT ON JURISDICTION

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PREFACE

This Reply Brief is filed on behalf of FIRST HOME BUILDERS OF FLORIDA and its partners, J.S.U.B., INC. and LOGUE ENTERPRISES, INC.

"BUILDER" – Refers to the Respondent, FIRST HOME BUILDERS OF FLORIDA and its partners J.S.U.B., INC. and LOGUE ENTERPRISES, INC.

"INSURER" – Refers to Petitioner, UNITED STATES FIRE INSURANCE COMPANY.

"CGL Policy" – Refers to Commercial General Liability Policy.

"ISO" – Refers to Insurance Services Organization

"Trial Court" – Refers to the Honorable William C. McIver, Circuit Judge

"DISTRICT COURT" – Refers to the Second District Court of Appeals

"DISTRICT COURT OPINION" – Refers to the Opinion of the Second District Court of Appeals in this matter, J.S.U.B., Inc. v. United States Fire Ins. Co., 906 So. 2d 303 (Fla. 2nd DCA 2005), *Motion for Rehearing and/or Certification denied,* June 23, 2005

STATEMENT OF THE CASE AND OF THE FACTS

BUILDER adopts its Statement of the Case and of the Facts as set forth in INSURER'S Brief, and also relies on those facts set forth in the District Court Opinion.

SUMMARY OF ARGUMENT

Conflict jurisdiction does not exist in this case. The District Court Opinion does not expressly or directly conflict with LaMarche v. The Shelby Mutual Insurance Company, 390 So. 2d 325 (Fla. 1980), Lassiter Construction Company v. American States Insurance Company, 699 So. 2d 768 (Fla. 4th DCA 1997) or Home Owners Warranty Corporation v. The Hanover Insurance Company, 683 So. 2d 527 (Fla. 3rd DCA 1996). Even if some conflict is inferred, this Court should decline to exercise its discretionary jurisdiction.

ARGUMENT

A. Conflict Jurisdiction

This Court is a court of limited jurisdiction which does not have authority to correct every district court holding it believes is erroneous. Stevens v Jefferson, 434 So. 2d 33, 36 (Fla. 1983) (Boyd, J. dissenting). This is true because under Article V, §3(b)(3), Florida Constitution represents a "determination by the legislature and the people that this Court should not be able to review any decision it chooses". Id. For the purposes of determining conflict, jurisdiction of this Court

is limited to the facts that appear on the face of the opinion. See Hardee v. State Operative, 477 So. 2d 706, 708 (Fla. 1988) and White Construction Company v. Dupont, 455 So. 2d 1026 (Fla. 1984).

B. The Holding in J.S.U.B., Inc., et al. v. United State Fire Insurance Company, 906 So. 2d 303 (Fla. 2nd DCA 2005).

This case admittedly involves the interpretation of the standard Insurance Services Organization (ISO) CGL policy. More specifically, BUILDER has argued for a narrow exception to Florida's historical treatment of business risks based on 1986 changes to the CGL policy. The narrow exception argued by BUILDER in this case only applies when all of the following elements are present:

1. The insured purchased a commercial general liability policy which includes the completed products operation hazard coverage;

2. There is an occurrence which constitutes an accident under the policy of insurance and applicable Florida law;

3. Damage to property occurs;

4. The property damage and occurrence were the result of the errors or omissions of the subcontractor;

5. The damages caused by the subcontractor's work occurred during the completed operations period.

The District Court's Opinion clearly recognizes that this limited exception to Florida's historical treatment of "business risks" was compelled by a clear reading of LaMarche, recent

Supreme Court precedent including the Supreme Court's decision in State Farm Fire and Casualty v. CTC Development Corporation, 720 So. 2d 1072 (Fla. 1998), and the changes to the CGL policy. The limited applicability of the District Court Opinion was recognized in the subsequent decision of the Second District Court of Appeals in Ryan Incorporated Eastern v. Continental Casualty Company, 2005 Fla. App. LEXIS 12210, 30 Fla. L. Weekly D1885 (Fla. 2nd DCA August 5, 2005) (holding that J.S.U.B.'s extension of coverage did not apply unless the occurrence and damage fell within the "products-completed operation hazard.") See also Taurus Holdings v. United States Fidelity & Guaranty, Co., 30 Fla. L. Weekly S633 (September 22, 2005) and Auto Owners Insurance Company v. Marvin Development Corporation, 805 So. 2d 888 (Fla. 2nd DCA 2001) (holding that a CGL policy with a completed operations hazard exclusion, as contrasted with specially purchased completed operations hazard coverage, did not cover the construction loss in question). Because the District Court's Opinion only applies to the narrow fact band set forth above and because no other court has directly treated this issue under Florida law, it would be inappropriate and unwise for this Court to accept jurisdiction over this matter.

