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

INITIAL BRIEF OF ESSEX INSURANCE COMPANY

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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 § 626.421, 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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STATEMENT OF THE CASE AND FACTS

These appeals arise from a final declaratory judgment (R3:120:1)[1] and an award of attorneys' fees and costs (R3:162:1; R3:163:1) entered by the United States District Court for the Southern District of Florida against Essex Insurance Company, a surplus lines insurance company which insured Lighthouse Intracoastal, Inc. Essex sought a declaration that no coverage was provided for a claim against Lighthouse, a developer of "spec" (short for "speculation") homes, brought by a worker who was injured while painting a mural on the ceiling of a residence under construction. (R2:74:9). Essex appealed the judgments to the Eleventh Circuit Court of Appeals which certified five questions to this Court for resolution. See App. at A1-22.

A. The Insured, His Actual and Imputed Knowledge of Insurance, The Insurance Agencies, and the Policy at Issue

Lighthouse, the named insured entity, was formed by Isidoro Farji in November, 1998, to build "spec homes." (R1:58:36, 63). Isidoro's son Jack is a 50% shareholder with his father and is a putative insured. (R1:56:35). From its inception, Lighthouse sought various insurance coverages through R.A. Brandon & Company, Inc. (hereinafter Brandon), which is a "producing" or "retail" agent. (R2:76:8, 10, 23, 24). Depending upon the state of completion of the spec homes, Brandon secured

[1]References to the record on appeal are to the volume number, the district court

various types of insurance for Lighthouse (e.g., flood, windstorm, and builder's risk) to protect the owner's property interests in the land and structure under construction; and liability policies to cover the owner's activities. (R2:76:30-31, 70). Brandon was able to issue binders (documents evidencing insurance) pursuant to written contracts with the managing general or surplus lines agent for certain surplus lines insurers. (R2:76:74; R2:105:8-9).[2] When policies were received from the surplus lines agent, Brandon received two copies, one for its file and one for the insured. (R2:76:19). Brandon reviewed the policies for accuracy and then provided them to the insureds, its clients/principals. (R2:76:19-20, 22). This was done with the Essex policy.

In correspondence and applications, Isidoro Farji described Lighthouse's business as "general contractor - home builders." (R2:76:35, 48, 51-55). To cover risks arising from construction activities, he requested coverage for development activities, not just for a vacant land or dwelling policy. (R2:76:49-50). Brandon first obtained a "comprehensive" general liability policy from Colony Insurance Company. (R2:76:35, 40). That policy, and such policies generally, base premiums upon the cost of construction and require the insured to obtain certificates of like

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docket entry number and page number or exhibit, when applicable.

[2] Discovery below was incomplete and/or not undertaken by Defendants, on Brandon's authority, if any, from Essex through its surplus lines agent, MacDuff

coverage with the same limits from the general contractor and all subcontractors working on the project; those contractor policies name the insured as an additional insured. (R2:76:36-37, 42). Such insurance often includes worker's compensation coverage. (R2:76:44-45). Mr. Brandon personally spoke with Isidoro Farji about these requirements and Isidoro personally assured Mr. Brandon that no one came on his construction sites without a certificate of insurance. (R2:76:43-44). In 1998, the premiums for this comprehensive coverage were $2,539.00. (R2:76:47-48).

To obtain these coverages, it was necessary to go to the surplus lines market. (R2:76:16, 68). However, when a house was completed and ready for sale, coverage for a dwelling liability policy was available on the standard lines market due to the lack of construction exposure. (R2:76:64-65, 68). Isidoro Farji obtained such policies from time to time which had much lower premiums. (R2:76:64, 65).

Over the years, similar comprehensive coverage was obtained for Lighthouse but the premiums continued to rise; by 2004, the premiums for the two markets available were $12,500.00 and $15,000.00. (R2:76:51-55, 58, 97). Communications between Isidoro Farji and Brandon continued to reiterate that such policies require certificates of like insurance in the same limits adding Lighthouse, for all subcontractors. (R2:76:76-77). Isidoro continued to demand certificates of insurance

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Underwriters, Inc.

from everyone who came onto his project sites. (R2:76:59).

A time came when Isidoro Farji ceased requesting comprehensive coverage and began requesting coverage for Lighthouse as an owner of vacant land, not as a builder. (R2:76:108). These policies cost far less. Id. Isidoro then began to list Jack's independent corporation, Broward Executive Builders, Inc., as the general contractor. (R2:76:128). Isidoro ultimately sought coverage for a house at 2723 N.E. 30th Ct. in Lighthouse Point for the purpose of showing it to prospective buyers. (R2:76:126). He did not request comprehensive coverage as he had in prior years. (R2:76:125-127; R2:80:216-217). He felt that would duplicate coverage of the purported contractor–Broward Executive Builders–whom he said already had comprehensive coverage. (R2:76:127-128). As a result, his application classified Lighthouse as an "owner of land where one family dwellings are being built" and stated again that Lighthouse merely owned the land. (R2:71:Ex. J). The premium for the policy was $1,089.86, concomitant with the coverage for lesser risks. (R2:74:Ex. C). Brandon and Isidoro Farji had discussed previously the fact that coverage for building the house was much greater than for just showing the property. (R2:76:128).

MacDuff Underwriters, Inc., who was the surplus lines agent that issued the policy for Essex (R2:84:13), delivered the policy to Brandon. (R2:71:Ex. D).

Brandon received and reviewed the policy and verified that it was the correct insurance for the risk contemplated for Lighthouse, i.e., coverage for the land only and not for construction activities. (R2:81:231-232).

Paragraph 8 of the Essex Combination General Endorsement provides:

> 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/sub-contractors 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.
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> (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.

(R1:50:11).

B. <u>Lighthouse As A Builder, Contractor, or Developer</u>

Lighthouse's has always been and continues to be in the business of developing residential properties for profit. Lighthouse buys either vacant land and builds a house on it, or buys land with a house already built, demolishes that house, and builds a new one. (R1:58:98-99).

