Filing # 14359159 Electronically Filed 06/03/2014 12:06:07 PM

RECEIVED, 6/3/2014 12:08:49, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-897

JOHN ROBERT SEBO, individually and as Trustee under Revocable Trust Agreement of John Robert Sebo dated November 4, 2004,

Petitioner,

vs.

AMERICAN HOME ASSURANCE COMPANY

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

On Notice to Invoke Jurisdiction from the Second District Court of Appeal, Case No. 2D11-4063

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP
ANTHONY J. RUSSO, ESQ.
Florida Bar No. 508608
SCOTT J. FRANK, ESQ.
Florida Bar No. 0775606
CHRISTOPHER M. RAMEY, ESQ.
Florida Bar No. 0044808
EZEQUIEL LUGO, ESQ.
Florida Bar No. 44538
777 S. Harbour Island Blvd., Suite 500
Tampa, FL 33602
(813) 281-1900

BOEHM, BROWN, HARWOOD, P.A.
JANET L. BROWN, ESQ.
Florida Bar No. 226629
SUSAN B. HARWOOD, ESQ.
Florida Bar No. 375667
1060 Maitland Center Commons
Suite 365
Maitland, FL 32751
(407) 660-0990

Attorneys for American Home Assurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF THE CASE AND FACTS

American Home Assurance Company ("AHAC") restates the case and facts because the Petitioner, John Robert Sebo, omits key facts and recites facts not supported by the four corners of the district court opinion. Consequently, the Petitioner's statement of the case and facts is misleading.[1]

AHAC insured a house owned by Sebo. *Am. Home Assurance Co. v. Sebo*, No. 2D11-4063, 2013 WL 5225271, at *1 (Fla. 2d DCA Sept. 18, 2013). The policy was a one-of-a-kind manuscript policy. *Id.* It was not a standard form policy; it was created specifically for the Sebo residence. *Id.*

Sebo's house suffered from major design and construction defects. *Id.* Shortly after he bought the house in April 2005, there were major water leaks throughout the house. *Id.* The house was also damaged by Hurricane Wilma in October 2005. *Id.* Sebo waited until December 30, 2005 before he notified AHAC of the water intrusion and other damages. *Id.* AHAC investigated Sebo's claim and denied coverage for most of the claimed losses under the policy's exclusion for Faulty, Inadequate or Defective Planning. *Id.* at **1-2. AHAC provided coverage

[1] The only facts relevant to this Court's decision to accept or reject jurisdiction based on alleged decisional conflict "are those facts contained within the four corners of the decisions allegedly in conflict." *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986). The Petitioner's inclusion of extraneous facts beyond the four corners of the opinion below is both "pointless and misleading." *See id.* Further, some of the Petitioner's unsupported facts are false. (*See* Sebo's Br. at 1-3.)

for mold damages, but Sebo refused to settle his claim for the mold policy limit. *Id.* The house could not be repaired and was eventually demolished. *Id.* at *1.

Sebo sued AHAC in a declaratory judgment action seeking a declaration that AHAC's policy provided coverage for his damages. *Id.* Sebo moved for summary judgment on the issue of whether the policy covered his damages. *Id.* at *2. Sebo argued AHAC had to cover all of his losses under the concurrent causation doctrine described in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988). *Id.* The trial court agreed and applied the concurrent causation doctrine. *Id.* at *6. The jury returned a verdict for Sebo, and the trial court entered a judgment against AHAC for more than $8 million. *Id.* at *1.

AHAC appealed and raised multiple grounds for reversal. *See id.* at *8. In particular, AHAC argued that the trial court erred in ruling that the concurrent causation doctrine applied. *Id.* at *3. On appeal, the Second District reversed because it determined that the concurrent causation doctrine did not apply in first-party property insurance cases. *Id.* at **3-6. The Second District remanded the case for further proceedings under the efficient proximate cause theory. *Id.* at *6.

