IN THE SUPREME COURT OF FLORIDA

Case No. SC06-2031

ESSEX INSURANCE COMPANY,

Petitioner,

vs.

MERCEDES ZOTA, MIGUEL ZOTA,
LIGHTHOUSE INTRACOASTAL, INC.,
JACK FARJI, individually, and
BROWARD EXECUTIVE BUILDERS, INC.,

Respondents.

On Review From Questions Certified by the
Eleventh Circuit Court of Appeals

Consolidated Case Nos. 05-13457-FF & 05-14671-FF

ANSWER BRIEF OF MERCEDES ZOTA AND MIGUEL ZOTA

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CERTIFIED QUESTIONS PRESENTED

(as stated by the Eleventh Circuit)

1. Whether Fla. Stat. § 626.922 or § 627.421, or both, require delivery of evidence of insurance directly to the insured, so that delivery to the insured's agent is insufficient.

2. Whether, if the delivery requirement of Fla. Stat. § 626.922 or § 627.421, or both, was not met in this case the appropriate remedy is to preclude the insurer from asserting lack of coverage under the terms of the policy.

3. If either the first or second question is answered in the negative, whether Lighthouse is a "builder, contractor or developer" under the terms of the insurance contract, so that there is no coverage.

4. If either the first or second question is answered in the negative, whether Zota is an employee of Lighthouse under the policy.

5. If Lighthouse is entitled to coverage, whether Fla. Stat. § 627.428 applies to surplus lines insurers.

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Petitioner, ESSEX INSURANCE COMPANY, will be referred to as ESSEX. Respondent, MERCEDES ZOTA, will be referred to as ZOTA, and Respondents, MERCEDES ZOTA and MIGUEL ZOTA, will be referred to collectively as the ZOTAS. Respondent, LIGHTHOUSE INTRACOASTAL, INC., will be referred to as LIGHTHOUSE. Respondent, BROWARD EXECUTIVE BUILDERS, INC., will be referred to as BROWARD. Respondent, JACK FARJI, will be referred to as JACK, and his father, ISIDORO FARJI, will be referred to as ISIDORO.

References to the record will refer to the volume, document number (per the district court docket sheet), and page number of the cited material, as reflected in the record utilized in the Eleventh Circuit proceedings, as follows:

(V___-D____-P____)

Where the record includes deposition mini-scripts (4 pages per page),

references to the record will also include the transcript page number, as follows:

(V___-D____-P____-T____)

References to the appendix of ESSEX'S Initial Brief will appear as follows:

(A.)

STATEMENT OF THE CASE AND FACTS

A. Introduction

MERCEDES ZOTA, was seriously injured on February 5, 2004, when she fell from the second floor while working as an architectural wall artist on a home located at 2373 N.E. 30th Court, Lighthouse Point, Broward County, Florida ("the 30th Court property"), a home owned by LIGHTHOUSE (V2-D74-P14-16).[1] ZOTA filed suit in Broward Circuit Court, Case No. 04-03388 CA 12, against LIGHTHOUSE, BROWARD, and JACK FARJI ("the underlying suit") (V2-D74-

[1] While the Eleventh Circuit's opinion states that ZOTA'S injuries resulted when she fell from scaffolding (A. 2), and ESSEX states that this fact was assumed arguendo below for purposes of cross-motions for summary judgment (Initial Brief at p. 8), in the underlying state court action, the circumstances of the accident are still in dispute, in the absence of any eyewitnesses (V1-D56-P102-103), and accident reconstructionists are in the process of forming conclusions as to what occurred.

P14-21). On May 7, 2004, ESSEX, LIGHTHOUSE'S insurer under a commercial general liability policy, Policy No. 3CM0753, with effective dates of September 26, 2003 through March 26, 2004 ("the policy"), filed a Complaint for Declaratory Judgment, seeking a determination that it had no duty to defend or indemnify the claims in the underlying suit (V1-D1; V3-D119-P2-3). The policy exclusions that ESSEX asserted included an employee exclusion, a workers' compensation and similar laws exclusion, and an employer's liability exclusion (V2-D74-P5-6), as well as the following exclusion found in Section 8 of ESSEX'S Combination General Endorsement, Form M/E-001 (4/00) (V2-D74-P34):

> If you are a contractor, builder or developer, there is no coverage under this policy for:
>
> (1) "Bodily injury," "personal injury" or "property damage" caused by acts of independent Contractors/subcontractors contracted by you or on your behalf unless you obtain Certificates of Insurance from them providing evidence of at least like coverage and limits of liability as provided by this policy and naming you as an additional insured.
>
> (2) "Bodily injury," "personal injury" or "property damage" sustained by any independent contractor/subcontractor, or any employee, leased worker, temporary or volunteer help of same, unless a Named Insured or employee of a Named Insured is on site, at the time of the injury or damage, and the Named Insured's actions or inactions are the direct cause of the injury or damage, or the injury or damage is directly caused by an

employee of the Named Insured.