Although Isidoro Farji ceased requesting coverage for building activities and interposed his son's company as the purported general contractor, Lighthouse continued to describe its activities as a contractor, builder, or developer. (R2:71: Ex. K). Broward Executive Builders described itself as the general contractor solely for the purpose of pulling permits, not for construction. (R2:76:146-148) ("insured obtains permits and deals with municipalities"; applications state categorically, "Only obtain permits. Does not build;" obtains certificates of insurance from subcontractors "only if needed for permits.").[3] Consistent with its status as the builder, Lighthouse paid for the construction costs of the project. (R1:58:119). Consistent with its self-description as "contractor" solely for the purpose of pulling permits, Broward Executive Builders had no contract with, and received no payment from, Lighthouse as a general contractor. (R1:58:119). Jack Farji's compensation was his share of the profits of Lighthouse as a 50% shareholder. (R1:58:32, 75-76; R1:56:42). Lighthouse had sole authority to approve subcontractors' contracts, received all quotes and proposals from subcontractors, was responsible for obtaining certificates of insurance from all subcontractors, and paid all subcontractors. (R1:58:121-123; R1:56:70, 72, 79, 89).

[3]Maria Figueras, the Brandon agent on this account, confirmed "insured only pulls permits for builders." (R2:76:155). This was for the purpose of obtaining general liability and not construction liability coverage. (R2:76:156).

In insurance transactions contemporaneous to the Essex application and policy which insured the same property, Lighthouse identified itself as the contractor. In May, 2003, Lighthouse–through Brandon–requested issuance of a "One Shot" Builder's Risk Insurance Policy from Assurance Company of America. That policy's declarations specifically identified Lighthouse as a "Residential Contractor" with at least two years of experience as a "contractor." (R2:71:Ex. L, §§ 9-10; R2:76:115).[4]

Finally, both Farjis testified that Jack, the licensed contractor who qualified the project, dealt with subcontractors and visited the site in his capacity as partner of Lighthouse. (R1:58:122) ("Q. Jack Farji dealt with them directly to supervise and oversee them? A. Of course; he's a partner of the company."); (R1:56:66) ("Were you ever there in your capacity as a vice-president of Lighthouse Intracoastal, Inc.? A. Yes, as part owner of Lighthouse, obviously I'm there also in that capacity."); (R1:56:116) (on the job daily for purpose of oversight for the owner).

C. <u>The Underlying Claim</u>

Mercedes Zota is an interior design artist who was engaged in a joint venture/partnership with Perla Lichi in a business with the fictitious name "Trompe L'Oeils 'R' Us." (R2:78:16-17). Lighthouse contracted with both Perla Lichi

[4]The policy declarations also requested the name of the contractor, if different from the named insured. That request was left blank, confirming that the insured was the contractor. (R2:71:Ex. L, § 8; R2:76:114).

Designs and Trompe L'Oeils 'R' Us to perform work on Lighthouse's spec home at 2373 N.E. 30th Ct. in Lighthouse Point. (R1:58:46; R1:56:61, 64). At the time of her injury, Zota was painting a mural as contracted with Lighthouse by Zota for Trompe L'Oeils 'R' Us. (R1:56:63, 70; R1:58:46).

The mural was to be painted on the ceiling above a "bridge" between two staircases from the first floor of the house to the second. (R1:56:90). Zota brought her own scaffolding for access to the ceiling. (R1:56:91). Although there had been temporary guardrails installed on the bridge, they had been temporarily removed by the flooring subcontractor and had not been replaced by February 5, 2004, the day that Zota fell. (R2:106:22-23, 25, 28, 31-32). The architect had designed permanent guardrails, but they had not yet been installed. (R1:56:93-94, 96). No one witnessed Zota's fall. (R1:56:102-103). Assumed arguendo for purposes of the cross-motions for summary judgment, Zota fell from the scaffolding to the floor below. (R1:56:98).

The Zota complaint alleged that Lighthouse, owner of the premises, had a duty to maintain the premises in a reasonably safe condition, to protect against the inherently dangerous condition of the unguarded edge, and to assure that the contractors, subcontractors, employees and agents ensured the safety of business invitees. (R2:71:Ex. A). The complaint did not allege that the construction had been completed or that the house had been accepted by Lighthouse. In its Answer,

Lighthouse affirmatively alleged that it was Zota's statutory employer and entitled to workers compensation immunity, thus asserting its status as the builder, contractor, or developer and not a mere owner. (R2:74:Ex. B ¶¶ 6, 7). Zota also alleged that Jack Farji, individually, acted as general contractor and owed similar duties to ensure safe construction conditions. (R2:71:Ex. A).

D. Summary Judgment Proceedings

Essex and the Defendants filed cross-motions for summary judgment. Essex's motion was based upon the policy's clear and unambiguous terms that do not extend coverage to builders, contractors, or developers unless there are policies of like terms and limits for all subcontractors, naming Lighthouse as an additional insured. Essex's motion was based alternatively on the exclusion for claims subject to workers' compensation. (R2:71:1; R2:85:1).

The Defendants' motions were based, in part, upon the assertion that delivery of the policy had been from MacDuff to Brandon, not from Essex directly to Lighthouse. (R2:88:6-10). Those motions further urged that Zota was not an employee of Lighthouse as defined in the Essex policy. The final basis for the motion was that the terms "contractor, builder or developer" are ambiguous, requiring construction in favor of coverage. (R2:88:23).

The district court accepted Defendants' first argument, reasoning that section 626.922(1), Florida Statutes, requires direct delivery of the policy to the insured unless the surplus lines insurer (Essex) grants the surplus lines agent (MacDuff) authority to delegate the duty of delivery to the producing agent (Brandon). (R3:119:1). In turn, the district court held that Essex's failure to make direct delivery precluded it from denying coverage under the terms of the policy. (R3:119:8).

A motion for rehearing was filed and denied. (R3:121:1; R3:146:1). The district court then entered final declaratory judgment in favor of Defendants Lighthouse Intracoastal, Inc., Jack Farji, and Broward Executive Builders, Inc. (R3:120:1).

E. Post-Judgment Proceedings

Based on the final declaratory judgment, Defendants moved for attorneys' fees pursuant to section 627.428, Florida Statutes which provides, in pertinent part:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court . . shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

(R3:123:1, 3). Defendants also sought to tax their costs under 28 U.S.C. § 1920. (R3:124:1, 3).

