IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO.: SC03-2172

L.T. CASE NO.: 3D03-50

HAITIAN REFUGEE CENTER, etc., et al.,

Petitioner,

v.

UNION AMERICAN INSURANCE COMPANY,

Respondent.

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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ISSUE ON JURISDICTION

WHETHER THE THIRD DISTRICT COURT OF APPEAL'S OPINION IN UNION AMERICAN INSURANCE COMPANY V. HAITIAN REFUGEE CENTER, 858 So.2d 1076(FLA. 3RD DCA 2003) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL IN SOUTHEAST FARMS, INC. V. AUTO OWNERS INSURANCE COMPANY, 714 So.2d 509 (FLA. 5TH DCA 1998) SO AS TO CONFER JURISDICTION PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE AND FACTS

On or about October 24, 1993, Donaldson Dona St. Plite was shot to death at a rally sponsored by the Haitian Refugee Center, which was the insured of the Respondent, UNION AMERICAN INSURANCE COMPANY. Mr. St. Plite was survived by his wife, Petitioner, SOLANGE ST. PLITE, as well as six minor children. SOLANGE ST. PLITE, as Personal Representative of the Estate of Donaldson Dona St. Plite, brought an action for negligent security/wrongful death in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Respondent, UNION AMERICAN INSURANCE COMPANY, filed a declaratory judgment to determine the existence or not of coverage for the shooting, which occurred off of the premises of

the Haitian Refugee Center. The policy in question was a commercial general liability form to which the Respondent insurance carrier had attached an endorsement entitled "Limitation of Coverage to Designated Premises or Project." That endorsement sought to limit coverage to "bodily injury...arising out of [t]he ownership, maintenance or use of the premises shown in the Schedule, and operations necessary or incidental to those premises.

Based upon the deposition testimony presented in the trial court, Judge Michael Genden entered a summary judgment in favor of Petitioner's position that the endorsement did not exclude coverage for the off-premises event. The Third-District Court of Appeal reversed and entered a judgment for Respondent, UNION AMERICAN INSURANCE COMPANY, finding no coverage. Union American Insurance Company V. Haitian Refugee Center, 858 So.2d 1076(Fla. 3rd DCA 2003). The Third District Court of Appeal's opinion and order denying motion for rehearing are attached as Appendix A. The court of appeal's holding expressly and directly conflicts with the decision of the Fifth District Court of Appeal in Southeast Farms, Inc. v. Auto Owners Insurance Company, 714 So.2d 509 (Fla. 5th DCA 1998). Consequently, this court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

In this declaratory judgment action arising out of a negligent security/wrongful death case, the Third District Court of Appeal reversed a trial court declaratory judgment in favor of coverage. In doing so, the Third District's opinion

expressly and directly conflicted with the opinion of the Fifth District Court of Appeal in Southeast Farms, Inc. v. Auto Owner's Insurance Company, 714 So.2d 509 (Fla. 5th DCA 1998) on two crucial points. First of all, the Third District found that a commercial general liability policy with a designated premises endorsement does not create any ambiguity, does not present any issue for a trial judge or jury and automatically results in a finding of no coverage for an off-premises event; whereas the Fifth District found that the same policy and the same exclusion at least creates an ambiguity and, on facts much more attenuated then those in the instant case, found coverage in favor of the underlying Plaintiffs.

Secondly, the Third District compounded its error and the conflict by relying on a prior case, Parliament Insurance Company v. Bryant, 380 So.2d 1088 (Fla. 3rd DCA), cert. denied, 388 So.2d 1110 (Fla. 1980), which involved an owner's, landlord's and tenant's (OLT) policy and a more specific exclusion as to any off-premises injuries. The Southeast Farms court found that case to be "easily distinguishable" based upon the more specific exclusion. Although the Third District found the Bryant case to include two holdings (one regarding the more specific exclusion and the other regarding the insuring clause itself), the Third District ignored the fact that the Bryant insuring clause was restricted to designated premises and that policy was designated an OLT policy whereas the policies in Southeast Farms and this case were CGL policies with broad insuring clauses nothing like the one in Bryant.

