IN THE SUPREME COURT OF FLORIDA
SC05-1295

D.C. CASE NO. 2D 03-134
L.T. CASE NO. 01-5533 CA

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner/ Defendant.

FIRST HOME BUILDERS OF FLORIDA,

Respondent/Plaintiff.

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

AMENDED BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

This case involves the interpretation of a standard ISO comprehensive general liability policy (the "CGL Policy") and whether coverage exists to a contractor for damage to a builder's own work or product that results from the faulty workmanship of a subcontractor. Contrary to precedent from this Court and the Third and Fourth Districts, the Second District concluded that coverage does exist under the terms of the standard CGL Policy and reversed the trial court's declaratory judgment that had been entered in favor of the insurer, Unites States Fire Insurance Company ("U.S. Fire"). The Second District reached this conclusion despite its express recognition that in the past, Florida courts had generally taken the position that CGL policies did not cover the cost of replacement of defective materials or workmanship of a builder or general contractor and had extended this general rule to defective work performed by a subcontractor on a general contractor's behalf. *See Opinion*, p. 3.

The Second District's decision, which found coverage in favor of a contractor for damage to a builder's own work or product that results from the faulty workmanship of a subcontractor, expressly and directly conflicts with this Court's decision in *LaMarche v. Shelby Mut. Ins. Co.*, 398 So. 2d 325 (Fla. 1980), the Fourth District's decision in *Lassiter Construction Co. v. American States Ins. Co.*, 699 So. 2d 768 (Fla. 4th DCA

1997), and the Third District's decision in *Home Owners Warranty Corp. v. Hanover Ins. Corp.*, 683 So. 2d 527 (Fla. 3d DCA 1996). These decisions conclude ***just the opposite*** as a matter of law on the same or substantially similar facts. Given this real and embarrassing conflict, and the resulting uncertainty under Florida law relating to the rights and obligations of insurers and insureds relative to certain claims for defective construction under a standard CGL policy, this Court should exercise its discretionary jurisdiction to review the unprecedented Opinion from the Second District.

STATEMENT OF THE CASE AND FACTS

The procedural history and facts of the case are set forth in the Opinion:

> J.S.U.B., Inc., and LOGUE Enterprises, Inc., as partners of First Home Builders of Florida (the Builder) appeal[ed] a final declaratory judgment holding that insurance policies purchased from United States Fire Insurance Company (the Insurer) d[id] not provide coverage for certain damage to homes constructed by the Builder. We conclude that the policies provide coverage and reverse. . . .
>
> The Builder was the general contractor on a series of homes built in Lee County, Florida. Subcontractors performed all work related to soil acquisition, compaction, and testing. After completion of construction, some homes suffered damage when the exterior walls moved or sank as a result of improper compaction of the soil, improper testing of the soil compaction, poor soil or fill material, or a combination thereof. The damage included structural damage as well as damage to items placed in or affixed to the homes, such as wallpaper.
>
> The Builder sought coverage for the damage under a commercial general liability (CGL) policy and renewal policy issued by the Insurer. . . When the Insurer denied coverage, the Builder filed an action for declaratory relief, seeking a determination that the insurance policies provided coverage. The

> Insurer acknowledged that the policies provided coverage for damage to items that the homeowners added to the homes. However, it maintained that the policies did not cover damage to the Builder's own work or product that resulted from the Builder's or a subcontractor's faulty workmanship.
>
> Following a nonjury trial, the trial court determined that the damage was the result of faulty workmanship caused by the subcontractors' use of poor soil, improper soil compaction, or improper testing and that the policies did not provide coverage for faulty workmanship. On that basis, the trial court entered judgment in favor of the Insurer.

See Opinion, pp. 1-2.

The Second District determined that the policies provide coverage and reversed the declaratory judgment that had been entered in the insurer's favor. U.S. Fire requested that the Second District certify the coverage issue in this case to this Court as a question of great public importance and also requested certification on the ground of conflict on the same question of law with *LaMarche, Lassiter and Home Owners*. The Second District denied these requests. U.S. Fire timely filed a Notice to Invoke Discretionary Jurisdiction of this Court.

SUMMARY OF ARGUMENT

Conflict jurisdiction exists in this case and should be exercised with respect to the Second District's decision that the subject CGL policy affords coverage to the builder for structural damage to a completed project caused by the faulty workmanship of a subcontractor. The Opinion expressly and directly conflicts on the same question of law with this Court's decision in *LaMarche*, the Fourth District's decision in *Lassiter*, and the Third District's decision in *Home Owners*.

ARGUMENT

A. The Opinion Expressly and Directly Conflicts With This Court's Decision in *LaMarche v. Shelby Mut. Ins. Co.*, 398 So. 2d 325 (Fla. 1980)

The Opinion expressly and directly conflicts with this Court's decision in *LaMarche* by announcing a rule of policy interpretation that directly conflicts with a rule previously announced in *LaMarche*, notwithstanding the different policy exclusions involved in *LaMarche*. This Court held in *LaMarche* that a comprehensive general liability policy ***does not*** protect the insured from liability for replacement or repair of defective materials and workmanship. *Id*. at 326. As this Court explained:

> The majority view holds that the purpose of this comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product.