Essex responded to Defendants' motion for attorneys' fees arguing that Defendants were not entitled to fees under section 627.428 because Chapter 627 does not apply to surplus lines insurers including Essex. (R3:140:2, 4-5; see also R3:144:2). Despite the plain language of section 627.021(2)(e), Florida Statutes, which states that "This chapter [627] does not apply to . . . Surplus lines insurance placed under the provisions of ss. 626.913-626.937," Defendants argued, inter alia: (1) that the quoted language only applies to part I of Chapter 627 which does not contain section 627.428; and (2) that part II of Chapter 627, which contains section 627.428, does not expressly exclude surplus lines insurers. (R3:143:3).

The district court ultimately granted Defendants entitlement to attorneys' fees by finding that section 627.428, Florida Statutes does apply to surplus lines insurers and awarded Defendants $117,000.00 in attorneys' fees. (R3:162:6, 8). The district court also awarded Defendants their costs. (R3:162:11). The district court entered final judgment for attorneys' fees and costs in favor of Defendants in the amount of $123,812.90. (R3:163:1).

Essex timely appealed the two judgments to the Eleventh Circuit Court of Appeals. Oral argument was held on August 18, 2006 and, on October 6, 2006, the Eleventh Circuit certified five questions to this Court for resolution.

SUMMARY OF ARGUMENT

The district court failed to apply the statutory law in accordance with its plain terms. It further failed to observe fundamental rules of statutory construction to determine the meaning of "delivery." It was thus led into error in foreclosing Essex from defending against the claims. No such statutory or common law sanction for the purported–albeit nonexistent–violation of a statutory duty of delivery exists. This is particularly true where, given Isidoro Farji's prior knowledge of limitations on coverage for construction activities, there could not possibly have been any representation tantamount to fraud as in cases on which Respondents relied.

In addition and alternatively, the district court erred in failing to grant summary judgment in favor of Essex based upon the undisputed evidence of Lighthouse's status and activities as a contractor, builder, and/or developer in addition to or by means of Farji's activities and licensure. Given the undisputed role that Lighthouse played in the construction of the residence where Zota was injured, and the fact that this status provides the only basis of potential liability to Zota, the policy provided no coverage as a matter of law.

Lastly, the district court erred by awarding the insured attorneys' fees under section 627.428, Florida Statutes, when the plain and unambiguous language of section 627.021(2), Florida Statutes, provides:

> This chapter does not apply to:
>
> . . . .
>
> (e) Surplus lines insurance placed under the provisions of ss. 626.913-626.937.

(Emphasis added). Because section 627.428 is found within Chapter 627, the district court's analysis should have stopped at this point but the district court nevertheless went on to construe section 627.021(2)(e) to allow fees despite this unambiguous language. Not only was the district court's analysis improper in the first instance but it was flawed for many reasons.

The district court's reliance on Chacin v. Generali Assicurazioni Generali Spa, 655 So. 2d 1162 (Fla. 3d DCA 1995), was also unfounded. The Chacin court relied entirely on the reasoning of a 1969 opinion which was decided prior to the legislature's addition of the language now found at section 627.021(2)(e). Because this 1969 decision was no longer good law, so was the holding in Chacin.

Based on the foregoing, the certified questions should be answered as follows: (1) No; (2) No; (3) Yes; (4) Yes; (5) No. See, supra, page i.

STANDARDS OF REVIEW

The review of orders on summary judgment is de novo. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

Review of the district court's order entitling the insured to attorneys' fees under section 627.428, Florida Statutes is de novo. See Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 1009 (11th Cir. 2001).

ARGUMENT[5]

I

THE DISTRICT COURT ERRONEOUSLY COMMINGLED AND AMPLIFIED THE MEANING OF SECTIONS 627.421(1) AND " 626.922, FLORIDA STATUTES, WHILE IGNORING CASE LAW THAT CONSTRUES THE TERM "DELIVERY" TO INCLUDE DELIVERY TO THE INSURED'S AGENT

In a stunning, judicial rewrite of section 626.922, Florida Statutes, the district court transferred the duty of delivery of a policy from a regulated surplus lines agent to an unregulated surplus lines insurer, expanded the requirements for delegating authority to issue evidence of insurance from a surplus lines agent to a producing agent to include a written delegation of authority to deliver a policy, and appended a draconian sanction for violation of that duty to deliver. This rewrite resulted from

[5]The five point headings herein correspond to the five questions certified by the Eleventh Circuit.

commingling sections 627.421 and 626.922, Florida Statutes, and abandoning basic principles of statutory construction. See App. at A23, A25.

Lighthouse argued that section 627.421, Florida Statutes, which requires a domestic insurer to deliver a policy directly to the insured, also applies to surplus lines insurers.[6] Lighthouse also argued that section 626.922, part of Florida's Surplus Lines Insurance Law, which requires a surplus lines **agent** to deliver a policy (or proof of coverage) to the insured also applies to a surplus lines **insurer**. However, in fatal contradiction to its own argument, Lighthouse also argued that the longstanding case law construing the delivery requirement of section 627.421, holding that delivery to the insured's agent is delivery to the insured, does **not** apply to the surplus lines insurer. See Jefferson Std. Life Ins. Co. v. Lyons, 165 So. 351, 353 (Fla. 1936) (delivery effectuated upon receipt by insured's agent); Reliance Ins. Co. v. D'Amico, 528 So. 2d 533, 534 (Fla. 2d DCA 1988) (delivery effectuated when policy delivered to an agent).

Led into error by that argument, the district court refused to apply the preexisting judicial construction of "delivery" to the first sentence of section 626.922(1), which reads as follows:

[6] Petitioner contests whether this statute even applies to this case given that section 627.021(2), Florida Statutes, expressly provides that the entire "chapter" 627, which contains section 627.421(1), does not apply to "Surplus Lines Insurance." See

> Upon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of insurance consisting of either the policy as issued by the insurer or, if such policy is not then available, a certificate, cover note, or other confirmation of insurance.

The district court incorrectly reasoned that because section 626.922 is new, construction of its words and phrases starts anew.

The legislature is presumed to know pre-existing law, including judicial interpretations of the law, and thus to adopt that judicial meaning when it enacts a new law on the subject. Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 917 (Fla. 2001). Consequently, the mere fact that a statute is new and not yet applied in any reported cases does not permit a court to abandon the long-standing judicial meaning attributed to terms in other similar statutes–here, judicial construction that delivery to the insured's agent satisfies a requirement of "delivery to the insured."

Further, statutes must be harmonized if at all possible. Cannella v. Auto-Owners Ins. Co., 801 So. 2d 94, 98 (Fla. 2001). Therefore, sections 627.421 and 626.922 should have been construed harmoniously, if at all, and not in a contradictory manner.

