Electronically Filed 07/17/2013 02:38:44 PM ET

RECEIVED, 7/17/2013 14:43:35, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC13-1244

FOURTH DISTRICT COURT
OF APPEAL CASE NO.: 4D11-3803

BENJAMIN and BETH ERGAS,

Petitioners,

vs.

UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondent.
_____/

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

Respondent agrees that the District Court issued an opinion and holding of first impression in the State of Florida, considering the application of the insurance policy term "marring" to a particular property damage loss. However, neither the Trial Court nor the District Court determined there was any ambiguity within the policy but, instead, accorded the term "marring" its plain and ordinary meaning and applied that meaning to the undisputed damages.

The District Court's specific Holding was as follows:

> We affirm, because marring is not covered under the policy, and the damage to the tile floor constitutes marring. *Ergas v. Universal Property and Casualty Insurance Company*, 38 Fla.L.Weekly D900 (Fla. 4th DCA 2013).

At no time did Petitioners create a sufficient record to establish that an ambiguity existed within the subject policy of insurance. No alternative dictionary definition was ever suggested by Petitioners. No alternative definition of any type was submitted by Petitioners in opposition to the Motion for Summary Judgment, and it was not until Petitioners filed a Motion for Rehearing with the Trial Court that the purported "industry definition" was offered. However, contrary to the allegations in Petitioners' Jurisdictional Brief, no evidence was ever submitted to the Trial Court or the District Court that the proffered definition was "insurance industry standard",

"widely - accepted and reliable interpretation" or that the proffered definition or its source, the alleged "Field Guide for Property and Casualty Agents and Practitioners", contained a definition which would be considered to provide the plain and ordinary definition of the subject term.

SUMMARY OF ARGUMENT

No basis for conflict jurisdiction appears within the four corners of the decision brought for review.

Petitioners failed to establish an ambiguity within the subject policy of insurance. Insurance policy terms are not ambiguous merely because they are undefined.

The Trial Court and District Court properly accorded the insurance policy terms their plain and ordinary meaning, in accordance with established precedent, and correctly determined that the damage claimed by Petitioners fell within this meaning.

The District Court properly determined that the Doctrine of the Ejusdem Generis does not apply to the interpretation of the insurance policy at issue in accord with existing precedent. There are no general terms or general words which require the application of the principle of Ejusdem Generis in the present contract. Therefore, the District Court's interpretation of the term "marring", pursuant to the plain and ordinary meaning of the terms, was properly reached without reference to adjoining

terms in the policy.

Since Petitioners have failed to establish any direct conflict, the Supreme Court does not have discretion to entertain the instant appeal, and jurisdiction should be denied.

STANDARD OF REVIEW

In order for the Supreme Court to grant conflict jurisdiction, the conflict must appear within the four corners of the decision brought for review. *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). The four corners rule is strictly enforced. *R.J. Reynolds Tobacco Company v. Kenyon*, 882 So.2d 986, 988-89 (Fla. 2004).

For conflict jurisdiction to exist, the Supreme Court must find that there is a direct conflict between the decision brought for review and prior rulings of a Florida District Court of Appeal or the Florida Supreme Court. *Stevens v. Jefferson*, 436 So.2d 33, 34 (Fla. 1983), aff'g 408 So.2d 634 (Fla. 5th DCA 1981).

In *Nielsen v. Sarasota*, 117 So.2d 731 (Fla. 1960), this Court articulated the Standard of Review as follows:

> While conceivably there may be other circumstances, the principle situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflicts are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. Under the first situation, the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the Court of Appeal. Under the second situation, the controlling facts become vital and our jurisdiction may be asserted only where the Court of Appeal has applied a recognized rule of law to reach a

conflicting conclusion in a case **involving substantially the same controlling facts as were involved in allegedly conflicting prior decisions of this Court.** *Nielson v. Sarasota, supra* at 734, *Florida Power Company v. Bell*, 113 So.2d 697 (Fla. 1959) (emphasis added).

ARGUMENT

A. PETITIONERS HAVE FAILED TO ESTABLISH ANY FACTS OR CIRCUMSTANCES WHICH WOULD ESTABLISH A DIRECT CONFLICT WITH APPLICABLE PRECEDENT.

For the Supreme Court to properly exercise the conflict jurisdiction, the conflict must appear within the four corners of the decision brought for review. *Reaves v. State, supra.* The four corners rule is strictly enforced. *R.J. Reynolds Tobacco Company v. Kenyon, supra.*

The overriding purpose of conflict review is elimination of inconsistent views within Florida about the same question of law. *Wainwright v. Taylor*, 476 So.2d 669, 670 (Fla. 1985). If there is no conflict established, then the Court has no discretion to entertain the appeal, and the petition should be denied on that basis. *Florida Star v. B.J.F.* 530 So.2d 286, 288-89 (Fla. 1988).

The Petitioners concede that the application of particular insurance policy terms by the District Court is a matter of first impression within the State of Florida. The District Court never found the policy term "marring" to be ambiguous and, in

fact, specifically noted that Petitioners had failed to offer any alternative definition to establish the plain and ordinary meaning of the term. As a result, the District Court did not actually supply a definition; but rather, utilized the plain and ordinary meaning of the term "marring", as supplied by Respondent and determined that the damages claimed by Petitioners fell within that meaning. This ruling was specifically reflected in the District Court's Opinion, wherein it stated:

> As did the Trial Court, we conclude that the damage caused by the hammer dropping constituted marring and thus was excluded from policy coverage. *Ergas v. Universal Property and Casualty Insurance Company*, 38 Fla.L.Weekly D900 (Fla. 4th DCA 2013).

