IN THE SUPREME COURT OF FLORIDA

CASE NO: SC05-1295
L.T. CASE NO: 2D 03-134

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

v.

FIRST HOME BUILDERS OF FLORIDA,

Respondent.
_____/

AMENDED REPLY BRIEF OF PETITIONER, UNITED STATES FIRE INSURANCE COMPANY

ON DISCRETIONARY CONFLICT REVIEW OF A DECISION FROM THE SECOND DISTRICT COURT OF APPEAL

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I. *LaMarche* Correctly Recognized that the Purpose of a CGL Policy is to Provide Coverage for Bodily Injury or Property Damage, Not the Cost of Repairing or Replacing the Contractor's Defective Work

Since 1968, Florida courts have consistently ruled that a CGL policy is not intended to cover the cost of repairing and replacing a contractor's faulty work. Rather, the purpose of a CGL policy is to cover only injuries to people and damage to property caused by the defective work. Before *J.S.U.B., Inc. v. U.S. Fire Ins. Co.*, 906 So. 2d 303 (Fla. 2d DCA 2005) ("*JSUB*"), this Court in *LaMarche v. Shelby Mutual Insurance Co.*, 390 So. 2d 325 (Fla. 1980) and each District Court of Appeal following it, uniformly found no coverage for defective work alone, since it is not an "occurrence," is not "property damage," is excluded by the business risks exclusions, and is repugnant to Florida public policy. To preserve this well-reasoned body of law, this Court should now reverse *JSUB*.

In an attempt to justify departing from nearly forty years of established law, First Home offers three inconsistent positions on *LaMarche*. It simultaneously argues that: (1) this Court "must overrule *LaMarche*" in order for U.S. Fire to prevail (Ans. Br. at 7); (2) this Court must overturn cases relying on *LaMarche* in order for First Home to prevail, since nearly every court in Florida has "misapprehended and misapplied" its holding (Ans. Br. at 8); and (3) *LaMarche* is

irrelevant since the "policy form has changed" (Ans. Br. at 13). Each of these arguments is poorly reasoned and entirely without merit.

In order to rationalize overruling the myriad cases applying *LaMarche*, First Home cherry-picks a single word from the opinion: "exclusion." Essentially, it argues that *LaMarche* turned entirely on the exclusions – with no consideration of the insuring agreement. (Ans. Br. at 8). While this Court referred to the exclusions and cited *Weedo v. Stone-E-Brick*, 405 A.2d 788 (N.J. 1979), it also acknowledged the paramount purpose of a CGL policy to cover accidental damages caused by faulty work, not the cost or repairing or replacing the faulty workmanship.[1] Nowhere in the opinion does the Court suggest that it was focusing on the exclusions and not interpreting the policy as a whole. Simply because the Court considered the exclusions does not mean it declared the loss was covered by the insuring agreement, as First Home strains to suggest. First Home has accordingly misapplied and misapprehended the holding in *LaMarche*, not the district courts prudent following its reasoning.

First Home also argues that this Court must overrule *LaMarche* for U.S. Fire to prevail. First Home has it backwards. The bedrock of the Second District's decision below was that the 1986 revisions "effectively broadened CGL coverage

[1] In *Weedo* the insurer conceded coverage under the insuring agreement, so the New Jersey Supreme Court limited its discussion to the exclusions.

by expanding the interpretation of what constitutes an 'accident.'" *JSUB* at 307. Because the U.S. Fire Policies include the revision, the Second District reasoned it could simply distinguish *LaMarche* and all other decisions finding no coverage under the pre-1986 form. In a significant break, First Home now concedes that the Second District was wrong. It admits that the 1986 revisions left the insuring agreement "essentially the same." (Ans. Br. at 14). Moreover, since the definition of "occurrence" has remained "essentially the same," *LaMarche* continues to be controlling. If, as First Home properly concedes, the revisions left the intent of the insuring agreement essentially unchanged, the Second District erroneously distinguished *LaMarche* and its progeny. Consequently, as part of a seismic reorganization of Florida jurisprudence – this Court would have to overrule *LaMarche* and every other decision applying it in order to find coverage for First Home's faulty workmanship.[2]

Instead, this Court should apply *LaMarche* and reaffirm the long-standing principle that the purpose of a CGL policy is to provide coverage when defective work *causes* bodily injury or property damage, but not for contractual liability

[2] Contrary to First Home's assertions, neither *Koikos v. Travelers Ins. Co.* 848 So. 2d 263 (Fla. 2003) nor *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779 (Fla. 2004) held that the 1986 revisions broadened the definition of occurrence. *Koikos* discussed the "continuous and repeated exposure" language to determine the number of occurrences in a nightclub shooting, and *PCR* involved coverage for a claim implicating an exception to worker's compensation immunity.

arising from the delivery of the defective work itself. A CGL policy is not a substitute for a performance bond.