To buttress its decision not to apply prior case law construing delivery to the insured, the district court relied on Lighthouse's interpretation of section 626.922(1),

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Point V, infra.

regarding when or how a producing agent may **issue** evidence of coverage, i.e., a "document" showing coverage when the actual policy is "not then available." A later portion of the statute reads as follows:[7]

> 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.

The district court accepted the argument that this portion of section 626.922(1) applies to "delivery" as well as to "issuance" of the insurance policy. In an amazing abrogation of agency principles, it thus concluded that a producing agent may not "deliver" a policy to its principal, the insured, absent prior written authority from the surplus lines agent. The district court misread section 626.922(1) by appending to the discussion of delegation of the authority to "issue," the words "or deliver."[8] Two

[7] It is undisputed that the producing agent, Brandon, did not "issue" anything.

[8] It also clearly erred in changing the statute's reference to the surplus lines **agent** to the surplus lines **insurer**. See discussion, infra, point II. Further, under Florida jurisprudence, the court misapplied the section of the statute addressing Florida jurisprudence, the court misapplied the section of the statute addressing issuance of a document **other than** the actual policy to the issuance of the **policy** itself. This distinction is important to prevent the issuance of binders having little relationship to the actual terms of a policy while awaiting issuance of an actual

duties are mentioned in the first sentence of the statute. First is the duty to issue evidence of the insurance; second is the duty to deliver the policy or binder. Cf. City of Miami v. Valdez, 847 So. 2d 1005, 1008 (Fla 3d DCA 2003) (stating that court must give effect to each word in statute). The three sentences that address delegation of authority omit any reference to delivery of the insurance policy. They address only the duty of the surplus lines agent to issue the alternative document evidencing coverage and the potential authority of the producing agent to issue such documents. There is no requirement that a surplus lines agent get written authority from the insurer before delegating delivery of the policy to the producing agent. There is no requirement that the producing agent be given written authority before making delivery of either the actual policy or the "binder" document to its principal, the insured.

Although unnecessary to construe this statute whose terms are clear and unambiguous, its legislative history confirms that its purpose was to amend the prior statutory requirement that the surplus lines agent must issue the evidence of insurance to the insured:

> Currently, the statute requires the surplus lines agent to issue to the insured evidence of the insurance consisting of a policy, certificate, or such other documentation of coverage. . . The bill provides that the

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policy. Such a limitation of authority is entirely unnecessary when the policy as issued by the insurer is "then available." §626.922(1), Fla. Stat.

> surplus lines agent may not delegate the duty to issue any such document (bind coverage) to the producing agent without prior written authority from the surplus lines insurer. A general lines agent would be authorized to issue the documentation (bind coverage) if the agent has prior written authority from the surplus lines agent.

(R3:121:App. A at 3) (emphasis added). The May 28th Staff Analysis recites the same purpose:

> The bill would allow the surplus lines agent to delegate to a licensed general lines agent the duty to issue the documentation of coverage, by providing the general lines agent with prior written authorization. (R3:121:App. B at 11).

A court cannot write into a statute what is not there. See State v. Swope, 159 Fla. 18, 24, 30 So. 2d 748, 751 (Fla. 1947); see also Limbaugh v. State, 887 So. 2d 387, 395 (Fla. 4th DCA 2004) ("Judges are not meant to be fixers of statutory omissions and have no authority to fill statutory voids"). Consequently, where the statute states, "A surplus lines agent may not delegate the duty to issue any such document" the district court improperly wrote into the statute the words, "A surplus lines agent may not delegate the duty to issue **'or deliver'** any such document." Where it states, "A general lines agent may issue any such document only if the agent has prior written authority," the district court impermissibly added the words, "A general lines agent may issue **'or deliver'** any such document only if the agent has prior written authority." Had the legislature intended the statute to read that way, it could easily have inserted the words "or deliver" just as the legislature stated at the

outset that the surplus lines agent shall "issue promptly and deliver" evidence of insurance.[9]

In sum, preexisting case law held that "delivery" includes delivery to an insured's agent. Because the legislature is presumed to have known of those cases and is presumed to have adopted that judicial meaning, section 626.922(1) is presumed to include the rule of law that a surplus lines agent must deliver evidence of insurance to the insured in the same manner, by delivery to the insured or the insured's agent. In other words, the authority of a surplus lines agent to "delegate" delivery of the policy or proof of insurance to the producing (insured's) agent was already firmly established in Florida law. There was no need to address that authority in section 626.922 unless the legislature had wanted to change the law. Clearly, the legislature did not. In sum, the first certified question should be answered in the negative.

[9]As noted above, the court also erred in equating issuance of an actual policy with issuance of a document evidencing coverage "when such policy is not available"-a meaning clearly not intended by the legislature.

II

ASSUMING THE DELIVERY REQUIREMENT WAS NOT MET, FLORIDA LAW DOES NOT SUPPORT THE REMEDY FASHIONED WHICH PRECLUDED ESSEX FROM ASSERTING LACK OF COVERAGE UNDER THE TERMS OF THE POLICY

The foregoing discussion begs the question whether there was any support for the district court's draconian sanction of coverage without regard to the policy's terms. As evidenced by the documents filed in the district court, there is no substantive support for the proposition that a surplus lines insurer must make direct delivery of a policy to the insured or that failure of the insured's agent (who undisputedly received the policy on behalf of the insured) to transmit the policy to the insured operates to extend unlimited universal coverage and to nullify all terms, conditions, and exclusions contained in the policy.[10]

Thus, while Lighthouse asserted that because Essex did not make delivery directly to Lighthouse, it was "thus precluded from asserting lack of coverage," not one case was cited for that proposition. But see Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987) (estoppel may be used defensively to prevent forfeiture, but

[10] This rule would theoretically create coverage for automobiles, for undeclared properties anywhere in the world, and for claims historically excluded by insurance policies such as pollution claims and acts of terrorism.

not affirmatively to create coverage); see also AIU Ins. Co. v. Block Marina Inv. Co., 544 So. 2d 998, 1000 (Fla. 1989) (creating coverage by estoppel amounts to an unconstitutional impairment of contract and the taking of property without due process). No case or statute was cited extending the insurer's duty under section 626.922 to the insurer. No case or statute was cited for the proposition that an insurer which has breached **no** duty is foreclosed from defending against a claim by an alleged failure of the insured's **own** agent to transmit to the insured a policy it unquestionably received. Although it did not resolve this issue, the Eleventh Circuit correctly asked:

> A strong argument can be made, however that the AIU decision evidences the Florida Supreme Court's reluctance to do what the defendants seek here, which would have the effect of altering the terms of the insurance contract to create coverage that is not provided for under the policy.