On April 13, 2005, the district court entered Final Declaratory Judgment against ESSEX and in favor of LIGHTHOUSE, BROWARD, JACK FARJI, and the ZOTAS, after granting the motions for summary judgment of LIGHTHOUSE, BROWARD, JACK FARJI, and the ZOTAS, and denying ESSEX'S motion for summary judgment (V3-D119; V3-D120). ESSEX timely appealed this judgment to the Eleventh Circuit (V3-D150). On October 6, 2006, the Eleventh Circuit issued an opinion certifying five questions for resolution by the Florida Supreme Court (A. 1-22).

B. General Business Operations of LIGHTHOUSE and BROWARD

As the president, sole officer, sole shareholder, and sole employee of BROWARD, JACK FARJI is in the business of building houses (V1-D56-P16,39,114; V2-D106-P51,66). JACK FARJI is a licensed building contractor since 2001, who is licensed to build residential and commercial structures up to two stories high (V1-D56-P16-17, 20). JACK FARJI runs BROWARD from a home office, and he has no employees, and has never directly employed anyone (V1-D56-P23). In addition to projects involving properties owned by LIGHTHOUSE, discussed below, BROWARD does home remodeling work, contracting directly with homeowners, and files pertaining to the remodeling work

are kept at JACK'S home (V1-D56-P25-26). When JACK FARJI first obtained his contractor's license, he started a business known as Florida Executive Builders, Inc., now inactive, which engaged in the same type of work as BROWARD (V1-D56-P32,39). JACK received a cease and desist letter from a company that had begun using "Florida Executive Builders" as a fictitious name before JACK began using the name, and consequently he allowed Florida Executive Builders to be administratively dissolved, and started BROWARD as a separate company (V1-D56-P37-38).

JACK FARJI is also vice-president of LIGHTHOUSE, which buys and sells properties in the city of Lighthouse Point (V1-D56-P17). LIGHTHOUSE is in the business of selling spec homes (V1-D56-P24). JACK'S father, ISIDORO, is president of LIGHTHOUSE, and ISIDORO is not a licensed contractor (V1-D56-P19). JACK and ISIDORO each own 50% of the shares of LIGHTHOUSE (V1-D56-P35). LIGHTHOUSE does not develop the properties, as the properties already have houses on them, and were previously developed in the 1960's when sewer and water services were installed (V1-D56-P17-18). The offices of LIGHTHOUSE are in ISIDORO FARJI'S home, and BROWARD maintains any files related to LIGHTHOUSE properties in the same filing cabinet as the files of LIGHTHOUSE, in ISIDORO FARJI'S home (V1-D56-P24-26). ISIDORO

applies for any insurance policies on behalf of both BROWARD and LIGHTHOUSE, and maintains and organizes the files containing such insurance policies in his home office (V1-D56-P53-54). ISIDORO is not an officer of BROWARD (V1-D56-P55).

With respect to the 30th Court property at issue, LIGHTHOUSE purchased the property, while BROWARD was responsible for the knocking down of the existing home and the building of the new home on the premises (V1-D56-P20,43,44). JACK was at the 30th Court property on a daily basis, on behalf of BROWARD, to deal with the subcontractors and building inspectors, including the subcontractor that handled the demolition of the prior home (V1-D56-P65-66; V2-D106-P18). Also on BROWARD'S behalf, JACK briefed his father on the progress of the construction when his father came by the property once or twice a week (V1-D56-P66). When JACK'S father came by, he was there on behalf of LIGHTHOUSE (V1-D56-P67). JACK obtained all required building permits on behalf of BROWARD, and the permits listed BROWARD as the contractor and LIGHTHOUSE as the owner (V1-D56-P67-68). JACK also negotiated the price of the work with the subcontractors on behalf of BROWARD (V1-D56-P72).