The Third District actually ruled in favor of the Respondent insurer by holding that there was no coverage as a matter of

law. Southeast Farms and other cases outside the jurisdiction have held that coverage is not excluded by the "designated premises" endorsement when there is a nexus between the off-premises event and the premises listed in the policy schedule, which there was here. Therefore, an express and direct conflict exists between the erroneous decision of the Third District Court of Appeal here and that of the Fifth District Court of Appeal in Southeast Farms. Jurisdiction should be accepted by this court under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

ARGUMENT

POINT ON JURISDICTION

THERE IS AN EXPRESS AND DIRECT CONFLICT BETWEEN UNION AMERICAN INSURANCE COMPANY V. HAITIAN REFUGEE CENTER, 858 So.2d 1076(FLA. 3RD DCA 2003) AND SOUTHEAST FARMS, INC. V. AUTO OWNERS INSURANCE COMPANY, 714 So.2d 509 (Fla. 5th DCA 1998) WHERE THE FORMER HOLDS THAT THERE IS NO COVERAGE, NO AMBIGUITY AND NO FACTUAL ISSUE CREATED BY THE PLACEMENT IN A COMPREHENSIVE GENERAL LIABILITY POLICY OF A "DESIGNATED PREMISES" ENDORSEMENT WHEN THAT ENDORSEMENT DOES NOT EXCLUDE COVERAGE FOR OPERATIONS INCIDENTAL TO THE INSURED PREMISES; AND WHERE SOUTHEAST FARMS HELD THE OPPOSITE.

The conflict between the decisions of the Third District Court of Appeal and the Fifth District Court of Appeal arises out of their differing treatments of a commercial general liability (CGL) policy with identical insuring clauses and identical "designated premises" endorsements. The Third District Court of Appeal held that the endorsement converted the policy into an owner's, landlord's and tenant's (OLT) policy. See Appendix A at footnote 1. The Fifth District Court of Appeal, in Southeast Farms, held that the policy in question, since it contained commercial general liability and personal and advertising injury parts like the one under consideration here,

was at least sufficiently ambiguous, in view of the designated premises or project endorsement, to make it "broad enough to include business operations necessary or incidental to the listed premises." Id. at 512.

Consequently, the Third District was of the opinion that a CGL policy with a designated premises endorsement becomes an OLT policy whereas the Fifth District held that such a combination at least opens the policy up to a determination of the meaning of the clause in light of the facts in question. The Fifth District had no problem with the common-sense notion that "operations," not being definitionally restricted by the policy, can and must include business operations. The Third District insisted that the trial judge should have ruled whether or not the off-premises event was incidental to the "premises" of the Haitian Refugee Center, as opposed to the "business" of the Haitian Refugee Center. Still, the court refused to remand the case to the trial judge to make such a determination.

The significance in the conflict between the district courts of appeal not only took the case away from the trial judge and jury but resulted in an erroneous application of the law by the Third District Court of Appeal. Courts across the country have held that when a commercial general liability policy has the identical designated premises clause as was contained in this case and in Southeast Farms, the question presented is whether there is a causal connection between the injuries alleged and the use of the insured premises.

In American Guarantee and Liability Insurance Company v. The 1906 Company, 129 F.3d 802 (11th Cir. 1997), several parties were sued because an uninsured person improperly videotaped

women at premises far from, and in a business with no relation to, the insured's premises. The Eleventh Circuit held that several of the parties that were sued, including the tortfeasor, were not covered under the policy in question. However, the Eleventh Circuit specifically held that the insureds, Richard Thomson and Hattiesburg Coke, were within coverage and not excluded by the designated premises endorsement as regards their supervisory activities over the remote location and non-employed, non-insured tortfeasor. Id. at 806.

Similarly, in State Auto Casualty Underwriters v. Beeson, 183 Colo. 284, 516 P.2d 623 (1973), the court held that there was a sufficient nexus between ownership of the insured apartment building and a property manager throwing keys (that struck the Plaintiff) from a window of a totally separate and remote apartment building, to establish coverage. Again, the policy and "designated premises" endorsement were identical to those in the case at bar.

The Third District's rejection of the sound reasoning behind these two decisions then culminated in its refusal to follow Southeast Farms. In that case, Southeast Farms was the insured and had offices only in Florida. It was sued for the negligent loading of potatoes on a truck in Alabama, which resulted in a collision in Virginia, causing injuries to the Plaintiff. Southeast Farms was merely a broker for the potatoes and did not engage in loading, hauling or trucking the potatoes. The Plaintiff in that case alleged that negligent loading, or inspection of the load, was the reason for the accident. The trial court granted summary judgment for Auto Owners Insurance Company stating that the "designated premises" endorsement,

identical to the one in our case, demonstrated that there was no coverage.