Essex Ins. Co. v. Zota, Slip Op. at 10 (11th Cir. Oct. 6, 2006) (A10).

The law which Respondents relied on applies different rules to different entities in different circumstances. ZC Ins. Co. v. Brooks, 847 So.2d 547 (Fla. 4th DCA 2003), for example, addressed a family member exclusion in a supplemental liability policy purchased by a renter of an automobile. Section 627.421(1) requires delivery of a policy or of a front page summary of "major coverages, conditions, exclusion, and limitations." The rental agreement contained a summary of policy

coverage but omitted the specific exclusion at issue, and indicated that a summary could be obtained at the rental counter. The court held that neither the summary on the rental agreement nor the undelivered counter summary satisfied the statute and the renter was thus not "adequately informed" of the actual coverage. The court explained that the issue was thus "tantamount to 'fraud by omission'." 847 So. 2d at 551 (citing Crown Life). ZC Ins. Co. did not involve a foreign insurer, a duty to deliver which is statutorily placed upon an agent, not the insurer, or the failure of the insured's agent to transmit the policy after receipt from the surplus lines agent.

Moreover, there is no question about Isidoro Farji's knowledge of the terms of liability coverage in this case. Isidoro Farji knew for years that he must obtain certificates of insurance from all subcontractors if he wanted liability arising out of his building of spec houses to be covered. There is no way that he could have been misled into believing coverage was provided notwithstanding his failure to satisfy the terms of such coverage. His own agent reviewed the policy and confirmed that it provided the coverage sought, i.e., coverage for an owner only and not for liabilities arising from building, construction, or development. (R2:81:231-232). It is impossible for Isidoro Farji to claim that lack of delivery directly to him by the surplus lines insurer was tantamount to fraud. The Eleventh Circuit likewise found that the ZC decision was inapplicable because "[i]n the case before us no one

contends that there was any fraud, intentional or otherwise." Essex, Slip Op. at 11; cf. T.H.E. Ins. Co. v. Dollar Rent-A-Car Systems, Inc., 900 So.2d 694, 696 (Fla. 5th DCA 2005) (dictum that prejudice to insured must be considered in imposing any sanction for failure to deliver under §627.421).

Because the reasoning and conclusions of the district court are hopelessly unsupported by the rules of statutory construction, by the case law construing "delivery," and by the very limited circumstances in which lack of delivery of a policy has precluded a coverage defense of the insurer, this Court must answer the second certified question in the negative.

[11] Judge Warner's dissent shows the narrow application of the theory underlying the majority decision. Citing Crown Life, Judge Warner stated that statutory violations do not nullify the terms of a policy to create coverage where none exists. An exception is made for "promissory estoppel," when an insurer's affirmative representations induce detrimental reliance by the insured so that enforcement of policy terms would result in fraud or injustice. Otherwise, an insurer's misconduct operates only to estop the insurer from seeking forfeiture of the policy. 847 So. 2d at 551-552; see also AIU Ins. Co., 544 So. 2d 998 (violation of Section 627.426(2), Fla. Stat. § 627.426(2), Fla. Stat., does not preclude defense that coverage did not exist).

III & IV

ASSUMING THAT THE DELIVERY REQUIREMENT WAS MET OR THAT THE DISTRICT COURT FASHIONED A LEGALLY UNSUPPORTABLE REMEDY, THERE WAS NO COVERAGE BECAUSE LIGHTHOUSE IS A "BUILDER, CONTRACTOR, OR DEVELOPER" AND ZOTA IS LIGHTHOUSE'S EMPLOYEE

Should this Court answer either the first or second certified question in the negative, there is still the issue of whether Essex's policy provided coverage to Lighthouse. There was no coverage under the policy because Lighthouse was a "contractor, builder, or developer" and there was an exclusion for worker's compensation claims based on Zota's status as an employee of Lighthouse.

A. Lighthouse as Builder, Developer, or Contractor

Insurance policies are subject to the same rules established for interpreting contracts. Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979). Every provision in a contract should be given meaning and effect. Id. at 941. The court must first examine the natural and plain meaning of a policy's language. See Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 785 (Fla. 2004). Where existence or non-existence of coverage is clear from the unambiguous policy terms, the court must give effect to their plain meaning regardless of whether they are beneficial or detrimental to the insured. Id. An insurance contract is ambiguous

under Florida law only where it is susceptible to two or more interpretations. Id. An ambiguity does not exist merely because an insurance policy does not define a term. Jefferson Ins. Co. v. Sea World of Fla., Inc., 586 So. 2d 95, 97 (Fla. 5th DCA 1991). Plain and unambiguous language requires no interpretation and should be given its popular and usual significance absent public policy reasons to the contrary. Indep. Fire Ins. Co. v. NCNB Nat'l Bank of Fla., 517 So. 2d 59, 63 (Fla. 1st DCA 1987).

Essex's motion was based upon the policy's definition of the scope of coverage. The general endorsement stated that no coverage was provided for a contractor, builder, or developer until and unless the insured took additional steps to secure insurance in at least the same amount as the Essex policy for all of its subcontractors, or others like Zota performing the insured's work, and naming Lighthouse as an additional insured. Correspondingly, that same endorsement stated that no coverage was provided for injuries to an employee or subcontractor unless the named insured was on the premises at the time of the injury and directly caused the injury.

The case thus presents a dilemma as to Lighthouse between facts that would support coverage and facts that would support liability to Zota. Lighthouse has no liability if it was **not** involved as the builder, developer, or contractor, because the responsibility of maintaining the safe condition of a site under construction belongs

to the contractor. Slavin v. Kay, 108 So. 2d 462 (Fla. 1959) (affirming directed verdict for owner of premises where owner had not accepted defect in work); Cruz v. Gables Colony Ltd., 579 So. 2d 278, 279 (Fla. 3d DCA 1991) (owners who turn property over to contractors for construction are not liable for contractor employee injuries).[12]

The terms "contractor", "builder" and "developer" are not defined in the policy, but are not ambiguous and must be given their usual and customary meaning. WEBSTER'S NEW WORLD DICTIONARY 183 (3d ed. 1994) *WEBSTER'S NEW WORLD DICTIONARY* 376 (3d ed. 1994). "Developer" is defined by Webster's as "a person or thing that develops, specifically a person who develops real estate on a speculative basis." Id. at 376. "Contractor" is defined by Webster's as "a person who contracts to supply certain materials or do certain work for a stipulated sum, especially one who does so in any of the building trades." Id. at 302; see also MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 251 (10th ed. 1994) (one that contracts to erect buildings).