II. This Court Rightly Acknowledged that Only Completed Operations that Cause Bodily Injury or Damage to Property Other than the Work Itself are Covered Under a CGL Policy

Under First Home's reading of the Policies, the identity of the damaged property is totally irrelevant to the determination of whether there was an "occurrence." First Home proposes a hypothetical where a building collapses after completion due to construction errors. (Ans. Br. at 18). First Home criticizes U.S. Fire for contending there is not an occurrence for damage to the property itself, but an occurrence for injury to the people and damage to the furniture inside. Once again, the language of the policy and nearly forty years of Florida case law belie First Home's proposed construction of a CGL policy.

Non-conforming, faulty construction is not an "occurrence." The need to replace defective work is not an unexpected or unintended consequence of defective work; it is all part of the same defective work. For example, if a window installer fails to properly flash a window and it leaks after it rains, that is not an occurrence. If a roofer fails to place tar paper to the edge of a roof and the roof leaks when it rains, that is not an occurrence. And if a builder fails to properly compact the soil and the house predictably settles, the settling of the house is not an occurrence, although the damage to the homeowner's furniture would be

covered. The distinction is simple: the damage to the home itself is not reasonably fortuitous, while the accidental damage to property outside the contract is fortuitous, which is the reason for the protection under a CGL policy.

Here, once First Home and its subcontractors failed to properly compact the soil, it was certainly expected there would be rain. Rain will cause the improperly compacted soil to shift, thereby damaging the house, including the tile floor, cabinetry, and drywall. Despite First Home's assertions to the contrary, the improperly compacted soil – not the familiar Florida rain – caused the damage. Besides, if it was an "Act of God" that caused the damage, not faulty work, there would be no basis for a suit against First Home. (Ans. Br. at 25). Instead, the homeowners would have simply filed a claim under their own homeowner's policy, no different than if there had been a lightning strike or a flood.[3]

To support its position, First Home cites *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072 (Fla. 1998) for the proposition that identifying the

[3] First Home asserts the parties stipulated that it did not intend the damage to the home. (Ans. Br. at 1, 17). It is mixing concepts. Unlike the facts of an arson or a shooting, the parties agreed that First Home did not specifically intend for the house to settle. (Tr. at 8). But, U.S. Fire always denied the damage was fortuitous or that the settling of the house was an unexpected or unintended consequence of improperly compacted soil under the insuring agreement: "The exception to the exclusion doesn't create coverage that's not otherwise there." (Tr. at 22). In any event, parties cannot by stipulation control questions of law. *Broward v. Sledge*, 50 So. 831, 831 (Fla. 1909); *Alvarez v. Smith*, 714 So. 2d 652, 653 (Fla. 5th DCA 1998); *Clark v. Munroe*, 407 So. 2d 1036, 1037 (Fla. 1st DCA 1981).

damaged property was not "worthy of discussion, much less the dispositive factor." (Ans. Br. at 18). U.S. Fire disagrees. In *CTC*, as in *LaMarche*, this Court understood that finding an occurrence necessarily involves identifying the damaged property. Unlike the situation here, *CTC* involved a lawsuit by a neighbor, not the homeowner who contracted with the builder. Thus, *CTC* was not a defective construction case; it was a third-party property damage case. Consistent with the reasoning in *LaMarche* and *Lassiter Constr. Co. Inc. v. Amn. States Ins. Co.*, 699 So. 2d 768 (Fla. 4th DCA 1997), the Court properly determined that the unexpected damage to the neighbor's property was an occurrence. To push the point further, if the home in *CTC* had been constructed on an incorrect part of the homeowner's land – with no encroachment on the neighbor's property – U.S. Fire submits that the Court would have found no coverage since the only damage was to the work itself. Even *Zurich Amer. Ins. Co. v. Cutrale Citrus Juices USA, Inc.*, 2002 WL 1433728, *2 (M.D. Fla 2002), a case cited by First Home, supports this view: "In all but one of the decisions … there was no claim for physical damage to the property of a third party, and that is a key distinction."