ISIDORO was responsible on behalf of LIGHTHOUSE for obtaining certificates of insurance from all the subcontractors that BROWARD oversaw (V1-

D56-P70-71). All final proposals and insurance documentation from subcontractors were sent to LIGHTHOUSE and handled by ISIDORO, and LIGHTHOUSE signed the contracts and made the payments to the subcontractors (V1-D56-P72). LIGHTHOUSE also took out a construction loan to finance the construction on the 30th Court property and other properties (V1-D56-P80-81).

The 30th Court property was eventually sold for a profit of $600,000, which was split equally between father and son (V1-D56-P45). This was consistent with the unwritten general agreement between LIGHTHOUSE and BROWARD that LIGHTHOUSE would pay all construction costs while a home was being built, including the home on the 30th Court property, and BROWARD would be paid for its services as a contractor from the profits from the sale of the home (V1-D56-P34-37,64-65,113-115; V2-D106-P49-50).

C. Procurement, Issuance, and Delivery of Insurance Policies for LIGHTHOUSE and BROWARD

Maria Figueras, a commercial underwriter at R.A. Brandon & Company ("Brandon"), the company which was the agent for LIGHTHOUSE and BROWARD in procuring insurance policies, testified extensively regarding the series of policies covering LIGHTHOUSE and BROWARD (V2-D80-P5-7,12-15). For the policy period of 1998-1999, LIGHTHOUSE had a commercial general

liability policy from Colony Insurance that had a classification code such that it was specifically designed to cover construction activities (V2-D80-P21-22). The next policy, which replaced the Colony policy and provided the same type of coverage, was from Scottsdale Insurance and covered a policy period of 2000-2001 (V2-D80-P26-28). The policies for the periods 2001-2002 and 2002-2003 were from Nova Casualty (V2-D80-P41). The Nova policies reflected a change in coverage such that they did not have a classification designed to cover construction activities (V2-D80-P31-32). While Figueras speculated that cost may have been a consideration, she acknowledged that she did not know the reason for the change in coverage (V2-D80-P29). This change coincided with JACK FARJI obtaining his building contractor's license in 2001(V1-D56-P16-17,20). The next policy Brandon, through its employee Figueras, procured as the agent for LIGHTHOUSE was the ESSEX policy at issue, which included commercial general liability and real estate coverage, but not contractors' coverage (V2-D80-P50).

Figueras obtained for BROWARD a commercial general liability policy from Colony Insurance for the policy period of 2001-2002 that had a contractors' classification for executive supervision (V2-D80-P62-63). That policy was replaced for the 2002-2003 policy period with a Scottsdale Insurance policy providing the same coverage (V2-D80-P64-65). Thereafter, BROWARD used a

different insurance agency (V2-D80-P65).

Communications between Brandon and MacDuff in 2003 during the process of procurement of the ESSEX policy reflected inquiry into the nature of LIGHTHOUSE'S and BROWARD'S business operations. An August 16, 2003, e-mail sent by Figueras indicated that she understood LIGHTHOUSE'S operations to encompass buying lands, having them cleared, building houses, and then selling the properties upon completion (V2-D80-P71). In a later paragraph of the same e-mail, Figueras stated that the general contractor, BROWARD, would pull the permits (V2-D80-P73).

ESSEX asserts that Brandon, consistent with its general business practice, received two copies of the ESSEX policy from the surplus lines agent, and put one copy in its files and sent the other to the client/insured (Initial Brief at p. 2). However, Figueras testified that normally she would send the policy to the insured with a cover letter, but she was unable to locate a letter sent by her to ISIDORO FARJI, and she only had proof that the policy was faxed to ISIDORO FARJI after the ZOTA accident (V2-D80-P85-86). Indeed, ISIDORO FARJI stated in an affidavit that he did not receive the policy from Brandon until after the accident (V2-D95-P3). Moreover, both the district court and the Eleventh Circuit found that LIGHTHOUSE never received a copy of the policy prior to the accident (V3-

D119-P6; A. 3-4).

Mark Lowe, the president of MacDuff Underwriters, which acted as the agent of ESSEX and which only issues surplus lines policies, testified in a manner consistent with Figueras of Brandon regarding the scope of operations of LIGHTHOUSE (V2-D105-P7-8,15,61-62). Lowe testified that his understanding was that a company other than LIGHTHOUSE was serving as contractor, and that the contractor would have its own insurance (V2-D105-P48-49). Moreover, MacDuff's records included an e-mail from Tina Johnson, a senior vice president at MacDuff, sent in May 2004 to Bonnie Young at ESSEX, reflecting Johnson's knowledge that someone other than LIGHTHOUSE was acting as the general contractor (V2-D105-P51-52).