SUMMARY OF ARGUMENT

The Second District's decision does not conflict with *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988). Both cases applied the efficient proximate cause rule. *Wallach*'s discussion of the concurrent causation rule was dicta. Thus,

there is no express and direct conflict on the same question of law, such that there could be conflict jurisdiction. And even assuming conflict jurisdiction existed (which it does not), the Court should not exercise that jurisdiction because the Second District's decision was correct and will not have widespread application.

ARGUMENT

Sebo's alleged basis for jurisdiction is express and direct conflict with *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988). To demonstrate such a conflict, Sebo must show that the Second District's decision "expressly and directly conflicts" with *Wallach* "on the same question of law." Art. V, § 3(b)(3), Fla. Const. The holdings of the decisions must be irreconcilable. *Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166 (Fla. 2006). No conflict jurisdiction exists to review alleged conflict with dicta from a district court. *Ciongoli v. State*, 337 So. 2d 780, 781-82 (Fla. 1976). Moreover, this Court's conflict jurisdiction is discretionary. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv). Therefore, this Court must decide not only whether conflict exists but, if so, whether to review the case.

I. The Second District's decision to apply the efficient proximate cause rule in a first party insurance case does not conflict with *Wallach*.

A. Wallach was decided according to the efficient proximate cause rule.

The trial court, in *Wallach*, applied the efficient proximate cause rule. 527 So. 2d at 1387. At directed verdict, the insurer claimed that the evidence showed the excluded weather factor was the efficient cause of the loss, and cited to

Hartford Accident & Indemnity Co. v. Phelps, 294 So. 2d 362 (Fla. 1st DCA 1974) (applying efficient proximate cause doctrine as the rule of decision). The trial court denied the insurer's motion. 527 So. 2d at 1387.

Thereafter, the *Wallach* jury was instructed that the insurer had "the burden of proof to show by the greater weight of the evidence that the exclusion in the policy was the sole, proximate cause of the damage or loss to the property . . . ." 527 So. 2d at 1389. The jury, from the face of the *Wallach* opinion, apparently made three findings: the neighbor had been negligent in maintaining his seawall; excluded earth movement was not the sole proximate cause of the loss; and the insurer had breached the contract. *Id.* at 1387.

On appeal, the insurer raised several points. *Id.* at 1387. The insurer contended that the trial court should have granted its motion for directed verdict because the evidence adduced at trial showed the efficient proximate cause of the loss was excluded earth movement. The *Wallach* court disagreed:

> On that theory [i.e., the efficient proximate cause theory] Old Republic was not entitled to a directed verdict. There is competent evidence which suggests that the defective wall, as well as the heavy rainfall, could have been the efficient cause of the loss. Where reasonable persons can draw different conclusions, the question as to which of several causes contributing to a loss is the efficient or proximate cause, is one for the jury.

The insurer also appealed the decision to instruct the jury that the insurer bore "the burden of proof to show by the greater weight of the evidence that the

exclusion in the insurance policy [earth movement] was the sole proximate cause of the damage or loss to the property." *Id.* at 1387. The *Wallach* court approved the jury instruction, without saying anything about the concurrent cause rule. And with these two rulings—affirming the denial of the directed verdict and approving the jury instruction—the *Wallach* appeal could have been entirely concluded.

B. The Wallach and Sebo opinions are not irreconcilable.

This Second District held the efficient proximate cause rule should be applied in first-party property insurance cases. The trial court in *Wallach*, a first-party property insurance case, also applied the efficient proximate cause rule. 527 So. 2d at 1387. The Third District affirmed that decision, in full and without qualification. The Third District did not disturb the trial court's rulings which appear, from the face of the opinion, to be based on the efficient proximate cause rule. If both *Wallach* and *Sebo* apply the efficient proximate cause rule in first-party cases, then these two opinions are not irreconcilable, and they do not conflict. Therefore, unlike in *Aravena*, this Court should find that it lacks jurisdiction.