Returning to First Home's question, the answer to why damage to the home is not an occurrence while damage to personal property inside the home is an occurrence is found in the insuring agreement. First Home contracted to build a

home. Damage to the home – the work, and the property that is the subject of the contract itself – is not an occurrence, while damage to property other than the home – property outside the contract – is covered. It is the reasonable degree of fortuity involved in the damage to property outside the contract that makes it an occurrence. *Key Custom Homes, Inc v. Mid-Continent Ins. Co.*, 450 F. Supp. 2d 1311, 1317 (M.D. Fla. 2006) ("General liability insurance 'is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss.'").

It is also fortuity that highlights the distinct, but complimentary, protection offered by a CGL policy and surety bond products like a performance bond. A CGL policy covers only accidental damages to property outside the contract, while a performance bond covers only business damages inside the contract, with no exception. *Harris Specialty Chems., Inc. v. U.S. Fire Ins. Co.*, 2000 WL 34533982, *6 (M.D. Fla. 2000) ("Comprehensive general liability policies are not performance bonds; comprehensive general liability insurance 'is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss ….'") (quoting *Weedo* at 796).[4]

[4] In turn, a builder purchases worker's compensation coverage for injuries to its employees, which is excluded from coverage under the CGL policy and the performance bond. To the point, each sphere of coverage has a separate purpose and all work to compliment one another against the various risks associated with operating a modern construction business.

First Home proposes the false dilemma that U.S. Fire's interpretation of the Policies would eliminate coverage for tort claims since all claims contain an element of foreseeability. This argument misses the point. First Home uses the example of a driver running a red light. (Ans. Br. at 29). The expected and intended consequence of running a red light is that the driver will arrive at his destination sooner. Whether running a red light results in an accident depends on multiple fortuitous factors, like the presence of another vehicle or person. It is this detail of fortuity that triggers coverage for the resulting accident. Conversely, it is the lack of fortuity that precludes coverage for a builder that does not properly compact the soil and an ordinary rain causes the house he built to settle.

III. The Recent Decision in *Kvaerner Metals* Illustrates the Fortuity Analysis Needed for an "Occurrence"

In *Kvaerner Metals v. Comm. Union Ins. Co.*, 908 A. 2d 888 (Pa. 2006), the Pennsylvania Supreme Court cogently summarized the analysis necessary to make an "occurrence" determination. Kvaerner was hired to construct a coal oven according to the plans and specifications in its contract. Kvaerner was later sued for breach of contract due to numerous problems with the oven, but there was no allegation of damage to other property. Since the complaint did not allege an occurrence, the insurer disclaimed coverage. Like First Home here, Kvaerner argued it did not intend any of the damage. It even offered expert testimony that a monsoon-like rain caused bricks in the oven's roof to move because they were

grouted too early. Kvaerner argued that it did not intend for the early grouting to cause the roof to move, so the damage to the oven was unintended and thus covered by its CGL policy. Like First Home, Kvaerner red-lined that the improper work was performed by its subcontractors, suggesting the loss was covered since its policy included Products Completed Operations Hazard (PCOH) coverage.

The court deftly rejected Kvaerner's occurrence theory, reasoning:

> We hold that the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship. Such claims simply do not present the degree of fortuity contemplated by the ordinary definition of, 'accident' or its common construction in this context. To hold otherwise would convert a policy for insurance into a performance bond. We are unwilling to do so, especially since such protections are already readily available for the protection of contractors.

Id. at 899. Rightly, the court understood that an occurrence requires fortuitous damage, *i.e.*, damage to property other than the work itself.