The Fifth District Court of Appeal reversed, noting that the policy (like the one here) specifically continues to cover "advertising injury," again indicating some aspects of continuing general liability coverage, despite the "designated premises" endorsement. With that existing ambiguity, the term "operations necessary or incidental to those premises appears broad enough to include *business* operations necessary or incidental to the listed premises." 714 So.2d at 512.

The Third District Court of Appeal expressly rejected that reasoning in holding that the operations must be those necessary or incidental to the listed premises and, by taking the case away from the trial judge, directly held that those activities did not include business operations necessary or incidental to the listed premises. Consequently, the Third District's opinion expressly and directly conflicts with the holding of Southeast Farms that the exact endorsement in question creates an ambiguity in a general liability policy and is broad enough to include business operations necessary or incidental to the listed premises.

The Third District and Fifth District also directly and expressly conflict in their treatment of a prior case, Parliament Insurance Company v. Bryant, 380 So.2d 1088 (Fla. 3rd DCA), cert. denied, 388 So.2d 1110 (Fla. 1980). In Bryant, the insurance contract in question was entitled an owner's, landlord's and tenant's policy, id. at 1089, as opposed to the commercial general liability policies with which the courts had to deal in Southeast Farms and this case. The insuring clause

in Bryant stated that the only bodily injuries covered by the policy were those:

> to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance, or use of the insured premises, and all operations necessary or incidental thereto....

This contrasts with the insuring clause in the CGL policies in our case and Southeast Farms which simply stated that the carrier would pay for bodily injury "to which this insurance applies." Consequently the statement in Respondent's initial brief in the Third District Court of Appeal that "[t]he instant Policy contains an insuring clause virtually identical to that in Parliament insurance" [Initial Brief of Appellant at p.5(LT Case #3DO3-50)] was simply false.

At any rate, Bryant involved an injury to a claimant in a boating accident away from the insured premises. The Parliament Insurance Company policy contained a designated premises endorsement which was infinitely more restrictive than the ones here and in Southeast Farms. It stated that the insurance did not apply to "bodily injury...if the bodily injury occurs away from the insured premise...." 380 So.2d at 1088. Additionally, as is stated above, the insuring clause and the title of the policy (OLT v. CGL) could not have been more different.

In Southeast Farms, the Fifth District Court of Appeal found that Bryant was "easily distinguishable" from the case before it. 714 So.2d at 512. The policy in Bryant clearly stated that any bodily injury occurring off the premises would not be covered. No such specific exclusion appears here. However, the Third District Court of Appeal relied upon the Bryant decision [see Appendix A at 3] in reaching its decision below. The Third

District opinion asserted in footnote 2 that there were two holdings in Bryant, one which applied the designated premises endorsement and the other which applied the limiting language in the insuring clause. However, the policy was already restricted by its insuring clause and also contained a clear and unambiguous "designated premises" endorsement which Union American could easily have written into the Haitian Refugee Center's policy. Thus the Third District's either-holding-applies rationale fails because, as the Fifth District was able to discern, neither holding of Bryant applies to a CGL policy with an open-ended "designated premises" endorsement.

This further misapplication of the law contributes to the direct and express conflict and the unfair result reached below. As such, this court should accept jurisdiction in order to resolve the conflict and bring the Third District in line with the prevailing law in this state and outside it.

CONCLUSION

In holding that a designated premises endorsement to a commercial general liability policy provides a clear and unambiguous exclusion of coverage for off-premises events that may be incidental to the premises when the endorsement says that operations necessary or incidental to the premises are covered, the Third District Court of Appeal expressly and directly conflicted with the opinion of the Fifth District Court of Appeal in Southeast Farms v. Auto Owners Insurance Company and also rejected the common sense notion of interpreting the policy to exclude only those operations that do not have a nexus to the listed premises. The Third District's holding is erroneous and expressly and directly conflicts with that of the Fifth

District Court of Appeal. This court should accept jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of January, 2004 to: Douglas H. Stein, Esquire, Anania Bandklayder et al., 100 SE 2nd Street, Suite 4300, Miami, Florida 33131, Stephen S. Nuell, Esquire, Nuell & Polsky, 782 NW 42nd Ave, Suite 345, Miami, Florida 33126.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

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

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