IN THE SUPREME COURT OF FLORIDA
TALLAHASSE, FLORIADA

CASE NO. SC12-144

COMPANION PROPERTY AND CASUALTY INSURANCY COMPANY,	)
Petitioner,	)
vs.	)
CATEGORY 5 MANAGEMENT GROUP, LLC,	)
Respondent.	)

BRIEF OF PETITIONER ON JURISDICTION

On Discretionary Review From the Decision of the First District Court of Appeal

WADSWORTH HUOTT, LLP
200 SE First Street, Suite 1100
Miami, FL 33131
305.777.1000 Telephone
305.777.1001 Facsimile
Attorneys for Petitioner

By: *s/Christopher W. Wadsworth*
Christopher W. Wadsworth
Florida Bar No. 78026

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PREFACE v

STATEMENT OF THE CASE AND FACTS 1-5

SUMMARY OF ARGUMENTS 6-7

POINT I 7-8

THE FIRST DISTRICT'S OPINION CREATES DIRECT EXPRESS CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS IN NOT ALLOWING AN INSURER TO RELY ON THE ALLEGATIONS IN THE COMPLAINT WHEN DETERMINING ITS DUTY TO DEFEND.

POINT II 8-9

THE FIRST DISTRICT'S APPARENT HOLDING THAT A WORKER CANNOT BE SIMULTANEOUSLY EMPLOYED BY MORE THAN ONE EMPLOYER IS CONTRARY TO THE LAW OF THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL.

POINT III 9-11

THE TRIAL COURT'S REJECTION OF APPELLEE'S TWO ALTERNATIVE ARGUMENTS CONTRADICTS THE TIPSEY COACHMAN DOCTRINE.

CONCLUSION 11

CERTIFICATE OF SERVICE 12

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

Aguero v. First Am. Ins. Co. 10, 11
927 So.2d 894 (Fla. 3d DCA 2005)

American Ins. Co. v. McGuire 10, 11
510 So.2d 1227 (Fla. 1st DCA 1987)

Applegate v. Barnett Bank 9
377 So.2d 1150 (Fla.1979)

Baron Oil Co. v. Nationwide Mut. Fire Ins. Co. 6, 7
470 So.2d 810 (Fla. 1st DCA 1985)

Berrier v. Associated Indem. Co. 8
142 Fla. 351, 196 So. 188 (1940)

Biltmore Constr. Co. v. Owners Ins. Co. 7
842 So.2d 947 (Fla. 2d DCA 2003)

Coastal Masonry, Inc. v. Gutierrez 10
30 So. 3d 545 (Fla. 3d DCA 2010)

Dade County School Bd. v. Radio Station WQBA 9
731 So.2d 638 (Fla. 1999)

Federal Insurance Co. v. Applestein 6
377 So.2d 229 (Fla. 3d DCA 1979)

Hamilton v. Shell Oil Co. 9
215 So.2d 21 (Fla. 4th DCA 1968)

J. J. Murphy & Son, Inc. v. Gibbs 8
137 So.2d 553 (Fla. 1962)

Jones v. Florida Ins. Guar. Ass'n, Inc. 6, 7
908 So.2d 435 (Fla. 2005)

Kings Point West, Inc. v. North River Insurance Co. 6
412 So.2d 379 (Fla. 2d DCA 1982)

McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n 7
758 So.2d 692 (Fla. 4th DCA 1999)

Naranja Rock Co. v. Dawal Farms 8
74 So.2d 282 (Fla. 1954)

Nat. Union Fire Ins. Co. v. Lenox Liquors, Inc. 6, 7
358 So.2d 533 (Fla. 1977)

New Amsterdam Casualty Co. v. Knowles 6
95 So.2d 413 (Fla. 1957)

St. Paul Fire & Marine Insurance Co. v. Thomas 6
273 So.2d 117 (Fla. 4th DCA 1973)

State Farm Mutual Automobile Ins. Co. v. Universal Atlas Cement Co. 6
406 So.2d 1184 (Fla. 1st DCA 1982)

PREFACE

This is a Petition seeking to have this Court exercise discretionary jurisdiction over a decision of the District Court of Appeal, State of Florida, First District based on a decisional conflict. The parties will be referred to by their proper names or as they appeared in the trial court. The following designations will be used:

(A) – Appendix (Lower court decision)

(R) – Record on Appeal

STATEMENT OF THE CASE AND FACTS

This case involves a coverage dispute between Appellee, the insurer, Companion Property and Casualty Insurance Company (hereinafter "Appellee"), and the Appellant, the insured, Category 5 Management Group, LLC (hereinafter "Cat 5" or "Appellant"). Circuit Court Judge Hon. Nickolas P. Geeker (the "Trial Court") entered an Order granting Appellee's motion for summary judgment finding that Appellee had no duty to defend Appellant in connection with an automobile collision case because, the Trial Court held, coverage was excluded by the respective policy's automobile exclusion. A. 1, p. 1. Appellant appealed the Trial Court's summary judgment to the First District Court of Appeals (the "First District") and, with its Opinion dated November 16, 2011 (the "First District Opinion"), the First District reversed the Trial Court's dismissal of the case and remanded the case to the Trial Court for further proceedings. A. 1, p. 1-2.

The underlying facts of this case are summarized in the First District Opinion:

> Appellant, a limited liability company owned by John and Dorothy Sims and located in Pensacola, purchased a commercial general liability policy from appellee for one year commencing on June 1, 2007, and ending on June 1, 2008. In the summer of 2007, appellant was hired by Young's General Contracting to supervise subcontractors and their crews performing cleanup operations in New Orleans following Hurricane Katrina. One of these subcontractors was Colonel McCrary Trucking, which performed certain transportation-related services at the project site. Joe Johnson, an employee of Colonel McCrary Trucking, worked at the site. On July 11, 2007,

> while driving a pickup truck owned by R.D. Construction (a subcontractor of Colonel McCrary Trucking), Johnson ran a stop light in Alabama and struck a car occupied by the Stewart family, severely injuring three family members.

A. 2. The Stewart family thereafter sued Mr. Johnson, the subcontractors involved with Mr. Johnson's construction project and Appellant, the general contractor who had contracted with those subcontractors. A. 1, p. 2. The Stewart family's claims against Appellee and its two principles, John and Dorothy Sims, were for "Negligence and/or Wantonness," "Negligent and/or Wanton Hiring," and "Negligent and/or Wanton Training." A. 1, p. 2-3. These claims were asserted in Counts I through V of the Stewart family Complaint. R. 243-249. As to each claim against Appellant, the Stewart family Complaint alleged that Mr. Johnson "was hired by or under the direct, control and supervision of John Sims and/or Dorothy Sims," again who are the principles of Appellant. A. 1, p. 3. More specifically, the Stewart family Complaint alleged in every claim against Appellant that Joe Johnson was employed by Appellant and every such claim was legally based on that employment relationship. In particular, Count I alleges that the Stewart family's claims arose "during his employment with defendants" (including Appellant), explicitly refers to Joe Johnsons' "duties of employment," and explicitly refers to Joe Johnson as an "employee." R. 245-46 (at ¶ 44, item (c)). Similarly, Count II explicitly refers to Joe Johnson being "employed" by, and "duties of employment" with respect to Appellant. R. 248, ¶ 47. Likewise, Count

III explicitly makes allegations against Appellant "during [Mr. Johnson's] employment" with Appellant and refers to Joe Johnson's "duties of employment" with respect to Appellant. R. 249, ¶ 51. Furthermore, the allegations in Count IV, as they relate to Appellant, are all based on Joe Johnson's "duties of employment" with Appellant. *Id.* at ¶ 53. As are the allegations in Count V. *Id*. at ¶ 55.

It is true that the Stewart family alleges that Joe Johnson was employed by other defendants in their Complaint. A. 1, p. 6. However, it is just beyond dispute that the Complaint also alleges that Mr. Johnson was employed by Appellant.

Appellant's general commercial insurance policy with Appellee contained the following exclusion:

> This insurance does not apply to:
>
> . . .
>
> g. Aircraft, Auto or Watercraft
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading." **This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by the insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.**

A. 1, p. 3-4 (the "Automobile Exclusion"). Appellee denied coverage based, at least in part, on this exclusion. A. 1, p. 3. Thereafter, Appellant consented to a

judgment with the Stewart family for $6 million and this lawsuit appears to be the only thing preventing Appellant's complete dissolution. R. 756 (Vol. 5); A. 1, p. 4. Appellant thereafter filed this lawsuit against Appellee for coverage under the policy.

