IN THE SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY,

Petitioner,

vs.

JODY WILLIS BUILDER, INC., CHET THARPE and HELEN THARPE,

Respondents.
_____/

CASE NO.: SC05-1373

LOWER TRIBUNAL NO.: 2D04-139

RESPONDENTS, CHET THARPE AND HELEN THARPE'S, ANSWER BRIEF ON JURISDICTION

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Statement of the Case

This appeal involves Petitioner's ill-conceived effort to seek this Court's discretionary review of a per curiam affirmed decision without opinion that cites to a case not pending review in this Court. Petitioner's sole basis for attempting to invoke this Court's limited conflict review jurisdiction is that the Second District Court of Appeal's ("Second DCA") decision *in another case* is "contrary" to decisions rendered by other district courts of appeal. According to Petitioner's convoluted argument, this Court should exercise its conflict review jurisdiction *in this case* because the Court could potentially exercise conflict review jurisdiction *in the other case*.

Astonishingly, nowhere in Petitioner's Brief on Jurisdiction does Petitioner allege that the Second DCA's decision *in this case* expressly and directly conflicts with a decision of this Court or another district court of appeal *on the same question of law* which, of course, is the actual standard for invoking this Court's conflict review jurisdiction. As such, Petitioner's attempt to invoke this Court's jurisdiction under Rule 9.030, Florida Rules of Appellate Procedure, is without merit and this Court should not review the Second DCA's per curiam affirmed decision in this case.

Statement of the Facts

On or about March 11, 2002, Petitioner, Auto-Owners Insurance Company ("Auto-Owners"), filed an action for declaratory relief under Chapter 86, Florida Statutes, against its insured Jody Willis Builder, Inc. ("Jody Willis Builder") and against Jody Willis Builder's customers, Chet Tharpe and Helen Tharpe (the "Tharpes").

Jody Willis Builder, as general contractor, built a home for the Tharpes in Hillsborough County, Florida. The Tharpes sued Jody Willis Builder for damages resulting from the improper construction of the home. Auto-Owners, as commercial general liability insurer of Jody Willis Builder, filed its declaratory judgment action to determine whether Auto-Owners has a duty to indemnify Jody Willis Builder against the Tharpes' claim.

On December 11, 2003, the trial court entered its Order granting the Tharpes' Motion for Final Summary Judgment, ruling that Auto-Owners has a duty to indemnify Jody Willis Builder against the Tharpes' claim. Auto-Owners appealed the trial court's Order to the Second DCA.

On April 6, 2005, the Second DCA per curiam affirmed the trial court's Order. Auto-Owners then moved for rehearing, requesting the Second DCA to, among other things, certify conflict with the Fourth District Court of Appeal's decision in *Aetna Casualty & Surety Co. v. Deluxe Systems, Inc.* 711 So. 2d 1293

(Fla. 4th DCA 1998). The Second DCA denied Auto-Owners' motion for rehearing. Auto-Owners, in turn, served its Notice to Invoke Discretionary Jurisdiction ("Notice") on August 1, 2005, and on August 4, 2005, Auto-Owners served its Brief on Jurisdiction.[1]

In an obvious attempt to create conflict review jurisdiction where none exists, Auto-Owners erroneously contends (i) that the Second DCA's per curiam affirmed decision in this case was "based solely" on the Second DCA's decision in *J.S.U.B., Inc. v. United States Fire Insurance Co.*, 30 Fla. L. Weekly D 774 (Fla. 2d DCA March 18, 2005) and (ii) that this Court has jurisdiction to review the Second DCA's per curiam affirmed decision in this case because the Second DCA's decision in *J.S.U.B.* is "pending review" in this Court and is "contrary" to the decisions in *Lassiter Construction Co., Inc. v. American States Insurance Co.*, 699 So. 2d 768 (Fla. 4th DCA 1997) and *Home Owners Warranty Corp. v. Hanover Insurance Co.*, 683 So. 2d 527 (Fla. 3d DCA 1996). (Brief at 3, 5).

However, this Court has not accepted review of *J.S.U.B.* and, regardless, Auto-Owners fails to identify a *single* question of law in the Second DCA's per

[1] Auto-Owners originally filed a Notice to Invoke Discretionary Jurisdiction on June 14, 2005 and its Brief on Jurisdiction on June 22, 2005. This Court struck Auto-Owners' Brief on Jurisdiction for violating Rule 9.120. Before Auto-Owners could file its Amended Brief on Jurisdiction, the Second DCA *sua sponte* withdrew and then reissued an identical per curiam affirmed decision, and ordered that no other motions would be considered by the Second DCA. Auto-Owners then dismissed its original appeal to this Court and filed its August 1, 2005 Notice.

curiam affirmed decision *in this case* that expressly and directly conflicts with any other decision.