> To interpret the policy as providing coverage for construction deficiencies . . . 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 . . . Rather than coverage and payment for building flaws or deficiencies, the policy instead covers damage *caused* by those flaws. We agree with the explanation of this type of coverage as stated by the Supreme Court of New Jersey in *Weedo v. Stone-E-Brick, Inc*., 81 N.J. 233, 405 A.2d 788 (1979), in which it said:
>
> An illustration of this fundamental point may serve to mark the boundaries between "business risks" and occurrences giving rise to insurable liability. When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will perforce have to be replaced or repaired by the tradesman or the surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrent of harm arises which is the proper subject of risk sharing as provided by the type of policy before us in this case. (citations omitted).
>
> The court in *Weedo* wrote an exhaustive opinion on this issue, discussing the majority and minority views. *We fully agree with its logic and reasoning*.

Id. at 326-327 (emphasis added). Furthermore, as the *Weedo* court wrote:

> 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, and for which the insured may be found liable. The insured, as a

> source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. ***The coverage is for tort liability for physical damage 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 [citations omitted]. As we have endeavored to make clear, the policy in question does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.***

Weedo, 405 A.2d at 791 (our emphasis).

In sharp contrast, the Opinion holds that coverage ***does exist*** under a CGL policy, according to its terms, for damage to a contractor's completed work caused by the faulty workmanship of a subcontractor. Thus, a fair reading of the Opinion is that it announces a new interpretation of policy or rule of law which directly conflicts with the interpretation announced in *LaMarche* and its progeny on substantially the same issue of law.[1] Absent resolution of this conflict, a large class of persons, including insurers, general contractors,

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[1] A fair implication or reasonable reading is sufficient to show conflict jurisdiction in the Florida Supreme Court. See Hardee v. State, 534 So.2d 706, 708 (Fla. 1988) (conflict can be based on the "fair implication to be drawn" from the facts stated in the opinion); Public Health Trust v. Menendez, 584 So.2d 567, 569 (Fla. 1991) (conflict exists when an opinion reasonably may be read as an incorrect statement of the law

subcontractors and homeowners will remain in the dark as to their respective rights and obligations relative to construction defects and possible insurance coverage under a standard CGL policy.

B. The Opinion Expressly and Directly Conflicts with *Lassiter Constr. Co. v. Am. States Ins. Co.*, 699 So.2d 768 (Fla. 4th DCA 1997) and *Home Owners Warranty Corp. v. Hanover Ins. Corp.*, 683 So.2d 527 (Fla. 3d DCA 1996)

The Opinion also expressly and directly conflicts with the Fourth District's decision in Lassiter, which involved precisely the same issue of law and the same CGL policy provisions. In *Lassiter*, the Fourth District, on a motion for clarification, held that there was no coverage in the first instance under a CGL policy with identical insuring provisions for defective construction performed by the insured or its subcontractors, notwithstanding exclusions that had exceptions for work performed by subcontractors. *Id*. at 769.[2] The

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applicable to the facts).

[2] The Lassiter policy contained the following exclusion and exception:

> 1. "Property damage" to your product arising out of it or any part of it and included in the products-completed operations hazard.
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Lassiter Court also examined the following policy provisions, which appear in the subject policy as well:

> j. "Property damage" to: . . .
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it . . .
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Id. at 769. The exclusions and exceptions thereto are identical to the policy provisions in the subject policy and which the Second District cited in support of its conclusion that coverage existed. The *Lassiter* Court concluded that the subcontractor exception did not

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Auto-Owners, 227 F. Supp. 2d at 1262.

afford coverage in the first place for the cost to repair or replace construction defects. *Id*. at 769.

In *Lassiter* the Fourth District also rejected the insured's contention that the exception for "products-completed operations hazard" B which is identical to the policy provision which the Second District relied upon in finding coverage B created coverage for the costs to repair or replace defective construction. *Lassiter*, 699 So. 2d at 770, *citing Tucker Construction Co. v. Michigan Mut. Ins. Co.*, 423 So. 2d 525 (Fla. 5th DCA 1982). The Opinion cannot be squared with *Lassiter*, and thus creates a definite split on the same issue of law involving identical policy provisions.

Similarly, the Opinion expressly and directly conflicts with the Third District's decision in *Home Owners Warranty Corp. v. Hanover Ins. Corp.*, 683 So.2d 527 (Fla. 3d DCA 1996), which the Fourth District cited with approval in *Lassiter*. Home Owners also addressed the question of whether defective construction claims were covered by a commercial general liability policy. The Third District held in *Home Owners* that there was no coverage under a CGL policy for alleged damages arising from a subcontractor's faulty workmanship. The Third District relied on the holdings and rationale of *LaMarche* and *Weedo*, and in examining the same insuring provisions at issue in the instant case, reasoned that an exclusion cannot, in and of itself, create coverage, where there is no coverage elsewhere in the policy. *See Home Owners*, 683 So.2d at 528-529. The

Opinion diverges from Home Owners on the same fundamental question of coverage under a CGL policy question involving the same or substantially similar facts.

CONCLUSION

The Opinion expressly and directly conflicts with *LaMarche*, *Lassiter* and *Home Owners* as set forth herein. Absent this Court's exercise of discretionary jurisdiction to resolve the conflict on this significant coverage question, with state-wide consequences for a large class of persons, insurers, builders, contractors, subcontractors and homeowners and trial courts will be unable to determine respective rights and obligations under CGL policies. Accordingly, Petitioner U.S. Fire respectfully requests that this Court exercise its discretionary jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished by U.S. Mail this ___ day of August, 2005 to Mark A. Boyle, Esq., Counsel for Appellant, Fink & Boyle, P.A., 2030 McGregor Boulevard, Fort Meyers, Florida 33902.

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CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that the typeface of this brief is 14 point Times New Roman and complies with the font standards prescribed by Fla.R.App.P. 9.210.

June G. Hoffman

BRIEF398-on Jurisdiction.JGH