C. The District Court Opinion Does Not Expressly or Directly Conflict With This Court's Decision in LaMarche v. The Shelby Mutual Insurance Company, 390 So. 2d 325 (Fla. 1980).

The primary basis for INSURER's claim of alleged conflict is a conflict between this Court's decision and LaMarche. When comparing the instant case with this Court's decision in LaMarche, it is crucial to note that **the insurance policy and facts of the respective losses are different.** This axiomatically compels different analyses than that given by this Court in LaMarche.

The first and foremost rule when interpreting an insurance policy under Florida Law is to interpret its plain language. Thus, when the insurance policy language changes, the interpretation of the policy must be revisited. This is exactly what the District Court Opinion does. Even if this Court disagrees with the Opinion, that does not serve as a basis of conflict of jurisdiction.

The District Court's Opinion clearly indicates that the 1986 changes to the CGL policy served as the primary basis for the District Court's Opinion. The changes recognized by the Court included the recognition that completed operations coverage had become a standard option for CGL policies, and that the exclusionary language of the policy had changed. More specifically, the 1986 CGL policy included an exception for the work of subcontractors to Exclusion "l", the "damage to your work" exclusion.

The instant case is also factually distinguishable from

LaMarche. In reading LaMarche, it is not clear that property damage which would give rise to an occurrence under the subject policy occurred. Similarly, reading the decision of the District Court decision in LaMarche leaves open the question of whether or not property damage occurred such that an occurrence would exist under the policy definitions. The Shelby Mutual Insurance Company v. LaMarche, 371 So. 2d 198 (Fla. 2nd DCA 1979).

Even absent the changes in policy language, the opinion does not conflict with LaMarche. The INSURER's primary argument has always been that the subject incident does not represent a covered "occurrence" under the policy. A proper reading of LaMarche simply does not support this proposition. As the opinion indicates, the LaMarche decision is based on policy exclusions incorporated in the then existing CGL policy form. LaMarche notes this, directly indicating:

> We find this interpretation was not the intent of this contractor and insurance company when they entered into the subject contract of insurance, the language of the policy clearly **excludes** this type of coverage.

[Emphasis added.] LaMarche at 326. Any doubt as to whether or not LaMarche is based on then existing exclusions is eliminated when reviewing the decision of the New Jersey Supreme Court in Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (1979). Weedo is crucial because it is the lynchpin of this Court's LaMarche

decision. In commenting on Weedo, this Court noted "We fully agree with its logic and reasoning." LaMarche at 327. It is very clear that the Weedo decision was not based on a claim of non-coverage, but instead was based on the idea that the subject loss was excluded under then existing policy language. This is set forth with striking clarity in footnote 2 of the Weedo decision, which notes:

> [Insurer] conceded at oral argument before us, as it apparently did before the Appellate Division … that but for the exclusions in the policy, coverage would obtain. Hence we need not address the validity of one of the carrier's initially-offered grounds of non-coverage, namely, that the policy did not extend coverage for the claims made even absent the exclusions.

With these considerations in mind, it is clear that the District Court's Opinion does not conflict with LaMarche in any way.

D. The District Court Opinion Does Not Expressly or Directly Conflict With This Court's Decision in Lassiter Construction Company v. American States Insurance Company, 699 So. 2d 768 (Fla. 4th DCA 1997) or Home Owners Warranty Corporation v. The Hanover Insurance Company, 683 So. 2d 527 (Fla. 3rd DCA 1996).

It is important to note that neither Lassiter nor Home Owners Warranty have the benefit of this Court's most recent decisions making clear the breadth of "occurrence" based coverage under the CGL policies. See State Farm Fire and Casualty v. CTC Development, 727 So. 2d 1072 (Fla. 1998), Travelers v. PCR, Inc., 889 So. 2d 779 (Fla. 2004) and Koikos v. Travelers Insurance Company, 849 So. 2d 263 (Fla. 2003). These

cases and their progeny make clear that the breadth of "occurrence" based coverage in Florida is quite wide and certainly sufficient to encompass the claims in the instant case. Accordingly, any "conflict" which is alleged to exist between the District Court's Opinion and the Lassiter and Home Owners Warranty decisions must begin with the understanding that those courts did not have the benefit of knowing the full breadth of "occurrence" based coverage under the CGL policy which would be clarified by this Court in the intervening years. Notwithstanding this issue, Lassiter and Home Owners Warranty are clearly distinguishable from the District Court Opinion.

