IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC21-1148

ANCHOR PROPERTY AND CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

ALEX TRIF AND GEORGE TRIF,

Respondents.

PETITIONER'S JURISDICTIONAL BRIEF

Fourth District Court of Appeal Case No. 4D20-814
Fifteenth Judicial Circuit Court Case No. 50-2018-CA-00820-XXXX-MB

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STATEMENT OF THE ISSUES

Petitioner Anchor Property and Casualty Insurance Company ("Anchor") respectfully requests the Court exercise its discretionary jurisdiction to review the following issue:

1. Whether the Fourth District Court of Appeal's decision in *Anchor Property and Casualty Insurance Company v. Trif*, 4D20-814, 2021 WL 2217265 (Fla. 4th DCA June 2, 2021) ("*Trif*") correctly found ambiguous the standard "Concealment or Fraud" provision contained in property insurance policies throughout Florida, contrary to the holdings in *Universal Property and Casualty Insurance Company v. Johnson*, 114 So. 3d 1031 (Fla. 1st DCA 2013) ("*Johnson*"), *Privilege Underwriters Reciprocal Exchange v. Clark*, 174 So. 3d 1028 (Fla. 5th DCA 2015) ("*Privilege Underwriters*"), and *Mezadieu v. SafePoint Insurance Company*, 315 So. 3d 26 (Fla. 4th DCA 2021) ("*Mezadieu*")?

In addition to and independent of the issue upon which jurisdiction is invoked, Anchor further requests the Court review the following issues:

2. Whether statements by an insured's agent to the insurer are binding on the insured for purposes of applying the "Concealment or Fraud" provision?

3. Whether an insured's submission of a $52,000 repair estimate while in possession of a $26,000 estimate for the same repair constitutes a "material" misrepresentation under the "Concealment or Fraud" provision?

STATEMENT OF THE CASE AND FACTS

Anchor appealed to the Fourth District Court of Appeal from an adverse jury verdict and final judgment. (App. 4).[1] Anchor's primary defense at trial asserted that their insureds, Respondents Alex Trif and George Trif ("Respondents"), violated their property insurance policy's "Concealment or Fraud" provision by submitting a roof repair estimate approximately double what it should have been. (App. 4-5). The Trifs submitted an estimate seeking $52,800 while they possessed an estimate to perform the same repair for $26,000. (App. 5-6).

Anchor believed this conduct to be a "material false statement" within the third prong of the following standard policy provision:

> **2. Concealment or Fraud.**
>
> a. Under SECTION I - PROPERTY COVERAGES, with respect to all "insureds" covered under this policy, we provide no coverage for loss under SECTION I - PROPERTY COVERAGES if, whether before or after a loss, one or more "insureds" have:

[1] Citations to the Appendix are in the form: (App. [page]).

> (1) Intentionally concealed or misrepresented any material fact or circumstance;
>
> (2) Engaged in fraudulent conduct; or
>
> (3) Made material false statements;
>
> relating to this insurance.

(App. 4).

On appeal, two members of the Fourth District Court of Appeal's three-judge panel held that "the 'Concealment or Fraud' provision is ambiguous, so it must be construed in the light most favorable to the insureds." (App. 8). The majority found it ambiguous whether "false statements" require a showing of intent. (App. 11). The majority discussed and rejected the First District Court of Appeal's analysis in *Johnson* finding the same language unambiguous and enforceable. (*Id.*).

The First District Court of Appeal held that intent is not required to establish "false statements" under the provision's third subsection because "intent" expressly appears within the first:

> We agree with Universal that, given the language of subsection 2a, subsection 2c would be superfluous if a "false statement" under 2c included only intentionally false statements.

Johnson, 114 So. 3d at 1036.