Like *Kvaerner Metals* and the majority of jurisdictions, this Court should continue to rule that there is no occurrence for faulty workmanship, unlike damage to property other than the completed work itself – which is the purpose of coverage under a CGL policy.[5] When a contractor breaches its contract and fails to build a

[5] By arguing that contrary cases were poorly reasoned or factually distinguishable, First Home strains to contend that its position represents the majority view. (Ans. Br. at 38-9). *Kvaerner Metals* summarily refutes that assertion: "[T]he majority of Courts have held that coverage under a CGL policy is not triggered by poor workmanship." 908 A. 2d at 899 n.9.

structure according to its plans or industry standards, the business damages flowing from that breach are not accidental or fortuitous.

IV. Like the "Occurrence" Analysis, Covered "Property Damage" Does Not Include Damage Limited to the Completed Work Itself

First Home argues that since the house's foundation, drywall, floor tiling, and cabinetry were physically damaged, the "property damage" requirement in the insuring agreement is satisfied. "Property damage" requires either (1) a "physical injury to" or "destruction of" tangible property, or (2) "loss of use of tangible property which has not been physically injured or destroyed[.]" Numerous courts in Florida and elsewhere have held that this definition logically requires that the property must have been undamaged or uninjured at some previous point in time. *Ins. Coverage of Constr. Defects,* Tort Trial & Ins. Practice L.J., (Summer 2006) ("In the context of design and construction defects, courts consistently rule that repair and replacement of the insured's defective work does not qualify as property damage. Only damage to other property qualifies.").

Here, the house was never constructed properly, so it was never un-damaged. To the contrary, the unstable foundation was part of the work that First Home delivered under the construction contract with its customer. When the house predictably settled, it further damaged itself – this damage is not accidental damage to "other property," and therefore, logically and by definition, not "property damage." These damages are merely continuing manifestations of

economic losses arising from First Home's breach of contract, which was not covered in the first place. *Key Custom*, 450 F. Supp. 2d at 1317-18.

First Home's citations to cases from other states also ignores Florida law holding that defective construction is an economic loss that does not constitute "property damage." *Auto Owners Ins. Co. v. Tripp Constr., Inc.* 737 So. 2d 600 (Fla 3d DCA 1999) (holding damage to repair and replace insured's own defective work flow from the breach of contract, which are economic losses not covered under a CGL policy); *West Orange Lumber Co., Inc. v. Indiana Lumbermens Mut. Ins. Co.*, 898 So. 2d 1147, 1148 (Fla. 5th DCA 2005) ("Failure to supply a product specified in a contract is a business risk not covered by the liability policy"). The present damages against First Home do not fall in the insuring agreement as they do not qualify as property damage caused by an occurrence. In contrast, liability for damage to "other property" is covered under a CGL policy, which is why U.S. Fire paid for all damage to the homeowner's personal property.

V. First Home's Discussion of Exclusion l. is a Red Herring

Since a construction defect claim does not fall in the insuring agreement, there is no reason for the Court to reach First Home's meandering discussion of Exclusion l. (Ans. Br. at 30). The most basic rule of insurance policy construction is that coverage starts with the declarations page, then the insuring agreement, and only if necessary, the exclusions. Applied here, if there is no coverage under the

insuring agreement to begin with, then the exception to Exclusion l. cannot create coverage since exclusions limit – not broaden – the coverage provided in the insuring agreement. *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 740 (Fla. 2002) ("'[P]olicy exclusions cannot create coverage where there is no coverage in the first place.' … This statement of the law is undeniable--the existence or nonexistence of an exclusionary provision in an insurance contract is not at all relevant until it has been concluded that the policy provides coverage for the insured's claimed loss.") (quoting *U.S. Fire Ins. Co. v. Meridian of Palm Beach Condo Ass'n, Inc.*, 700 So. 2d 161 (Fla. 4th DCA 1997)) (citing *Lassiter*).[6]

VI. An Unambiguous Policy is Not Made Ambiguous by Varying Interpretations in a Minority of States

Without authority, First Home and its Amicus contend that the policy is ambiguous since courts from other jurisdictions have reached dissimilar results. They also takes pains to refer to a loose collection of commentary and language from other insurance policies. (Ans. Br. at 38-9). These same arguments were unsuccessfully attempted by the policyholder in *Dimmit Chevrolet v. Southeastern Fid. Ins. Corp.*, 636 So. 2d 700 (Fla. 1994). As in *Dimmit*, this Court should disregard all purported drafting history, unsubstantiated commentary, and irrelevant policy forms. Based on the plain language of the Policies and nearly

[6] Exclusion l. and its exception are not applicable here. *Wm. C. Vick Const. Co. v. Penn. Nat. Mut. Cas. Ins. Co.*, 52 F. Supp. 2d 569, 582 (E.D.N.C. 1999).

forty years of measured case law, First Home is not entitled to coverage for the damage its faulty work causes to its own faulty work.