After some discovery, Appellee moved for summary judgment and on January 27, 2011, the Trial Court entered an Order granting Appellee's motion on the basis of the Automobile Exclusion. [R. 492-493 (Vol. 3)]. Appellant appealed that Order to the First District. R. 758-761 Vol. 5.

In Appellee's answer brief, in addition to arguing that denial of coverage was justified based on the Automobile Exclusion, Appellee argued that denial of coverage was justified based on (i) a geographical limitation in the policy and (ii) the doctrines of judicial and equitable estoppel. The first alternative argument was based on language in the policy stating that coverage was only for activities "in the performance of [the insureds] ongoing operations for the additional insured(s) at the location(s) designated above." A. 3, p. 12-13. The "location(s) designated above" included solely the Policy Schedule address (Location 1) of Appellant's business: 527 Bobwhite Court, Pensacola, FL 32514. R. 9. Importantly, the accident giving rise to the Stewart family's claims did not even occur in the same state as that address (it occurred in Alabama), much less the same address. Therefore, Appellee argued, the geographic limitation precluded coverage. The

second alternative basis for denying coverage, judicial and equitable estoppel, was based on the contradiction between (a) Appellant's position in this lawsuit that Joe Johnson was not an employee of Appellant, and (b) Appellant's position in the Stewart family lawsuit that he was an employee.

The First District reversed the Trial Court's decision regarding the Automobile Exclusion and rejected Appellee's two alternative arguments. A. 1, p. 7. It reversed the Trial Court's ruling on the automobile exclusion based on its finding that the Stewart family Complaint did not clearly allege an employment relationship between Joe Johnson and Appellant. To support that finding the First District pointed out that the Stewart family Complaint also alleged that Joe Johnson was an employee of another defendant in that case, Colonial McCrary Trucking. A. 1, p. 6. Apparently, the First District held that it is just not possible for the Stewart family to allege that Joe Johnson was an employee of more than one entity. The First District rejected Appellee's two alternative argument arguments based on the holding that "those defenses could not be asserted for the first time in appellee's answer brief." A. 1, p. 7.

SUMMARY OF ARGUMENTS

The First District Opinion creates conflict with decisions of this Court and other districts courts for three reasons. First, in reversing the Trial Court's ruling on the Automobile Exclusion, the Trial Court reversed the doctrine of this Court that an insurer may rely solely on the allegations in the complaint when determining its duty to defend its insured in a lawsuit. *Jones v. Florida Ins. Guar. Ass'n, Inc*. 908 So.2d 435 (Fla. 2005) (citing *Nat. Union Fire Ins. Co. v. Lenox Liquors, Inc*., 358 So.2d 533, 535 (Fla. 1977)). *See also Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So.2d 810 (Fla. 1st DCA 1985); (citing *Nat. Union Fire Insurance Co. v. Lenox Liquors, Inc*., 358 So.2d 533 (Fla. 1977); *New Amsterdam Casualty Co. v. Knowles*, 95 So.2d 413 (Fla. 1957); *State Farm Mutual Automobile Ins. Co. v. Universal Atlas Cement Co*., 406 So.2d 1184 (Fla. 1st DCA 1982). This puts the First District at odds the law of this Court and the numerous decisions in other District Court of Appeal that have followed it. *See, e.g., Kings Point West, Inc. v. North River Insurance Co*., 412 So.2d 379 (Fla. 2d DCA 1982); *Federal Insurance Co. v. Applestein*, 377 So.2d 229 (Fla. 3d DCA 1979); *St. Paul Fire & Marine Insurance Co. v. Thomas*, 273 So.2d 117 (Fla. 4th DCA 1973)).

Second, inasmuch as the First District held that the Stewart family Complaint did not allege an employment relationship with Appellant because it also alleged an employment relationship with another entity, the First District

Opinion violated the law in this Court and other District Courts that a worker may simultaneously be employed by more than one employer.