According to Isidoro Farji's own sworn testimony, Lighthouse is "in the business" of building and selling "spec" homes. (R1:58:36). In the one-shot policy

[12]Essex has been defending Lighthouse and Jack Farji in the personal injury lawsuit under a reservation of rights. (R2:74:8-9). The current Zota complaint alleges that Lighthouse is an owner only and that Broward Executive Builders was the contractor. (R2:91:Ex. A ¶¶ 10, 18).

that Lighthouse obtained at the same time as the Essex policy and which covered the same property, Lighthouse admitted it was the "builder" of the project where Mercedes Zota was injured and was the "contractor" on the job.[13] (R2:71:Ex.L §§ 8-10).

The first limitation of coverage set forth in the general endorsement does not apply if the insured obtains certificates of insurance from its subcontractors which show at least like coverage and limits of liability and which name the insured as an additional insured. There is no evidence that Lighthouse obtained these certificates. See Essex, Slip Op. at 12.

The second limitation of coverage does not apply if an employee of Lighthouse was actually on site at the time of the fall and directly caused the fall. As set forth above, there is no factual scenario by which this clause can be satisfied because there are **no** employees of Lighthouse, much less anyone who was present that directly caused Zota's fall. Id. at 12-13. To the contrary, the evidence shows that any alleged causally related negligence had taken place before Zota arrived that day.[14]

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[13] As the licensed contractor, Jack Farji was clearly also acting as a contractor. However, coverage is afforded only insofar as he is performing duties or responsibilities of Lighthouse. His coverage thus rises and falls with Lighthouse's.

[14]Under any scenario, the fall was caused by an independent contractor or subcontractor (e.g., the sub who removed or the one who did not replace temporary guardrails; the sub who had not installed permanent railings; Broward Executive

B. The Exclusion for Worker's Compensation Claims Precludes Coverage

Lighthouse has alleged at all times that it was the statutory employer of Zota. (R2:74:Ex. B ¶¶ 6, 7; R2:71:Ex. C). It is uncontradicted that Lighthouse directly contracted with Zota as Trompe L'Oeils 'R' Us. The policy contains an exclusion for injuries to employees which, as a matter of Florida's Workers Compensation Law, includes the employees of all subcontractors. § 440.10(1) (a), (b), Fla. Stat. To the extent that this admission and evidence bind the parties, there can be no coverage for Zota's injury. If this evidence is not dispositive, then whether Zota was an employee is an issue of fact for the jury. Based on the foregoing, the third and fourth certified questions should be answered affirmatively.

V

ASSUMING LIGHTHOUSE IS ENTITLED TO COVERAGE, THE DISTRICT COURT ERRED IN AWARDING DEFENDANTS THEIR ATTORNEYS' FEES BECAUSE SECTION 627.428, FLORIDA STATUTES, DOES NOT ENTITLE AN INSURED TO ATTORNEYS' FEES FROM A SURPLUS LINES INSURER

As discussed below, the insureds, Lighthouse Intracoastal, Inc. and Jack Farji, are not entitled to attorneys fees under section 627.428, Florida Statutes because

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Builders which claims oversight responsibility; Perla Lichi who supplied the scaffold without rails; or, alternatively, Zota herself who knew that railings were absent on the bridge and caused her own fall).

Chapter 627 expressly provides that it does not apply to surplus lines insurers.

The plain meaning of a statute is the first consideration of statutory interpretation, Capers v. State, 678 So. 2d 330, 332 (Fla. 1996), and its polestar. See Acosta v. Richter, 671 So. 2d 149, 153 (Fla. 1996). When the language of a statute is unambiguous and conveys a definite meaning, there is no need to resort to rules of statutory construction; a court must read the statute as written, for to do otherwise would constitute an abrogation of legislative power. See Nicoll v. Baker, 668 So. 2d 989, 990-91 (Fla. 1996); see also Capers, 678 So. 2d at 332 (only when a statute is of doubtful meaning should extrinsic matters be considered in construing the language employed by the legislature).

The clear language of Chapter 627 states that its provisions do not apply to surplus lines insurance placed under the provisions of sections 626.913-626.937, Florida Statutes. Section 627.021(2) specifically provides:

> This chapter does not apply to:
>
> . . . .
>
> (e) Surplus lines insurance placed under the provisions of ss. 626.913-626.937.

(Emphasis added); see App. at A26. It is undisputed that the insurance policy issued in this case was a surplus lines policy and that Essex is a surplus lines carrier. Thus, surplus lines' insureds are not entitled to recover attorneys' fees pursuant to section

627.428–the vehicle chosen by Defendants for their fee award. Cf. Gen. Star Indem. Co. v. W. Fla. Village Inn, Inc., 874 So. 2d 26, 30 n.3 (Fla. 2d DCA 2004) (noting that § 627.701 does not apply to a surplus lines carrier).

A. *Chacin* & *English* Are Not Good Law

The Third and Fourth District Courts of Appeal previously held that attorneys' fees could be assessed against surplus lines insurers under section 627.428, but, as discussed below, those cases are no longer good law. See Chacin v. Generali Assicurazioni Generali Spa, 655 So. 2d 1162 (Fla. 3d DCA 1995); English & Am. Ins. Co. v. Swain Groves, Inc., 218 So. 2d 453 (Fla. 4th DCA 1969).

In 1969, the Third District in English held that a surplus lines carrier was within the scope of section 627.0127 (now § 627.428). At the time, section 627.021(2), Florida Statutes, did not have a provision which excluded surplus lines insurers from the operation of Chapter 627.

In 1988, the Florida Legislature amended section 627.021, Florida Statutes, to exclude the application of Chapter 627–which of course includes section 627.428–to surplus lines insurance. See Ch. 88-166, § 2, Laws of Fla. Specifically, the legislature added subparagraph (d) which stated:

> This chapter does not apply to . . . surplus line insurance placed under the provisions of ss. 626.913-626.937.