Lowe also testified that ESSEX never gave MacDuff written authorization to delegate to Brandon the duty of delivering the policy to the insured (V2-D105-P38-40). Lowe believed it was the common practice in the insurance industry for the retail agent (in this case, Brandon) to have the duty to deliver the policy to the insured (V2-D105-P38).

Margie Bolton, an underwriter at MacDuff, testified that she did not issue policies, she merely prepared quotes (V2-D104-P17,21,27,42). However, in the case at hand, the quote was prepared by Bonnie Young, an underwriter at ESSEX,

and Bonnie advised what forms applied to the quote (V2-D104-P43). Bolton merely acted as a conduit between the underwriter at ESSEX and Brandon (V2-D104-P76-77). Bolton testified that ESSEX used both coverage and exclusion forms from the Insurance Service Office (ISO), and coverage and exclusion forms of ESSEX'S own creation, which were called ME forms (V2-D104-P40). The combination general endorsement form was an ME form, not an ISO form, and therefore is a form used only by ESSEX (V2-D104-P67).

Jack Miller, the associate vice president of claims at ESSEX, testified as to his understanding of the applicability of certain policy exclusions based on ESSEX'S investigation of the ZOTA claims, as well as regarding requirements for surplus lines insurers (V2-D84-P3-T7). Miller acknowledged that ESSEX is a surplus lines insurer; that a surplus lines insurer could only issue policies in Florida through a surplus lines agent; that MacDuff was ESSEX'S surplus lines agent; and that when MacDuff issues policies on behalf of ESSEX it is doing so as ESSEX'S agent (V2-D84-P4-T12-13). With regard to the second prong of the "contractor, builder or developer" exclusion, Miller testified that while the insured was on site at the time of the accident, whether his actions or inactions were the direct cause of the accident was still in question (V2-D84-P10-T34). Miller acknowledged that ZOTA did not fit the definition of a leased worker (V2-D84-

P17-T64-65), or the definition of a temporary worker (V2-D84-P18-T68). Licensure as a contractor would be relevant to a determination of whether a person or entity was a contractor, and lack of a license would indicate that the person or entity was not a contractor (V2-D84-P27-T104-105). Miller acknowledged that ESSEX had already determined that ZOTA was not an employee within the meaning of the policy (V2-D84-P28,30-T106,116). Miller admitted that nothing in the policy put LIGHTHOUSE on notice that sharing the proceeds of its business with BROWARD could void coverage (V2-D84-P28-T109). **D. The Zota Accident**

At the time of the accident, the house was very close to completion, and the remaining work was largely cosmetic (V1-D56-P83). The closing on the sale of the house was in March 2004, and the necessary certificate of occupancy was issued in late February or early March 2004 (V1-D56-P83-84). JACK FARJI was present at the 30th Court property on the day of the accident, on behalf of BROWARD, to oversee the subcontractors, including subcontractors doing landscaping, drywall punch-out, and marble work (V1-D56-P84-86,121-122). ZOTA'S work was decorative work, rather than construction work, and did not require a permit (V1-D56-P115). BROWARD had no involvement with the decorative work, which was contracted by LIGHTHOUSE as the property owner

(V1-D56-P115,118,119). The construction work could not proceed without BROWARD as the qualifying contractor, but the decorative work that did not require permits could go on without BROWARD'S involvement (V1-D56-P130-131). ZOTA was not an employee of either BROWARD or LIGHTHOUSE (V1-D56-P117-119).

Perla Lichi, the president and sole owner of Permaco, Inc. d/b/a Perla Lichi Designs, testified regarding her professional relationship with ZOTA and the work done by ZOTA on the 30th Court property (V2-D78-P6). ZOTA and Lichi formed a corporation, Trompe L'Oeils 'R' Us ("Trompe")(V2-D78-P17). Lichi was president of Trompe, and ZOTA was either vice president and secretary, or vice president and treasurer (V2-D78-P29). Trompe's offices were adjacent to Lichi's offices, and Lichi paid Trompe's rent (V2-D78-P27,47). All proceeds of the business generated by Trompe were divided equally between Lichi and ZOTA (V2-D78-P113). Trompe did not have any employees, and ZOTA was the only person doing work under the auspices of Trompe (V2-D78-P36,118).