C. Wallach's discussion of the concurrent cause rule is dicta.

That part of the *Wallach* opinion addressing the concurrent cause rule should be considered dicta because that discussion made no difference to the outcome of that case. The *Wallach* court chose to respond to the insurer's argument that

"where two concurrent causes join to produce a loss, and one of the causes is a risk excluded under the policy, then no coverage is available to the insured." 527 So. 2d at 1387. The insurer's "pro-insurer" approach to analyzing losses caused by multiple perils had not been adopted in any domestic jurisdiction.[2] The *Wallach* court did not need to reach this issue to resolve the appeal; its rulings on the directed verdict and jury instructions—both approving the application of the efficient proximate cause rule in a first-party case—were sufficient to affirm the judgment. But the *Wallach* court plunged into the argument to address the issue.

The *Wallach* court first addressed the cases of *Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963) (applying the efficient proximate cause rule in a first-party property insurance case) and *State Farm Mut. Auto. Ins. Co. v. Partridge*, 514 P.2d 123 (Cal. 1973) (applying the concurrent cause rule in a third-party personal injury negligence case), and noted the efficient proximate cause rule "offered little analytical support where it can be said that but for the joinder of two independent causes the loss would not have been covered." 527 So. 2d at 1388. Then the *Wallach* court decided to adopt the concurrent cause rule from the third-party

---

[2] *See* Mark Bell, *A Concurrent Mess and a Call for Clarity in First-Party Property Insurance Coverage Analysis*, 18 Conn. Ins. L.J. 73, 76 (2011-2012) ("Under the pro-insurer approach, if one of the causes of loss is excluded, the entire loss is excluded. While no domestic jurisdictions have entirely adopted this approach, British courts apply the pro-insurer approach with some uniformity").

liability case of *Partridge,* to (unnecessarily) resolve the insurer's alternative, non-dispositive, strictly-academic argument. What the *Wallach* court said about concurrent causation was dicta. It may have been applied to decide future cases, but it was not used to decide the issues in the *Wallach* case.

The discussion of the concurrent cause rule in *Wallach* was "without force as precedent" because it was not essential to that decision. *State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation of Dep't of Bus. Regulation of State*, 276 So. 2d 823, 826 (Fla. 1973). Further, "it cannot be said to be part of the holding in the case." *Lewis v. State*, 34 So. 3d 183, 186 (Fla. 1st DCA 2010); *see also State v. Dodd*, 419 So. 2d 333, 335 n.2 (Fla. 1982) (finding that statement in prior opinion was dicta because it was not necessary to decide the prior case). *Wallach*'s discussion of the concurrent cause rule was dicta that cannot directly conflict with the Second District's opinion. Thus, like in *Ciongoli*, this Court lacks jurisdiction.

D. No precedent to find conflict exists.

This Court has accepted jurisdiction on the basis of conflict with dicta only where the dicta is from this Court and the Court wants to recede from the dicta. *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005); *Watson Realty Corp. v. Quinn*, 452 So. 2d 568 (Fla. 1984). But that is not the case here.

Further, the Third District apparently saw no conflict between its decision in *Wallach* and the First District's *Phelps* opinion. It did not certify conflict. This Court subsequently denied review of the case. *Wallach v. Rosenberg*, 536 So. 2d 246 (Fla. 1988) (order denying review). This Court should do the same here.

II. This Court should not exercise its discretion to accept this case because it does not involve a recurrent issue and the Second District did not alter Florida law.

The Second District's decision is not likely to have widespread impact. The legal issue here arose out of a one-of-a-kind manuscript policy. It was not a standard form policy; it was created specifically for the Sebo residence. Most modern property insurance policies contain prefatory anti-concurrent causation language, e.g., "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Bell, *supra*, at 85 (citing *Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.*, 207 P.3d 839, 841 (Colo. App. 2008)). The exclusion in the Sebo policy did not contain such anti-concurrent causation language. *Sebo,* 2013 WL 5225271, at **2, 6-7. Second, most modern property insurance policies also contain a clause in the exclusions that "puts back" coverage for ensuing damages. The faulty construction exclusion in the Sebo policy did not contain a clause that "puts back" coverage for ensuing damages. *Id.* at *2.