Third, and finally, the First District Opinion violated the well-settled tipsy coachman doctrine when it rejected as untimely the two alternative arguments proposed by Appellee in support of the Trial Court's ruling.

POINT I

THE FIRST DISTRICT'S OPINION CREATES DIRECT EXPRESS CONFLICT WITH THE DECISION OF THIS COURT AND OTHER DISTRICT COURTS IN NOT ALLOWING AN INSURER TO RELY ON THE ALLEGATIONS IN THE COMPLAINT WHEN DETERMNINING ITS DUTY TO DEFEND.

This Court has long held that an insurer's "duty to defend must be determined from the allegations in the complaint." *Jones v. Florida Ins. Guar. Ass'n, Inc*. 908 So.2d 435 (Fla.,2005) (citing *Nat. Union Fire Ins. Co. v. Lenox Liquors, Inc*., 358 So.2d 533, 535 (Fla.1977); *Biltmore Constr. Co. v. Owners Ins. Co*., 842 So.2d 947, 949 (Fla. 2d DCA 2003); *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So.2d 692, 695 (Fla. 4th DCA 1999); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co*., 470 So.2d 810, 813 (Fla. 1st DCA 1985). Here, as the Trial Court reasoned, because the Stewart Complaint repeatedly and unambiguously alleged that Joe Johnson was the employee of Appellant, the Automobile Exclusion was triggered so that there was no coverage under its policy with Appellant. Importantly, the First District Opinion acknowledges that if Joe

Johnson was an employee of Appellant, then the Automobile Exclusion applies because it excludes "claims involving automobiles owned or operated by or rented or loaned to any insured" and "[t]he policy defined 'insured' as including appellant and its employees." A. 1, p. 5-6. And again, the Stewart family Complaint repeatedly alleges in every claim asserted against Appellant that Joe Johnson was employed by Appellant. *Supra* 2-3. Therefore, in reversing the Trial Court's decision, the First District Opinion is in direct conflict with numerous cases of this Court and the other District Courts of Appeal that an insurer may rely on the allegations in the Complaint when determining coverage.

POINT II

THE FIRST DISTRICT'S APPARENT HOLDING THAT A WORKER CANNOT BE SIMULTANEOUSLY EMPLOYED BY MORE THAN ONE EMPLOYER IS CONTRARY TO THE LAW OF THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL.

This Court long ago held that an employee may be concurrently employed by more than one employer. In *J. J. Murphy & Son, Inc. v. Gibbs,* 137 So.2d 553, 562 (Fla. 1962), this Court discussed the factors for determining "concurrent employment" by multiple employers with respect to the same or similar job duties. Also, in *Berrier v. Associated Indem. Co.,* 142 Fla. 351, 196 So. 188 (1940), this court analyzed the liability between an "original" employer and a "special" employer, the latter being defined as "the party to whom the [employee] has been

furnished." And in *Naranja Rock Co. v. Dawal Farms*, 74 So.2d 282 (Fla. 1954), this Court held that where an employee is "at the same time employed by two separate companies," they "must be treated as separate employers." *Id.* at 288. Also, the Fourth District Court of Appeal explicitly held that, in Florida, "the concept of joint employment has been recognized as a distinct contractual possibility" *Hamilton v. Shell Oil Co*., 215 So.2d 21, 23 fn. 2 (Fla. 4th DCA 1968).

Here, the First District contradicts all of these cases because it relied on its observation that the Stewart family complaint alleges an employment relationship with another entity, Colonial McCrary Trucking, to conclude that it did not necessarily allege an employment relationship with Appellant. A. 1, p. 6. Again, that conclusion flatly contradicts the recognition in this Court that an employee may be simultaneously employed by more than one employer. And it also contradicts the Fourth District's holding that, under Florida law, "joint employment" is recognized.

POINT III

THE TRIAL COURT'S REJECTION OF APPELLEE'S TWO ALTERNATIVE ARGUMENTS CONTRADICTS THE TIPSEY COACHMAN DOCTRINE.