At the 30th Court property, ZOTA was retained to do a mural on canvas, some stenciling painting beneath the stairs, and some stenciling painting on the bridge ceiling, and this work was performed on behalf of Trompe, which had been hired by LIGHTHOUSE (V2-D78-P16,34). LIGHTHOUSE issued a check to

Trompe for $3000.00 as a deposit toward the services ZOTA was rendering at the time of the accident (V2-D78-P39-40). The total amount charged for the work was $6,000.00 (VS-D78-P62-63).

E. Summary Judgment Proceedings

While ESSEX'S characterization of the proceedings is largely accurate, a few clarifications are in order. First, ESSEX states that its motion for summary judgment was based upon "the policy's clear and unambiguous terms that do not extend coverage to builders, contractors, or developers..." (Initial Brief at p. 9), but it would be more accurate to say that exclusionary policy language negates coverage for contractors, builders, and developers that would otherwise exist under the policy. Additionally, ESSEX states that the Defendants' motions for summary judgment were based in part on "the assertion that delivery of the policy had been from MacDuff to Brandon, not from Essex directly to Lighthouse" (Initial Brief at p.9). However, the essence of Defendants' argument is that in violation of Section 626.922, Florida Statutes, delivery of the policy was from MacDuff to Brandon, not from MacDuff directly to LIGHTHOUSE, and that since MacDuff was ESSEX'S agent, ESSEX is liable for MacDuff's omission.[2]

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[2] ZOTA recognizes that the argument set forth below by the other

Defendants (V2-D88-P6-10), and adopted by the ZOTAS (V2-D98), was not articulated with the utmost clarity, and takes this opportunity to crystallize the argument for the benefit of this Court.

POINTS ON APPEAL

I. The district court correctly construed Section 626.922, Florida Statutes, to require delivery to the insured, and not merely to the insured's agent.

II. The district court correctly fashioned a remedy that estopped ESSEX from asserting the applicability of policy exclusions where the policy otherwise provided coverage.

III. LIGHTHOUSE is not a "builder, contractor or developer" as a matter of law, or in the alternative, this issue is a question of fact for the jury.

IV. ZOTA was not LIGHTHOUSE'S employee as a matter of law, or in the alternative, this issue is a question of fact for the jury.

SUMMARY OF ARGUMENT

Both the language and the legislative history of Section 626.922, Florida Statutes, establish that a surplus lines agent (MacDuff) must get written authority from a surplus lines carrier (ESSEX) before it can delegate delivery of the policy to the producing general lines agent (Brandon). The evidence is clear that this was not done in the instant case, and in fact, the insured, LIGHTHOUSE, never received the policy at all prior to the accident. Florida decisions indicate that declining to enforce the exclusions is a reasonable remedy when the insured is not on notice of the exclusions in a policy, and suffers resulting prejudice. ISIDORO FARJI did not have reason to know of the "contractor, builder or developer" exclusion, which was found in an ESSEX form rather than a standard ISO form, when he had not previously been an ESSEX policyholder, and his business insurance needs had changed over time as the result of his son becoming a licensed contractor.

In light of the facts concerning how LIGHTHOUSE and BROWARD conducted their business operations, LIGHTHOUSE clearly did not fall under various well-established definitions of a "contractor, builder or developer" that would result in the exclusion of coverage. To the extent that there are varying

reasonable definitions of these terms, they are ambiguous and should be strictly construed in favor of coverage for the insured. The record is largely lacking in evidence as to whether ZOTA was an employee of LIGHTHOUSE, and this issue should be further developed factually in the district court, if ESSEX'S admission via sworn testimony that she does not meet its definition of an "employee" is not considered binding.

ARGUMENT[3]

I. The district court correctly construed Section 626.922, Florida Statutes, to require delivery to the insured, and not merely to the insured's agent.

A. Standard of Review

Issues of statutory construction are pure questions of law requiring de novo review, and summary judgments are also reviewed de novo. Active Spine Centers, LLC v. State Farm Fire & Cas. Co., 911 So.2d 241, 243 (Fla. 3d DCA 2005).