The concurrent cause rule is largely, if not totally irrelevant to the coverage analysis when the policy contains anti-concurrent causation language or ensuing loss coverage. This prefatory language was designed by the insurance industry as a work-around of the ill-effect of *Partridge* and its progeny. *See Sebo*, 2013 WL 5225271, at **6-7; Bell, *supra*, at 85.

The Second District noted that "[b]ecause so many hurricanes have ravaged the state in recent decades, it is somewhat surprising to find so few Florida cases addressing coverage when multiple perils cause a loss." *Sebo*, 2013 WL 5225271, at *6 n.3. Part of the answer may be that most modern homeowner policies now contain anti-concurrent causation language that prevents disputes that would have otherwise arisen, even if it may not have prevented this particular one. And the dearth of case authorities noted by the Second District is empirical evidence that litigation of this issue is rare. So it is unlikely that this case will have widespread application or ill effect. The *Sebo* opinion will apply only to that small subset of cases where the pertinent policy exclusion is not preceded by anti-concurrent causation language, or a "put-back" provision for ensuing damages.

The Second District's decision was correct. The efficient proximate cause rule has been the law in Florida since *Phelps*. The Third District affirmed the trial court's application of the efficient proximate cause rule in that case. The Second

District's opinion likewise applied the efficient proximate cause rule. The Second District did not alter Florida law.

CONCLUSION

This Court lacks discretionary jurisdiction to review the decisions below because there is no conflict with *Wallach*. And assuming, *arguendo*, this Court had discretionary jurisdiction (which it does not), the Court should not exercise that jurisdiction to consider the merits of the Petitioner's arguments.

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP

/S/
ANTHONY J. RUSSO, ESQ.
Florida Bar No.: 508608
SCOTT J. FRANK, ESQ.
Florida Bar No.: 0775606
CHRISTOPHER M. RAMEY, ESQ.
Florida Bar No.: 0044808
EZEQUIEL LUGO, ESQ.
Florida Bar No.: 44538
777 S. Harbour Island Blvd., Suite 500
Tampa, FL 33602
Tel.: (813) 281-1900
Fax: (813) 281-0900
arusso@butlerpappas.com
sfrank@butlerpappas.com
cramey@butlerpappas.com
elugo@butlerpappas.com

and

JANET L. BROWN, ESQ.
Florida Bar No.: 226629
SUSAN B. HARWOOD, ESQ.
Florida Bar No.: 375667
BOEHM, BROWN, HARWOOD, P.A.
1060 Maitland Center Commons, Suite 365
Maitland, FL 32751
Tel.: (407) 660-0990
Fax: (407) 660-5052
Jbrown@boehmbrown.com
sbharwood@boehmbrown.com

Attorneys for American Home Assurance Company, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing notice has been furnished to the following via E-Portal on June 3rd, 2014.

Edward K. Cheffy, Esq.
David A. Zulian, Esq.
Cheffy Passidomo, P.A.
821 Fifth Avenue S, Suite 200
Naples, FL 34102
ekcheffy@napleslaw.com
dazulian@napleslaw.com

Mark A. Boyle, Esq.
Molly A. Chafe, Esq.
Boyle, Gentile & Leonard, P.A.
2050 McGregor Blvd.
Ft. Myers, FL 33901
mboyle@boylegentilelaw.com
mchafe@boylegentilelaw.com

Bruce S. Rogow, Esq.
Tara A. Campion, Esq.
Bruce S. Rogow, P.A.
500 East Broward Blvd., Suite 1930
Ft. Lauderdale, FL 33394
brogow@rogowlaw.com
tcampion@rogowlaw.com

Counsel for John Robert Sebo

/S/
ANTHONY J. RUSSO, ESQ.

CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Brief is14 point Times New Roman.

/S/
ANTHONY J. RUSSO, ESQ.