(Emphasis added). In 1998, the Legislature moved this subparagraph to

subparagraph (e). See Ch. 98-173, § 1, Laws of Fla. As such, English, which was decided before this substantive amendment, is not good law. See Nicoll, 668 So. 2d at 991 (stating that "legislature is presumed to be cognizant of the judicial construction of a statute when contemplating making changes" to it).

In 1995, the Fourth District decided Chacin by relying exclusively on the reasoning in English which was no longer good law. In fact, the sum and substance of the Chacin court's reasoning was a quotation from English. See Chacin, 655 So. 2d at 1162-63. In Chacin, the trial court denied the insured's motion for attorneys' fees in a suit filed against a surplus lines insurer and the insured appealed. The appellate court was faced with the question of whether attorneys' fees could be assessed against a surplus lines carrier pursuant to section 626.911, Florida Statutes. The surplus lines insurer in that case argued that section 626.912 exempted the application of section 626.911. The appellate court deferred determining whether section 626.912 applied by concluding that attorneys' fees could be awarded under section 627.428. In reaching its conclusion, the appellate court adopted the reasoning in toto of the English decision. Because English was no longer good law, Chacin which depended wholly on its reasoning was also bad law.

B. The District Court's Reasoning Was Flawed

The district court believed that Chacin was still good law because it was decided after the amendment to section 627.021(2) and because it did not "exclusively cite the decision in English." (R3:162:6). The district court's reasoning is flawed for several reasons.[15]

First, nowhere does the opinion mention or attempt to reconcile the amendment which expressly provided that Chapter 627 does not apply to surplus lines carriers. A common-sense reading of the opinion illustrates that the appellate court adopted wholesale the out-dated reasoning of English without any independent analysis. The fact that it quoted English bears this out.

Second, Essex argued that Chacin was no longer good law because the Chacin court adopted the entire reasoning of the out-dated English decision. The district court rejected this position by noting that the Chacin court "made specific mention of the relevant statutes in their amended form." (R3-162-6). While the Chacin court bracketed the amended forms for sections 626.0509, 626.0508, and 627.0127, the court never specifically mentioned the amended form of section 627.021–the statute at issue here. Put another way, the Chacin court did not expressly acknowledge that section 627.021 had been amended since English, and that under the amended version

[15] In a bit of circular logic, the district court cited to 31B Fla. Jur. 2d Insurance §3593 (2002), to support its order entitling the insured to attorney's fees (R3:162:6), but Florida Jurisprudence cites only to the Chacin decision to support its statement

the result would be the same.

Third, given the legislature's adoption of section 627.021(2)(e) and its unambiguous language, no court was free to rewrite the law. See § 2.01, Fla. Stat. (providing that the common law is only in force to the extent that it does not conflict with Florida statutory law); see also Berman v. U.S. Fin. Acceptance Corp., 669 So. 2d 1116, 1117 (Fla. 4th DCA 1996) (holding that to the extent a case is inconsistent with a statute, the statute prevails); 10A Fla. Jur. 2d Constitutional Law § 171 (2003) (courts have no power to amend, change, modify, rewrite, enlarge, or overrule valid laws).

To avoid the clear effect of section 627.021(2)(e), the district court also engaged in a statutory construction to counter the statute's plain and unambiguous language. At the outset, any construction of the statute was inappropriate.[16] See Citizens of the State of Fla. v. Public Serv. Comm'n, 435 So. 2d 784 (Fla. 1983) (where the words of a statute are clear and unambiguous, judicial interpretation is not

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that under section 627.428 an "insurer" includes a surplus lines insurer.

[16] Petitioner likewise believes that any inquiry into legislative history would be inappropriate based on the plain and unambiguous language of the statute. Nevertheless, Petitioner notes that the legislative history connected with the bill which became section 627.021(2)(d), Florida Statutes, indicates that the committee only may have intended to exempt surplus lines insurance from the rating laws of part I, Chapter 627. See Fla. H.R. Comm. on Insurance, CS for CS for SB 368 (1988) Staff Analysis 3, 4 (June 30, 1988) (on file with Fla. State Archives). However, by its own language the legislature exempted surplus lines insurance from the entire chapter.

appropriate).

The district court reasoned that section 627.021 excludes surplus lines insurance only from Part I of Chapter 627–which does not contain section 627.428. However, the statutory language undeniably excludes surplus lines insurance entirely from Chapter 627. As indicated, section 627.021provides as follows:

> (1) This part of this chapter applies only to property, casualty, and surety insurances on subjects of insurance resident, located, or to be performed in this state.
>
> (2) This chapter does not apply to:
>
> . . .
>
> (e) Surplus lines insurance placed under the provisions of ss. 626.913-626.937.

(Emphasis added). A literal reading of section 627.021 indicates that surplus lines insurance is excluded from the entire Chapter 627. The Court should construe Chapter 627 according to the precise language adopted by the legislature. See Campbell v. Kessler, 848 So. 2d 369, 371 (Fla. 4th DCA 2003) (courts interpret statutes according to precise language used). Again, in this case, a precise reading of section 627.021 clearly and unequivocally indicates surplus lines insurance is excluded from the entire "chapter." Undeniably, if the legislature had in fact intended that surplus lines insurance only be excluded from Part I of Chapter 627, as the Responents contend, then surely the legislature would have inserted the words

"part" rather than the word "chapter" when describing the exclusions. See Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (legislature is presumed to know the meaning of words and to have expressed its intent by the use of its words).

Moreover, in 1998 the Florida Legislature moved paragraph (d) of section 627.021(2) to paragraph (e) and added "commercial inland marine insurance" to paragraph (d). If this Court wishes to engage in statutory construction then it cannot ignore the title to the act which amended this statute. See Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 365 (Fla. 1977) (a court may look to the title of a legislative act to aid in its interpretation). Chapter 98-173, § 1, Laws of Florida provides, in pertinent part:

> An act relating to insurance; amending s. 627.021, F.S., providing that the provisions of ch. 627, F.S., do not apply to commercial inland marine insurance.