B. The Merits

Rather than doing a "stunning, judicial rewrite" of Section 626.922, Florida Statutes, as ESSEX alleges (Initial Brief at p. 14) the district court applied the statute consistent with its plain language and legislative history. ESSEX asserts that this purported error resulted in part from the commingling of Sections 627.421

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[3] The four enumerated arguments correspond to the first four certified questions. The ZOTAS will not address the fifth question because it pertains only to LIGHTHOUSE, FARJI, and BROWARD, who obtained an award of attorney's

and 626.922, Florida Statutes (Initial Brief at p. 15). However, while LIGHTHOUSE'S Motion for Summary Judgment did base its argument on Section 627.421 as well Section 626.922 (V2-D88-P6-10), ESSEX did not raise the inapplicability of Section 627.421, or the inapplicability of Chapter 627 in general, in either its response to LIGHTHOUSE'S Motion for Summary Judgment (V2-D103), or on rehearing (V3-D121,139), though ESSEX now raises this point in footnote 6 of its Initial Brief. In fact, ESSEX'S response to LIGHTHOUSE'S Motion for Summary Judgment relied in part on Section 627.421 for the proposition that delivery of the policy to the insured's agent is sufficient (V2-D103-P8).

In any case, even assuming arguendo that Section 627.421 and Chapter 627 generally are inapplicable, the district court's opinion does not rely on Section 627.421. In fact, the district court specifically rejected ESSEX'S contention that Section 627.421 authorizes delivery of the policy to the insured's agent rather than the insured, stating that "§ 627.421(1) does not supercede § 626.922(1), and § 626.922(1) is explicit in its requirement that evidence of the insurance must be delivered 'to the insured.'" (V3-D119-P7). While the district court's opinion made one subsequent passing mention of Section 627.421, its analysis was

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fees from the district court.

grounded upon Section 626.922 (V3-D119-P4-8).

Furthermore, Section 626.922 standing alone supports LIGHTHOUSE'S and ZOTAS' conclusion that Section 626.922 required delivery by MacDuff of the policy directly to LIGHTHOUSE, and that ESSEX is liable for the acts and omissions of its agent, MacDuff. Section 626.922(1), Florida Statutes, provides as follows:

> (1) **Upon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of the insurance consisting either of the policy as issued by the insurer or, if such policy is not then available, a certificate, cover note, or other confirmation of insurance.** Such document shall be executed or countersigned by the surplus lines agent and shall show the description and location of the subject of the insurance; coverage, conditions, and term of the insurance; the premium and rate charged and taxes collected from the insured; and the name and address of the insured and insurer. If the direct risk is assumed by more than one insurer, the document shall state the name and address and proportion of the entire direct risk assumed by each insurer. **A surplus lines agent may not delegate the duty to issue any such document to producing general lines agents without prior written authority from the surplus lines insurer. A general lines agent may issue any such document only if the agent has prior written authority from the surplus lines agent. The surplus lines agent must maintain copies of the authorization from the surplus lines insurer and the delegation to the producing general lines agent. The producing agent must maintain copies of the written delegation from the surplus lines agent and copies of any evidence of coverage or certificate of insurance which the producing agent issues or delivers.** Any evidence of coverage issued by a producing agent

> pursuant to this section must include the name and address of the authorizing surplus lines agent.

(Emphasis added in boldface). The sentences highlighted in bold are quoted in ESSEX'S Initial Brief (pp. 16-17). The four sentences highlighted in bold toward the end of Section 626.922(1), along with the final unhighlighted sentence, were added to the statute by Chapter 98-199, § 69, Laws of Florida.

ESSEX notes that the first sentence of Section 626.922(1) refers to "issuance" and "delivery", but the next two boldface sentences only refer to "issuance" rather than "delivery". ESSEX argues that the district court improperly read "delivery" into those sentences that only referred to "issuance" to arrive at the conclusion that the surplus lines agent was required to deliver the policy directly to the insured in the absence of prior written authority from the surplus lines insurer allowing delegation of delivery to the producing general lines agent. In making this argument, ESSEX overlooks the final sentence highlighted in bold: "The producing agent must maintain copies of the **written delegation** from the surplus lines agent and copies of any evidence of coverage or certificate of insurance which the producing agent **issues or delivers**." (Emphasis added in bold).

While acknowledging that it is unnecessary to resort to legislative history

when a statute is unambiguous, ESSEX proceeds to argue that the 1998 legislative changes only pertained to requirements for issuance of evidence of insurance to the insured. While this contention is based upon a portion of the Florida Staff Analysis of S.B. 1372 dated March 12, 1998, ESSEX overlooks another portion of the same Staff Analysis:

> **CS/SB 1372** makes various changes to the laws affecting insurance agents and other individuals licensed by the Department of Insurance. The bill: (1) .... (14) **specifies conditions under which a surplus lines agent may delegate to a producing agent the requirement to provide documentation of coverage to an insured**; ....