In Lassiter, there is absolutely nothing which indicates whether or not products completed operations coverage existed in that case. The only discussion of that issue is dicta. It would not be a "fair implication" to assume the existence of completed operations coverage in Lassiter, but instead a leap of faith. More telling is the fact that Exclusion "j." the property damage exclusion appears to be the focal point of the Lassiter decision. This indicates that the damages in question occurred **during operations**. Such claims would still be excluded under J.S.U.B. See also Ryan Eastern Incorporated. This is in direct contrast to the undisputed facts of the instant case. BUILDER acknowledges that, pursuant to Exclusion j., coverage would not be available for damaged work even if occasioned by a

subcontractor, when such damage occurs during operations. Coverage for such incidents is almost certainly excluded by Exclusion "j(5) and j(6)."

The Home Owners Warranty case is also clearly distinguishable from the fact pattern in the instant case as set forth in the District Court's Opinion. Importantly, the Home Owners Warranty case has no specific indication of property damage which would be required to trigger coverage. In footnote 1 of the Home Owners Warranty opinion, the Court sets forth a series of defects alleged in the complaint, none of which clearly indicate physical damage to tangible property, which would be required to trigger coverage under the definition of property damage in the insuring agreement. It is also not clear from the Home Owners Warranty opinion that the subcontractors in fact performed the work which was allegedly defective, or that the damage first manifested itself during the completed operations period such that coverage would be available under the District Court's Opinion.

E. Even if Some Conflict is Inferred Between the Opinions of LaMarche, Lassiter and/or Home Owners Warranty, This Court Should Choose Not to Exercise it's Discretion by Accepting Jurisdiction Over This Matter.

INSURER's Brief refers to the alleged claim of conflict as "real and embarrassing," and further notes that the District Court's Opinion is "unprecedented". This hyperbole

notwithstanding, it is quite clear that a conflict does not exist and cannot be reasonably inferred on the face of the District Court's Opinion when contrasted with LaMarche, Lassiter and/or Home Owner's Warranty. As to the decision being "unprecedented" , it is clear that the District Court's Opinion comports with the vast majority rule of cases interpreting the 1986 changes to the CGL policy where all the elements referenced in the District Court Opinion are present. In the last several years, five (5) state Supreme Courts have addressed the legal issues involved in the present appeal. See American Family Mutual Insurance Company v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004), Auto-Owners Insurance Company v. Home Pride Companies, Inc., 268 Neb. 528 (Neb. 2004), L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 2005 S.C. LEXIS 270 (S.C. September 26, 2005), Fejes v. Alaska Insurance Company, 984 P.2d 519 (Alaska 1999), and Gibbs M. Smith v. United States Fidelity & Guaranty Corporation, 949 P.2d 337 (Utah 1997). Only the L-J, Inc. case has arguably been decided contrary to the position espoused by BUILDER in this case. In short, the trend and majority rule regarding this issue are very clear. The District Court's decision is neither unprecedented nor in conflict with any decision of this Court or other district courts.

The real question going forward in this case is how will the

courts of Florida treat this issue now that this District Court's Opinion has been rendered. Because no clear conflict exists between the District Court Opinion and the opinions of this Court in LaMarche, and the decisions of the other district courts in Home Owners and Lassiter, the undersigned respectfully submits that the most prudent way for this Court to exercise its discretion is to allow the trial and district courts of Florida to decide, based on the specific facts in insurance policies at issues, whether coverage is available. This evaluation can be made based on the review of the District Court Opinion, Lassiter, Home Owners Warranty, and the intervening cases from this Court with a careful reflection of the limited fact pattern for which the District Court Opinion found coverage was granted under the policy of insurance.

CONCLUSION

Given the four corners of the respective opinions, and the limited jurisdiction that this Court has under Article V §3(b)(3), jurisdiction simply does not exist to review the District Court's Opinion. Accordingly, BUILDER respectfully requests that this Court declines to exercise its discretionary jurisdiction.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Mark A. Boyle
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U. S. Mail to JOSEPH MIELE, ESQUIRE, 350 East Las Olas Blvd., #1700, Ft. Lauderdale, FL 33301, on this ____ day of September, 2005.

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