

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AUTO-OWNERS INSURANCE
COMPANY,

Petitioner,

Case No.: SC05-

vs.
139

Second DCA Case No. 2D04-

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

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

PRELIMINARY STATEMENT..... 1

STATEMENT OF THE CASE AND
FACTS 1

ISSUE ON APPEAL 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The *J.S.U.B.* Case, on
Which the Second
District Based its
Affirmance in this
Appeal, Expressly
and Directly
Conflicts with
District Court of
Appeal Decisions
in *Lassiter*
Construction
Company, Inc. and
Home Owners
Warranty
Corporation 4

A. Standard of Review 4

B. Argument 5

CONCLUSION..... 7

CERTIFICATE OF SERVICE..... 8

CERTIFICATE OF COMPLIANCE 8

INDEX TO APPENDIX 9

TABLE OF AUTHORITIES

| CASE | PAGE |
|---|-------------|
| <i>Aetna Casualty and Surety Company of America v. Deluxe Systems, Inc. of Florida,</i> | 711 |
| <i>Epifano v. Town of Indian River Shores,</i> 379 So. 2d 966 (Fla. 4th DCA 1979) | 5 |
| <i>Ford Motor Company v. Kikas,</i> 401 So. 2d 1341 (Fla. 1981) | 4 |
| <i>Harrison v. Hyster Company,</i> 515 So. 2d 1279 (Fla. 1987) | 5 |
| <i>Home Owners Warranty Corporation v. Hanover Insurance Company,</i> 683 So. 2d 527 (Fla. 3d DCA 1996) | 2, 4 |
| <i>J.S.U.B., Inc. v. United States Fire Insurance Company,</i> Case No. 2D03-134, 30 Fla. L. Weekly D774 | (Fla. |
| <i>Jollie v. State,</i> 405 So. 2d 418 (Fla. 1981) | 5 |
| <i>Lassiter Construction Co., Inc. v. American States Insurance Company,</i> 699 So. 2d 768 (Fla. 4th DCA 1997) | 2, 4 |
| <i>Robles Del Mar Inc. v. Town of Indian River Shores,</i> 385 So. 2d 1371 (Fla. 1980) | 5 |
| <i>Sekura v. Granada Insurance Company,</i> 896 So. 2d 861 (Fla. 3d DCA 2005) | 6 |

PRELIMINARY STATEMENT

Petitioner, Auto-Owners
Insurance Company, refers to itself as
“Auto-Owners.”

Auto-Owners refers to
Respondents, Jody Willis Builder,
Inc., Chet Tharpe and Helen Tharpe,
as “Respondents.”

STATEMENT OF THE CASE

AND FACTS

The Second District entered a
citation per curiam affirmed opinion
in this matter on July 1, 2005, citing
to the court’s decision in *J.S.U.B.,
Inc. v. United States Fire Insurance
Company*, Case No. 2D03-134, 30
Fla. L. Weekly D774 (Fla. 2d DCA

March 18, 2005), *review pending*,

SC05-1295.¹

The *J.S.U.B.* case is pending before this Court on a petition for discretionary review as Case No. SC05-1295. As discussed below, if this Court exercises jurisdiction over *J.S.U.B.*, then it could exercise jurisdiction over this petition by Auto-Owners.

¹ The Second District issued a prior opinion that it withdrew by its order of July 1, 2005. Auto-Owners had filed a petition for review of that prior opinion, which was pending in this Court as SC05-1076. In light of the petition Auto-Owners has taken from the new July 1 opinion, it has filed a motion to dismiss Case No. SC05-1076.

ISSUE ON APPEAL

Whether the *J.S.U.B.* case, on which the Second District Based its Affirmance in this Appeal, Expressly and Directly Conflicts with District Court of Appeal Decisions in *Lassiter Construction Company, Inc.*² and *Home Owners Warranty Corporation*³?

² *Lassiter Construction Co., Inc. v. American States Insurance Company*, 699 So. 2d 768 (Fla. 4th DCA 1997).

³ *Home Owners Warranty Corporation v. Hanover Insurance Company*, 683 So. 2d 527 (Fla. 3d DCA 1996).

SUMMARY OF ARGUMENT

The Second District affirmed Auto-Owners' appeal based on the *J.S.U.B.* case, which is pending before this Court, awaiting a decision on jurisdiction. If this Court accepts *J.S.U.B.* based on conflict jurisdiction, then the Second District's citation PCA to *J.S.U.B.* provides a basis for this Court's jurisdiction over Auto-Owners' appeal. The *J.S.U.B.* decision expressly and directly conflicts with the decisions of two other district courts of appeal.