SUMMARY OF THE ARGUMENT

This Court does not have conflict review jurisdiction in this case. This Court has repeatedly held that the Court does not have jurisdiction to review a per curiam affirmed decision that cites to a decision that is not pending review before the Court. Moreover, the Court does not have jurisdiction in this case in any event because: (i) Auto-Owners concedes there is no express and direct conflict between the Second DCA's per curiam affirmed decision *in this case* and a decision of this Court or another district court of appeal; and (ii) *Lassiter* and *Home Owners Warranty* are easily distinguishable from this case and from *J.S.U.B.*

ARGUMENT

The Florida Supreme Court's jurisdiction "extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution." *See Gandy v. State*, 846 So. 2d 1141, 1143 (Fla. 2003). In this case, Auto-Owners seeks to invoke the Court's "conflict review" jurisdiction. This Court only has conflict review jurisdiction to review a district court of appeal decision that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court *on the same question of law*." Art. V, § (3)(b)(3), Fla.

Const. (emphasis added); Fla. R. App. P. 9.030(a)(2)(A)(iv); *Times Publishing Co. v. Russell*, 615 So. 2d 158 (Fla. 1993).

A. This Court Does Not Have Jurisdiction to Review a Per Curiam Affirmed Decision that Cites to a Case Not Pending Review in this Court.

This Court has previously cautioned that it does not have jurisdiction over an opinion "that fails to *expressly* address a question of law, *such as [decisions] issued without opinion or citation*." *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988) (emphasis added). Therefore, "mere citation PCA decisions rendered in the traditional form [are] nonreviewable by this Court." *Jollie v. State*, 405 So. 2d 418, 421 (Fla. 1981); *Persaud v. State*, 838 So. 2d 529, 531-32 (Fla. 2003).

This Court has recognized only two limited exceptions to the rule announced in *Jollie* that citation PCA decisions—such as the decision in this case—are nonreviewable by this Court. This Court has jurisdiction to review per curiam affirmed decisions only where the case cited by the district court (i) has been reversed or (ii) is pending review by the Florida Supreme Court. *See id.* at 420. The latter exception only applies where the Court has actually granted discretionary review *and* the cited case is pending before this Court for disposition on the merits. *See Harrison v. Hyster*, 515 So. 2d 1279, 1280 (Fla. 1987).

As such, this Court has expressly rejected the notion that it should accept jurisdiction under the "pending review" exception *before* the Court has actually

accepted jurisdiction over the case cited in the per curiam affirmed decision. *See Harrison*, 515 So. 2d at 1280. For example, in holding that it improvidently granted review in *Harrison v. Hyster*, 515 So. 2d 1279 (Fla. 1987), this Court stated that the:

> anomaly of reviewing a decision because it was decided upon the authority of another decision which was never reviewed on the merits by this Court has caused us to conclude that *we should not have accepted jurisdiction of this case until it was determined to accept jurisdiction in Small*. *Jollie*'s reference to the "controlling authority . . . that is . . . pending review" refers to a case in which the petition for jurisdictional review *has been granted and the case is pending for disposition on the merits*.

Id. (emphasis added).

If a per curiam affirmed decision does not fall within either of the two limited exceptions noted above, then this Court does not have conflict review jurisdiction unless the district court opinion, at a minimum, contains "'some statement,' indicating that it has 'expressly addresse[d] a question of law within the four corners of the opinion itself.'" *Gandy v. State*, 846 So. 2d 1141, 1144 (Fla. 2003) (quoting *Florida Star*, 530 So. 2d at 288). Absent such a statement, "it is necessary for the district court to have included some facts in its decision so that the question of law addressed by the district court in its decision can be discerned by the Court." *Persaud*, 838 So. 2d at 532.

In this case, the Second DCA per curiam affirmed the trial court's Order granting final summary judgment in favor of the Tharpes, citing *J.S.U.B.* in the per

curiam affirmed decision. While Auto-Owners concedes that *J.S.U.B.* has not been reversed, Auto-Owners erroneously contends that *J.S.U.B.* is pending review before this Court. A review of this Court's docket, however, reveals that this Court has not accepted review of *J.S.U.B.* as of the date of this brief and, contrary to Auto-Owners assertion, *J.S.U.B.* is not pending before this Court for disposition on the merits. Moreover, the Second DCA's per curiam affirmed decision in this case does not contain *any* statement that the Second DCA addressed *any* particular question of law, nor does the decision include *any* facts that would allow this Court to discern any question of law addressed in this Second DCA's per curiam affirmed decision.