VII. Florida Public Policy Compels Holding No Coverage for Faulty Work

Starting with *LaMarche*, Florida courts have correctly held it is antithetical to the purpose of liability insurance coverage to allow a contractor to breach its contract by improperly performing its work, and then simply turn to its insurer to fund the repair or replacement of the work the builder failed to perform or supervise correctly in the first place. Yet, *JSUB* held that coverage exists without even addressing this seminal principle, in total disregard of the economic realities of modern construction. If insurance pays for poor workmanship, contractors have every incentive to use the cheapest labor and materials – regardless of skill or quality – in order to maximize their profits, since they have no personal exposure, unlike the indemnity obligation in a surety bond. To avoid this moral hazard, Florida courts have thoughtfully held that coverage for faulty work would promote shoddy workmanship, which is against public policy. *Centex Homes Corp. v. Prestressed Syss., Inc,* 444 So. 2d 66 (Fla. 3d DCA 1984).

Should this Court apply *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005 (Fla. 1989) to construction defect cases, although no court previously has, the first prong of the two-part test is satisfied. The second prong is also satisfied, like *Ranger*, since the bulk of defective construction cases are brought against

commercial enterprises that have resources to compensate claimants, independent of insurance proceeds. *Id*. at 1009.[7]

Under present Florida law, a builder has every incentive to perform the work correctly and to supervise and inspect the work performed on its behalf, which helps to limit the overall construction litigation in Florida.[8] Under First Home's new approach, liability insurers must "pay" to repair the defective work, and must "pay" again for litigation to pursue the subcontractors that the builder failed to supervise. This scenario also assumes that insurers will be able to recoup their money from subcontractors, which may not be possible under *Slavin* v. *Kay*, 108 So. 2d 462 (Fla. 1958) (subcontractor is generally not liable after work is turned over to the general contractor), or if the subcontractors, which unlike general contractors, often do not have assets or insurance to satisfy a judgment, and can simply file bankruptcy and walk away.

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[7] In *PCR*, 889 So. 2d 779 (Fla. 2000) this Court noted that the State's Worker's Compensation Law was intended to allow injured employees to sue employers for injuries caused by their employers. While the construction industry is regulated, there is no similar legislative pronouncement to support the conclusion that compensation as opposed to deterrence is the primary goal of the State's construction laws.

[8] The Policies' definition of "your work" includes the work of subcontractors since subcontractors perform work "on behalf of" general contractors like First Home. This definition has remained unchanged since *Tucker Constr. Co. v. Mich. Mut. Ins. Co.*, 423 So. 2d 525 (Fla. 5th DCA 1982) was decided, making First Home's lukewarm attempt to distinguish it unavailing.

In a final attempt to justify why insuring construction defect claims is not contrary to Florida's public policy, First Home compares coverage for breach of contract claims against builders to tort claims against professionals. As detailed above, there is nothing unexpected or fortuitous about repairing shoddy construction, and it is for that reason Florida's public policy precludes coverage for construction defect claims. In addition, contractors, unlike other professionals, can simply shut down their businesses, and reincorporate with a virtual "clean slate" with both the public and insurers. A doctor or lawyer cannot. Last, professional liability policies provide coverage on a claims made, not occurrence basis, so any attempt to extrapolate is extremely tenuous.

CONCLUSION

For nearly forty years, every Florida court before *JSUB* correctly held that the purpose of a CGL policy is to cover injuries to people and damage to property caused by defective work, not the cost of repairing and replacing the faulty work itself. First Home's arguments do not offer a compelling reason to abandon this well-reasoned body of law. This court should reverse *JSUB* and reaffirm the pre-eminent purpose of a CGL policy: to cover bodily injury and property damage caused by faulty workmanship.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of this document was served by U.S. Mail on this 13th day of December, 2006 to all counsel on the attached service list.

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CERTIFICATE OF COMPLIANCE

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

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