(Emphasis added). The legislature was aware of what it was doing and did not make a mistake by using the term "chapter" in section 627.021(2). If the legislature had intended to exclude commercial inland marine insurance from chapter 627, then it clearly intended to have another subparagraph within the same section to have the same effect. See Thayer, 335 So. 2d at 817. Similarly, if the legislature had wanted to only exempt surplus lines insurance from part I of Chapter 627, it could have easily amended paragraph four to state: "This part does not apply to health insurance

and surplus lines insurance."[17]

The district court also pointed to section 627.401, Florida Statutes in Part II of Chapter 627 to support its construction of section 627.021, which is found in Part I of Chapter 627. Section 627.401 provides that "no provision of this part of this chapter [which contains § 627.428] applies to":

> (1) Reinsurance
> (2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code.
> (3) Wet marine and transportation insurance, except ss. 627.409, 627.420, and 627.428.
> (4) Title insurance, except ss. 627.406, 627.415, 627.416, 627.419, 627.427, and 627.428.
> (5) Credit life or credit disability insurance, except ss. 627.419(5) and 627.428.

The district court inferred that the legislature's omission of surplus lines insurance from this statute indicated an intent to have section 627.428 apply to them. But see 48A Fla. Jur. 2d Statutes § 126 (2000) (courts should be wary of construing statutes by relying on innuendoes). However, there was no need for the legislature to specifically exclude surplus lines insurance from the other parts of Chapter 627, including Part II, since section 627.021 already excludes surplus lines insurance from the entire chapter. See Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986) (statutory

[17] The district court also ignored the fact that Part VIII of Chapter 626, Florida Statutes, which regulates surplus lines insurance, contains its own attorneys' fee provision. See § 626.911, Fla. Stat. Although the statute did not apply in this case, the fact that such a statute exists is not inconsistent with the inapplicability of section 627.428 to surplus lines insurers.

interpretations that render statutory provisions superfluous are disfavored).

The district court also engaged in the following statutory construction regarding sections 627.021 and 627.401:

> The titles of both sections, "Scope of this part," indicate that the exclusions only apply to each part, and not the entire chapter. Furthermore, had the legislature intended for § 627.021 to apply to the entire chapter, it would not have included "Reinsurance" under both sections §§ 627.201 [sic] and 627.401. In other words, if the legislature had intended for § 627.201 [sic] to apply to the entire chapter, the legislature would only have excluded joint reinsurance under § 627.401. rather than all reinsurance, since that was the only form of reinsurance permitted under § 627.201 [sic]. The fact that the statute excludes "reinsurance" in two separate parts indicates that the first exclusion was not intended to apply to the entire chapter, but only to apply to the first part.

(R3:162:5). This statutory construction is rife with flaws. First, the titles of statutes afford no substantive meaning to the statute itself. See Askew v. MGIC Dev. Corp. of Fla., Inc., 262 So. 2d 227, 228 (Fla. 4th DCA 1972); 48A Fla. Jur. 2d Statutes § 156 (2000). As such, the fact that the title of section 627.021 states "Scope of this Part" does not override the actual language of the statute itself. See Essex Ins. Co. v. Zota, Slip Op. at 20 (11th Cir. Oct. 6, 2006) (stating that under federal law the district court erred in using the heading of a statutory section to "undo . . . that which the text makes plain").

Second, if the district court's construction were correct, then there is no valid explanation for the entirely separate subsection in 627.021, which states that "**This**

part does not apply to health insurance." § 627.021(4), Fla. Stat. (2005) (emphasis added). If the legislature had wanted to only exempt surplus lines insurance from part I of Chapter 627, it could have easily amended paragraph four to state: "This part does not apply to health insurance and surplus lines insurance placed under the provisions of ss. 626.913-626.937." However, the Florida legislature did not do so, which is proof that the language it used in section 627.021(2) ("This chapter does not apply to . . .") was intended to have the desired meaning. (Emphasis added); see Overstreet v. State, 629 So. 2d 125, 126 (Fla. 1993) ("The Legislature is assumed to know the meaning of the words in the statute and to have expressed its intent by the use of those words.").

Third, the district court made two logically inconsistent arguments–it first agreed with Defendants that the legislature's omission of surplus lines insurance from section 627.401 (in Part II of Chapter 627) weighed in favor of their construction that section 627.021(2)(e) did not apply to the entire chapter, but at the same time found that the legislature's inclusion of "Reinsurance" in both Parts I and II of Chapter 627 weighed in favor of their construction. Clearly, the Defendants cannot have it both ways.

Fourth, if this Court were to adopt the district court's construction of sections 627.021 and 627.401, it would render meaningless the language contained in section

627.021(2)(e). This would fly in the face of the tenets of statutory construction that statutes must be harmonized if at all possible and words in a statute should not be construed as mere surplusage. See Cannella v. Auto-Owners Ins. Co., 801 So. 2d 94, 98 (Fla. 2001).

Fifth, there is not a "hopeless inconsistency" between sections 627.021(2)(e) and 627.401 which would warrant defeating the plain language of section 627.021(2)(e) in favor of the inference drawn from section 627.401. See Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1068 (Fla. 1995).

Finally**,** even if the legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute, not for this Court to rewrite it by judicial fiat. See Overstreet, 629 So. 2d at 126 ("Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.")

Thus, Defendants/Respondents are not entitled to attorneys' fees pursuant to section 627.428. The fifth 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. **NO.**
2. Whether, if the delivery requirement of Fla. Stat. § 626.922 or § 626.421, 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. **NO.**
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. **YES.**
4. If either the first or second question is answered in the negative, whether Zota is an employee of Lighthouse under the policy. **YES.**
5. If Lighthouse is entitled to coverage, whether Fla. Stat. § 627.428 applies to surplus lines insurers. **NO.**

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven (7) copies have been filed with the Clerk of the Florida Supreme Court and one copy of the foregoing has been furnished by U.S. Mail to: Michael Kaplan, Esq., Lydecker, Diaz, Lee, Behar, Berga & de Zayas, LLC, 1201 Brickell Avenue, Suite 200, Miami, Florida 33131; Matthew D. Weissing, Esq., The Weissing Law Firm, 1735 East Atlantic Boulevard, Pompano Beach, Florida 33060; and Billy Galloway, Esq., Volpe Bajalia Wickes Rogerson Galloway & Wachs, 106 E. College Avenue, Suite 600, Tallahassee, Florida 32301 on this **6th** day of **November, 2006**.

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CERTIFICATE OF FONT SIZE

The undersigned hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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