According to the well settled tipsy coachman rule, "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record." *Dade County School Bd. v.*

Radio Station WQBA 731, So.2d 638 (Fla. 1999) (citing *Applegate v. Barnett Bank*, 377 So.2d 1150, 1152 (Fla.1979)). Here, the First District Opinion held that Appellee could not assert for the first time in its appeal two arguments, both of which were based on the undisputed record, "could not be asserted for the first time in appellee's answer brief." A. 1, p. 7. That holding just flatly contradicts tipsy coachman.

Incidentally, the two cases cited in the First District Opinion on this point are both inapposite. A. 1, p. 7. In *Coastal Masonry, Inc. v. Gutierrez,* 30 So. 3d 545, 549 n. 3 (Fla. 3d DCA 2010), the Third District Court of Appeals was reviewing an order where the insurer failed to raise a coverage issue, lost and then raised it for the first time on appeal. In that case the tipsy coachman doctrine did not apply because it was the appellant that failed to raise the argument (therefore waiving it) below. Likewise, in *American Ins. Co. v. McGuire,* 510 So.2d 1227 (Fla. 1st DCA 1987), the tipsy coachman doctrine had no application because the insurer was the appellant.[1] But here, because it was the Appellee providing new

---

[1] While the pin citation in the First District Opinion to *Costal Masonry* plainly involved issue waiver, and was therefore subject to the tipsy coachman doctrine, the Court's pin citation to *McGuire* might have been intended to invoke the doctrine of equitable estoppel. But to establish that doctrine, Appellee would have had to reasonably rely on the insured's representations to its detriment. It did not. Here, when the Appellee denied coverage it *might have* done exactly what the insured did in *McGuire*—defend and prevail on the obviously legally baseless claims against it. 510 So.2d at 1229-30 (explaining that "since [the insureds] incurred expense by acting on their belief that [the insured's stated basis to deny]

arguments to support the Trial Court's ruling, the tipsy coachman doctrine required the First District to affirm the Trial Court's ruling if those arguments were valid.

CONCLUSION

In order to maintain uniformity in decisional law and adherence to this Court's rulings, Appellee respectfully requests discretionary review of the First District Opinion under Florida Constitution, Article 5, § 3(b)(3).

---

coverage was without merit, [the insurer] ought now be estopped to raise the occurrence defense" and affirming "order directing [insurer] to reimburse [insured] for expenses incurred in defense of the action"). But Appellant did not do that. Instead, it traded a gigantic (and legally unjustifiable) judgment for an assignment of the proceeds of this coverage action. R. 746; Supp. P. 773**.** To the extent that decision was reasonable, it was because the judgment was harmless as to Appellant because it was more than likely contingent upon the underlying plaintiff's success in pursuing this coverage action on Appellant's behalf. *See e.g. Aguero v. First Am. Ins. Co.*, 927 So.2d 894 (Fla. 3d DCA 2005) (insured assigned proceeds of coverage action in exchange for release of claims in event coverage action failed). In other words, Appellant's decision to agree to the judgment was either unreasonable or harmless. Either way, it cannot form the basis of an equitable estoppel defense. Therefore, *McGuire* is inapposite regarding either the doctrine of issue waiver (because of tipsy coachman) or the issue of equitable estoppel (because Appellant did not reasonably rely on Appellee's coverage decision to its detriment).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail and facsimile to: ***Kevin F. Masterson, Esq***., MASTERSON & NEWELL, LLC, P.O. Box 2067, Mobile, Alabama 36652 [f: (251) 441-9984], and ***Emily Nelson, Esq***., MORRIS, HAYNES & HORNSBY, 3500 Colonnade Parkway, Suite 100, Birmingham, Alabama 35243 [f: (205) 324-4008] on this 6th day of February, 2012.

WADSWORTH HUOTT, LLP
Attorneys for Petitioner
200 SE First Street, Suite 1100
Miami, FL 33131
305.777.1000 Telephone
305.777.1001 Facsimile

By: *s/Christopher W. Wadsworth*
Christopher W. Wadsworth
Florida Bar No. 78026

CERTIFICATE OF COMPLIANCE

The Appellee hereby certifies that the foregoing complies with the font requirement listed in Fla. R. App. P. § 9.100(l) and was drafted using Times New Roman, 14-point font.

By: *s/Christopher W. Wadsworth*
Christopher W. Wadsworth
Florida Bar No. 78026