Following the First District Court of Appeal, the Fifth District Court of Appeal applied *Johnson* in *Privilege Underwriters*. *See* 174 So. 3d at 1031 ("However, a showing of intent is not required under the provisions of this policy.") (citing *Johnson*, 114 So. 3d at 1037). Although rejected as controlling by the *Trif* majority, the Fourth District Court of Appeal also adopted *Johnson* in a decision two months before *Trif*.[2] *See Mezadieu*, 315 So. 3d at 29 ("**We agree with, and adopt, the *Johnson* court's interpretation**.") (emphasis added); *see also Trif*, 2021 WL 2217265, *11-12 (Artau, J. concurring in part and dissenting in part).

The *Trif* majority rejected *Johnson* by concluding that *Johnson* "failed to address the ordinary meaning of the term 'false statement.'" (App. 11). To supply that meaning, the majority relied upon Black's Law Dictionary, the second "legal definition" of "false" in Merriam Webster's Online Dictionary, and a criminal case from the Connecticut Supreme Court, *State v. Tedesco*, 397 A.2d 1352 (Conn. 1978). (*Id.*). The majority also determined that *Johnson* conflicts with this Court's decision in *U.S. Fire Insurance Company v. Dickerson*, 90 So. 613 (Fla. 1921). (*Id.*).

[2] Anchor seeks review based on the inter-district conflict between *Trif*, *Johnson*, and *Privilege Underwriters*. Anchor notes the intra-district conflict between *Trif* and *Mezadieu* to underscore the discord resulting from *Trif* and the need for resolution in this Court.

Holding the "Concealment or Fraud" provision requires intent under all circumstances, the majority found intent was not established. (App. 11-12). The court held the insureds' inflated estimate from their representative could have been a mistake insufficient to preclude coverage. (App. 12).

On July 28, 2021, the same panel majority denied Anchor's motions for rehearing, rehearing *en banc*, or to certify conflict. On August 6, 2021, Anchor filed its Notice of Intent to Invoke Discretionary Review.

ARGUMENT

The *Trif* majority has misconstrued a critical insurance policy provision that safeguards the integrity of the insurance claim-making and adjusting processes. Contrary to the plain structure of the standard "Concealment or Fraud" provision, the *Trif* majority requires Florida property insurers now make an additional showing of intent in all situations where an insured makes a material false statement.

The broad ramifications of this decision warrant the Court's attention. The same policy language appears in virtually every property and casualty insurance policy in Florida. Review is both appropriate and necessary to

prevent this misinterpretation from further exacerbating the distressing state of first-party property litigation in Florida.[3]

Jurisdiction Exists to Resolve Irreconcilable Interpretations Of the Same Policy Language

The Court may accept jurisdiction because *Trif* expressly and directly conflicts with *Johnson* and *Privilege Underwriters*. *See* art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(2)(A)(iv). The *Trif* majority expressly and directly rejected the holding in *Johnson*:

> Taking an approach that departs from *Dickerson*, the First District has interpreted a "concealment or fraud" clause substantively identical to the one here at issue, although in the context of a misrepresentation on an insurance application, and held that a false statement need not be intentional to void the policy. . . . Although it was unnecessary to do so because the case was controlled by statute, *Johnson* went on to construe the meaning of the term "false statement" in section 2.a.(3) of the policy, but it failed to address the ordinary meaning of the term "false statement."

(App. 11); *see Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 271 n.1 (Fla. 2018) ("Because the [holding] is both apparent from the face of the opinion (i.e., express) and irreconcilable with the contrary rule of law and

[3] By the Office of Insurance Regulation's calculation, "in 2019, Florida accounted for **76.45% of all homeowners' suits opened against insurance companies in the U.S.**" Letter from David Altmaier to Chair Ingoglia (Apr. 2, 2021) (available online at https://www.insurancejournal.com/app/uploads/2021/04/Florida-OIR-Report.pdf) (emphasis added). The precipitous spike in litigation has caused equally unprecedented rate increases to Florida's insureds.

abuse of discretion analysis expressly set forth in our precedent (making the conflict 'direct'), we have jurisdiction.").