Section I. Summary, Florida Staff Analysis, S.B. 1372 for the proposition that a statute cannot create coverage where none exists. In AIU, the court indicated that it was applying that long-standing principle in construing Section 627.426(2), Florida Statutes, also known as the Claims Administration Statute, and thus admittedly the holding cannot be limited to the context of that statute. However, in AIU, there was no allegation that the insured had not received a copy of the policy, and in fact the insured had contracted for an additional endorsement to provide coverage the policy would not otherwise have provided, but then allowed that provision to lapse. By contrast, in the instant case, ESSEX is seeking to preclude coverage under a policy exclusion, when the policy and its exclusions were not delivered to the insured until after ZOTA'S accident, near the end of the six-month

policy term. Thus, AIU does not preclude application of principles of estoppel in the instant case.

More pertinent to the instant case is ZC Ins. Co. v. Brooks, 847 So.2d 547 (Fla. 4th DCA 2003), in which the Fourth District. ZC Ins. found that, "[t]he obvious point of requiring insurers to deliver a policy to the insured with a summary of coverage and exclusions **… is to place sufficient information in the insured's hands to allow her to be fully informed of the scope of the coverage she has purchased."** Id.Ins. Co. v. Dollar Rent-A-Car Systems, Inc., 900 So.2d 694 (Fla. 5th DCA 2005)Purrelli v. State Farm Fire and Cas. Co., 698 So.2d 618, 620 (Fla. 2d DCA 1997)Weldon v. All Am. Life Ins. Co., 605 So.2d 911 (Fla. 2d DCA 1992)Cont'l Cas. Co. v. Wendt, 205 F.3d 1258, 1261 (11th Cir. 2000)Fla. Stat. § 489.105 and he qualified BROWARD. In fact, BROWARD pulled all the permits for the construction of the home.

ESSEX would be hard pressed to argue that the Legislature's definition of contractor is not a reasonable one. Contractor is also reasonably defined as:

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[4] Perhaps, although improper without the appropriate written delegation, had the policy been delivered by Brandon to LIGHTHOUSE at some point prior to ZOTA'S accident, ESSEX might have been able to claim "no harm, no foul." However, it was undisputed that Brandon never delivered the policy to LIGHTHOUSE until after MERCEDES ZOTA'S accident. This is exactly the

> one who contracts on predetermined terms to provide labor and materials and to be responsible for the performance of a construction job in accordance with established specifications or plans – called also building contractor.

Webster's Third New International Dictionary, Unabridged, (Merriam-Webster, 2002) (emphasis in original). It was BROWARD that acted as the contractor and FARJI, the licensed building contractor, who was responsible for the performance of the construction with the established specifications. Therefore, under Merriam-Webster's reasonable definition, LIGHTHOUSE was not a contractor because it was not responsible for the performance of the construction of the home in accordance with the established specifications.

LIGHTHOUSE does not even meet ESSEX'S definition of a contractor because it did not contract to supply certain materials or do certain work for a stipulated sum. The ones contracting to supply certain materials or do certain work for a stipulated sum were the subcontractors, such as plumbers, electricians, etc., not the owner, LIGHTHOUSE, who paid the subcontractors.

ESSEX provides the Court with the definition of builder as "a person in the business of constructing buildings." However, Webster's Third New International Dictionary, Unabridged, also provides the following definition of builder:

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kind of situation the 1998 amendment, if followed, prevents.

> a person who supervises and usually has a financial interest in building operations and the arts and trades involved in their progress – compare CONTRACTOR.

All of the construction supervision was performed by FARJI as a licensed building contractor and was always performed in his capacity with BROWARD. Under Merriam-Webster's reasonable definition, LIGHTHOUSE is not a builder because it did not supervise the construction of the home. In addition, Merriam-Webster likens the definition of builder to contractor. As demonstrated above, LIGHTHOUSE is not a contractor, and if builder is akin to contractor, it can be concluded that, under this definition, Section 8 of the Combination General Endorsement (M/E-001) does not preclude coverage.