ARGUMENT

**I. The *J.S.U.B.* Case, on Which
the Second District Based its
Affirmance in this Appeal,
Expressly and Directly
Conflicts with District Court
of Appeal Decisions in
*Lassiter Construction
Company, Inc.*¹ and *Home
Owners Warranty
Corporation*.⁵**

**A. Standard of
Review.**

Because this Court
makes the initial decision on whether

⁴ *Lassiter Construction Co., Inc. v. American States Insurance Company*, 699 So. 2d 768 (Fla. 4th DCA 1997).

it will accept this case based on conflict jurisdiction, it is not reviewing the decision of an underlying court on the merits. This Court determines as a matter of law if there is conflict between the decisions.

The district court opinion does not have to identify the conflict to create jurisdiction. *Ford Motor Company v. Kikas*, 401 So. 2d 1341 (Fla. 1981).

⁵ *Home Owners Warranty Corporation v. Hanover Insurance Company*, 683 So. 2d 527 (Fla. 3d DCA 1996).

B. Argument.

The Second District affirmed Auto-Owners' appeal based solely on the *J.S.U.B.* case, which decision conflicts with the district court of appeal decisions in *Lassiter Construction Co., Inc.* and *Home Owners Warranty Corporation*. If this Court accepts jurisdiction of the *J.S.U.B.* case, then Auto-Owners requests that it accept jurisdiction of this decision as well, which cited to the *J.S.U.B.* case as its sole basis for affirming.

As this Court has recognized, it may exercise jurisdiction over a citation PCA when the cited case is pending before the Court. *Jollie v. State*, 405 So. 2d 418 (Fla. 1981); *Harrison v. Hyster Company*, 515 So.

2d 1279 (Fla. 1987). Consistent with this Court's comments in *Harrison v. Hyster*, the Court may decide first if it is going to accept jurisdiction in *J.S.U.B.*, and if it does, then accept jurisdiction over the Auto-Owners' case.⁶

J.S.U.B. reaches a decision contrary to the decisions of the Fourth and Third District Courts of Appeal in *Lassiter* and *Home Owners Warranty*. Based on the conflict between *J.S.U.B.* and the decisions in *Lassiter* and *Home Owners Warranty*, conflict jurisdiction exists for this Court to

⁶ *Robles Del Mar Inc. v. Town of Indian River Shores*, 385 So. 2d 1371 (Fla. 1980), is inapposite. There, the citation PCA opinion cited to *Epifano v. Town of Indian River Shores*, 379 So. 2d 966 (Fla. 4th DCA 1979). The parties in *Epifano* did not seek review in this Court, so there was no basis for the Court to accept jurisdiction in *Robles*, which cited to *Epifano*. By contrast,

accept review of the *J.S.U.B.* decision.⁷ If that occurs, then this Court would have jurisdiction to accept review over this petition by Auto-Owners. Then, if the Court reversed the decision in *J.S.U.B.* – the sole case cited for the affirmance in Auto-Owners’ case – Auto-Owners would benefit from that reversal.

here the petitioner in *J.S.U.B.* is seeking review in this Court.

⁷ See also *Sekura v. Granada Insurance Company*, 896 So. 2d 861 (Fla. 3d DCA 2005); *Aetna Casualty and Surety Company of America v. Deluxe Systems, Inc. of Florida*, 711 So. 2d 1293 (Fla. 4th DCA 1998).

CONCLUSION

Auto-Owners respectfully
requests that this Court accept
jurisdiction in its case if the Court
accepts jurisdiction over *J.S.U.B.*

Respectfully submitted,

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COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a
copy of the foregoing has been
furnished by U.S. Mail to: ERNEST
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Attorneys for Appellees Chet Tharpe
and Helen Tharpe, on August _____,
2005.

Attorney

CERTIFICATE OF

COMPLIANCE

I HEREBY CERTIFY that this
brief has been prepared using 14-point

Times New Roman type, a font that is proportionately spaced.

Attorney

INDEX TO APPENDIX

*Auto-Owners Insurance Company v.
Jody Willis Builder, Inc.,
Chet Tharpe and Helen Tharpe, Case
No. 2D04-139
Order rendered July 1, 2005* A -1