Accordingly, the District Court's analysis was, in fact, consistent with precedent calling for the court to utilize the plain and ordinary meaning of undefined terms in a policy of insurance, and there is no direct conflict of any type between the decision brought for review and any existing precedent. The District Court's Opinion does not announce a rule of law which conflicts with any rule previously announced by this Court, nor does the District Court's Opinion apply a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case since, as Petitioners have conceded, this is a case of first impression.

Therefore, the Petition should be denied.

B. THE DISTRICT COURT CORRECTLY APPLIED THE PROPER RULES OF INSURANCE POLICY CONSTRUCTION, IN ACCORD WITH APPLICABLE PRECEDENT.

The rights and obligations of the parties under an insurance policy are governed by contract law since they arise out of an insurance contract. *Lumbermens Mutual Casualty Company v. August*, 530 So.2d 293, 295 (Fla. 1988). If a contract is not ambiguous, it must be enforced pursuant to its plain language. *Travelers Indemnity Company v. PCR, Inc.*, 889 So.2d 779, 785 (Fla. 2004). The mere fact that a policy term is undefined does not render the term ambiguous. *Deni Associates of Florida Inc. v. State Farm Fire and Casualty Insurance Co.*, 711 So.2d 1135 (Fla. 1998). Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written. *State Farm Mutual Automobile Insurance v. Menendez*, 70 So.3d 566, 569-70 (Fla. 2011). In construing insurance contracts, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect. *U.S. Fire Insurance Company v. J.S.U.B. Inc.* 979 So.2d 871, 877 (Fla. 2007).

Since Petitioners failed to establish, and the District Court failed to find, any ambiguity relating to the term "marring" in the subject policy of insurance, the

District Court properly proceeded to determine if the damages claimed by Petitioners fell within the plain meaning of "marring". Finding that the chipped tile did, indeed, fall within the plain and ordinary meaning of the term, the District Court properly gave the term its full meaning and operative effect, concluding that the claimed damage was not covered under the policy.

Only when a genuine inconsistency, uncertainty or ambiguity in meaning remains after resort to the ordinary rules of construction should the contract language be construed against the drafter. *Swire Pacific Holdings, Inc. V. Zurich Insurance Company*, 845 So.2d 161, 165 (Fla. 2003). The only information or evidence properly before the Trial Court and the District Court were the standard dictionary definitions pertaining to "marring". Neither these definitions, nor the policy language itself, created any ambiguity, and therefore the District Court properly gave meaning to the policy terms as drafted.

Accordingly, there is no direct conflict with the decision of the District Court and any existing precedent, and jurisdiction should be denied.

C. THE DISTRICT COURT PROPERLY DECLINED TO APPLY THE PRINCIPLE OF EJUSDEM GENERIS TO INTERPRET THE INSURANCE POLICY TERMS.

In *Fayad v. Clarendon National Insurance Company*, 899 So.2d 1082 (Fla.

2005), this Court explained the principle of Ejusdem Generis, stating:

> Distilled to it essence, this rule provides that where general words follow an enumeration of specific words, the general words are construed as to the same kind or class as those that are specifically mentioned. *Fayad v. Clarendon National Insurance Company*, *supra* at 1088 - 89.

This District Court properly determined that the principle of Ejusdem Generis does not apply to the interpretation or construction of the insurance policy terms at issue, since there are no general terms or general words which follow, or are meant to influence, the policy exceptions for "wear and tear, marring, deterioration" which were the basis of the Trial Court's Summary Judgment ruling.

Accordingly, the District Court appropriately followed precedent in declining to apply the principle of Ejusdem Generis to the interpretation of subject insurance policy, and there is no direct conflict on this issue with any other decisions of this Court or any other Florida District Court. Therefore, there is no basis for this Court to exercise conflict jurisdiction and the Petition should be denied.

CONCLUSION

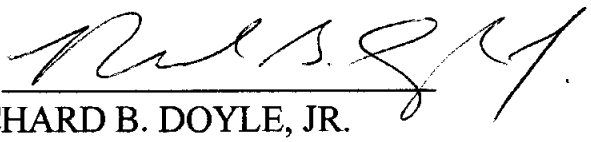
The District Court properly followed precedent in its construction of the subject insurance policy. The District Court's decision does not conflict with any rule of law previously announced by this Court or any District Court of the State of Florida. The District Court's Opinion also does not apply a rule of law to produce a

different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court, or any Court of the State of Florida. Accordingly, there is no direct conflict, and therefore no basis for this Court to exercise jurisdiction. The Petition should be denied.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by Electronic Mail on this 17th day of July, 2013 to: pfeltman@acglegal.com; cmirabal@acglegal.com, and service@acglegal.com, **Paul B. Feltman, Esquire**, ALVAREZ, CARBONELL, FELTMAN, JIMENEZ & GOMEZ, P.L., 2100 Ponce de Leon Boulevard, Suite 800, Coral Gables, Florida 33134.

LOUGHREN AND DOYLE, P.A.

By: 

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CERTIFICATE OF COMPLIANCE WITH FONT AND TYPE SIZE REQUIREMENTS

COMES NOW, the undersigned, counsel for Respondent, and hereby certifies that the above filing is typed in Times New Roman 14-point font, in compliance with Rule 9.100(l) of the Florida Rules of Appellate Procedure.

RICHARD B. DOYLE, JR.