This case is analogous to *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980), where the Florida Supreme Court specifically rejected the argument that a purported conflict between a case cited in a per curiam affirmed decision and the decision of another district court of appeal is sufficient to invoke this Court's conflict review jurisdiction. *Id.* at 1369 (holding that the "issue to be decided from a petition for conflict review is . . . whether there is express and direct conflict in the decision of the district court before us for review, *not whether there is conflict in a prior written opinion which is now cited for authority*") (emphasis added); *see also Jollie*, 405 So. 2d at 419 (stating that Court "will not

reexamine the case referenced in a 'citation PCA' to determine whether the contents of that case now conflict with other appellate decisions").

Because *J.S.U.B.* has not been reversed and is not pending before this Court for disposition on the merits, and because the Second DCA's opinion in this case does not contain *any* facts or statement that the Second DCA addressed *any* particular question of law in this case, this Court does not have discretionary jurisdiction to review the Second DCA's per curiam affirmed decision in this case.

B. The Second DCA's Per Curiam Affirmed Decision Does Not Expressly and Directly Conflict with a Decision of this Court or Another District Court of Appeal on the Same Question of Law.

This Court also does not have conflict review jurisdiction in this case because Auto-Owners fails to allege any *express and direct* conflict between this case and *Lassiter* or *Home Owners Warranty* on the *same question of law*. In fact, Auto-Owners' convoluted argument for jurisdiction is based solely on a purported conflict between the Second DCA's decision in *J.S.U.B.* and *Lassiter* and *Home Owners Warranty*. (Brief at 6).[2] And Auto-Owners acknowledges that any purported conflict is with the *outcomes* of those decisions, not a conflict as to a particular question of law. (Brief at 5-6).

[2] The *J.S.U.B.* Court specifically rejected the insurer's request to certify *J.S.U.B*. as being in conflict with *Lassiter* and *Home Owners Warranty*.

Auto-Owners' Brief is completely devoid of any analysis of how the Second DCA's decision *in this case* conflicts in any way with the decisions in *Lassiter* or *Home Owners Warranty*. Auto-Owners devoted a substantial part of its Initial Brief and Reply Brief below to its argument that the Second DCA should deny coverage *in this case* based on *LaMarche v. Shelby Mutual Insurance Co.*, 390 So. 2d 325 (Fla. 1980) and its progeny, including *Lassiter* and *Home Owners Warranty*. (Initial Brief at 10-12, 15; Reply Brief at 4-10, 13). Auto-Owners also argued in its motion for rehearing that a conflict exists between this case and *LaMarche* and its progeny. The Second DCA rejected Auto-Owners' arguments in both instances.

Auto-Owners is unable to allege an express and direct conflict for one simple reason: *LaMarche, Lassiter*, and *Home Owners Warranty* are all easily distinguished from this case. For example, *LaMarche*, decided in 1980, interpreted an older, narrower version of the CGL policy, totally different from Jody Willis Builder's Auto-Owners CGL policy in this case. Specifically, pre-1986 additions to the standard form CGL policy not present in the *LaMarche* policy, and post-1986 revisions to the standard form CGL policy, made after *LaMarche* was decided, were intended to and, in fact, did significantly expand coverage under the form CGL policy that is the subject of this case.

Lassiter is distinguishable from this case because construction operations in *Lassiter* were *ongoing* at the time the defective construction was discovered. The post-1986 CGL policy contains different coverage provisions for damages arising *during construction*, as opposed to damages to a *completed project* as in this case. Here, the Tharpe residence was completed and put to its intended purpose, triggering the completed operations coverage, which was not invoked by the *Lassiter* court.

Home Owners Warranty is likewise distinguishable from this case because there was no allegation in *Home Owners Warranty* that *any* of the alleged defects were caused by the work of subcontractors. In this case, all of the defective work was performed by Jody Willis Builder's subcontractors, triggering the subcontractor exception to the coverage exclusion (for the insured's own work) in Jody Willis Builder's Auto-Owners post-1986 CGL policy at issue in this case. Accordingly, *LaMarche*, *Lassiter*, and *Home Owners Warranty* are easily distinguished from this case, and no express and direct conflict exists between this case and any decision of another district court of appeal.

CONCLUSION

Auto-Owners has failed to meet its threshold burden of demonstrating that this Court may exercise discretionary conflict review jurisdiction. Therefore, this Court should not review the Second DCA's per curiam affirmed decision in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 2005, a true and correct copy of the foregoing was furnished by U.S. Mail to Frank A. Miller, Esquire, Caglianone, Miller & Anthony, P.A., 703 Lamar Avenue, Brooksville, Florida 34601, A. Wade James, Esquire, 216 Mirror Lake Drive N., St. Petersburg, FL 33701-3224, and Jody Willis Builder, Inc., 900 Central Parke Circle, Unit 302, Lakeland, Florida 33805.

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ATTORNEY

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Fla. R. App. P. 9.210.

/s/
ATTORNEY