Even if the definition ESSEX relies upon excluded coverage, this does not end the analysis. Again, what is important is the fact that the term "builder" is susceptible to two or more reasonable interpretations that can fairly be made. As previously stated, when this occurs, the policy is deemed ambiguous and coverage is found. Continental Cas. Co. v. Wendt, 205 F.3d at 1261

In summary, the evidence indicates that under some definitions, LIGHTHOUSE clearly is not a "contractor, builder or developer."As the policy fails to define the terms "contractor, builder and developer," and because each of these terms is subject to more than one reasonable interpretation, Section 8 of the

Combination General Endorsement (M/E-001) is ambiguous as a matter of law, and must be strictly construed in favor of the insured. Accordingly, the third certified question should be answered in the negative.

IV. ZOTA was not LIGHTHOUSE'S employee as a matter of law, or in the alternative, this issue is a question of fact for the jury.

A. Standard of Review

A trial court's interpretation of an insurance policy and entry of summary judgment are reviewed de novo. East Florida Hauling, Inc. v. Lexington Ins. Co., 913 So.2d 673, 676 (Fla. 3d DCA 2005).

B. The Merits

As the Eleventh Circuit noted, ESSEX'S own executive, Jack Miller, testified that ZOTA was not an employee within the definition found in the policy's employee exclusion (A. 15). While the Eleventh Circuit referenced an admission by LIGHTHOUSE that it was ZOTA'S "statutory employer" within the meaning of Chapter 440, Florida Statutes, it should be kept in mind that such a statement was a boiler-plate affirmative defense asserted on LIGHTHOUSE'S behalf by insurance defense counsel appointed by ESSEX. Both the Eleventh Circuit and ESSEX have recognized that if such admissions are not determinative, the issue is one of fact for the jury, as the record is not sufficiently developed on

this issue (A. 15; Initial Brief at p. 29). The only evidence in the record is the manner of payment, consisting of an initial 50% deposit from LIGHTHOUSE for Trompe's/ZOTA'S work, which is customary for an independent contractor as distinguished from an employee, but evidence is lacking as to other factors in determining whether there was an employer-employee relationship. See, e.g., Cantor v. Cochran, 184 So.2d 173 (Fla. 1966)(setting forth factors for determining whether employer-employee relationship exists). Thus, the fourth certified question should be answered in the negative.

CONCLUSION

This court should answer the certified questions as follows:

1. Whether Fla. Stat. § 626.922 or § 627.421, or both, require delivery of evidence of insurance directly to the insured, so that delivery to the insured's agent is insufficient. **YES.**

2. Whether, if the delivery requirement of Fla. Stat. § 626.922 or § 627.421, or both, was not met in this case the appropriate remedy is to preclude the insurer from asserting lack of coverage under the terms of the policy. **YES.**

3. If either the first or second question is answered in the negative, whether Lighthouse is a "builder, contractor or developer" under the terms of the insurance contract, so that there is no coverage. **NO.**

4. If either the first or second question is answered in the negative, whether Zota is an employee of Lighthouse under the policy. **NO.**

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven (7) copies will be filed with the Clerk of Court of the Florida Supreme Court and one copy of the foregoing was mailed this 1st day of December, 2006, to: Michael Kaplan, Esq., Lydecker, Diaz, et al., 1201 Brickell Avenue, Suite 200, Miami, Florida 33131; Clyde W. Galloway, Esq. and L. Michael Billmeier, Jr., Esq., Galloway, Brennan &Billmeier, 240 East 5th Avenue, Tallahassee, Florida 32303; Anthony J. Russo, Esq. and William R. Lewis, Esq., Butler Pappas, et al., 777 S. Harbour Island Blvd., Suite 500, Tampa, Florida 33602; Douglas M. McIntosh, Esq. and Robert C. Weill, Esq., McIntosh, Sawran, Peltz & Cartaya, P.A., 1776 East Sunrise Boulevard, P.O. Box 7990, Fort Lauderdale, Florida 33338-7990; John R. Catizone, Esq., Litchfield Cavo, LLP, 5201 W. Kennedy Blvd., Suite 450, Tampa, Florida 33609; Daniel S. Green, Esq., Ullman, Bursa, Hoffman & Ragano, LLC, 410 S. Ware Blvd., Suite 1100, Tampa, Florida 33619; Tracy Raffles Gunn, Esq., Fowler, White, Boggs & Banker, P.A., 510 E. Kennedy Blvd., Suite 1700, Tampa, Florida 33602; Roy D. Wasson, Esq., Wasson & Associates, Chartered, 1320 S. Dixie Highway, Suite 450, Coral Gables, Florida 33146.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Initial Brief was prepared in Times New Roman 14-point typeface.

BY:
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