Although the *Trif* majority does not expressly reference *Privilege Underwriters*, *Trif*'s holding also directly conflicts with the Fifth District Court of Appeal on whether the "Concealment or Fraud" provision requires intent.[4] *See Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166–67 (Fla. 2006) (noting that jurisdiction lies where holdings are "irreconcilable"); (App. 13) (Artau J., concurring in part and dissenting in part) (citing *Privilege Underwriters* and *Mezadieu* as aligned with *Johnson*).

The "Concealment or Fraud" Provision Is Not Ambiguous

The *Trif* majority disregards the bedrock tenet of policy construction to read the policy as a whole. The majority isolates the term "false statements" and considers varying definitions, primarily from a criminal context. The mere availability of multiple definitions does not create ambiguity. The majority should have viewed the term in context, like the First District Court of Appeal in *Johnson*, the Fifth District Court of Appeal in *Privilege Underwriters*, and even the Fourth District Court of Appeal in *Mezadieu.* Instead, the majority manufactures an ambiguity where none exists.

[4] Jurisdiction may be accepted despite the *Trif* majority's refusal to certify conflict. *See State v. Vickery*, 961 So. 2d 309, 311–12 (Fla. 2007).

By viewing the term "false statements" in isolation, the majority disregards the Court's instruction to "read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007) (quoting *Auto–Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla. 2000)); Fla. Stat. § 627.419(1) ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto.").

Reading the "Concealment or Fraud" provision as a whole dispels the ambiguity that the majority strains to create. As Judge Artau notes in dissent, and consistent with *Johnson*, *Privilege Underwriters*, and *Mezadieu*, a "false statement" under the third subsection does not require intent because "intent" appears elsewhere in the same sentence: "The disjunctive use of "or" before subsection (3), without repeating the term—'intentionally'—as utilized in subsection (1), unambiguously renders intent to be unnecessary when an insurance company invokes subsection (3)—'material false statements'—in defense of a claim." (App. 13) (Artau, J., concurring in part and dissenting in part).

Instead of viewing "false statements" in context, the majority isolates the term and imports an element of intent based largely on legal dictionary definitions. "Language, of course, cannot be interpreted apart from context." *Smith v. United States*, 508 U.S. 223, 229 (1993). Resort to a dictionary is unnecessary where context illuminates meaning. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

The mere existence of multiple dictionary definitions does not create an ambiguity: "If multiple definitions alone created ambiguity, insurance policies would either lose all meaning or would devolve into epic tomes." *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F. Supp. 2d 488, 501 (E.D. Pa. 2006), *aff'd sub nom. Subclass 2 of Master Class of Plaintiffs Defined & Certified in January 30, 2006 & July 28, 2006 Orders of Circuit of Court of Cook County, Ill. in Litig*, 503 F.3d 339 (3d Cir. 2007); *see United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) ("There are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word.") (quoting Note, "Looking It Up: Dictionaries and Statutory Interpretation," 107 Harv. L. Rev. 1437, 1445 (1994)); *Kootnz v. Ameritech Servs., Inc.,* 466 Mich. 304, 645 N.W.2d 34, 42 (Mich. 2002)

("A word is not rendered ambiguous, however, merely because a dictionary defines it in a variety of ways."); *Citation Ins. Co. v. Gomez,* 426 Mass. 379, 688 N.E.2d 951, 953 (Mass. 1998) ("Nor does the mere existence of multiple dictionary definitions of a word, without more, suffice to create an ambiguity, for most words have multiple definitions.").

Here, there is no need for specialized dictionaries. The correct approach, applied in *Johnson*, *Privilege Underwriters*, and *Mezadieu*, is to define "false statement" by its plain meaning in context. That context dispels the need to rewrite the policy to read "intentionally false statement" based on a dictionary definition that contradicts the provision's overall structure.

Even viewing the term in isolation, the dictionary definitions upon which the *Trif* majority relies are misplaced in this civil setting. Black's Law Dictionary defines "false statement" by reference to criminal perjury. *See Statement*, Black's Law Dictionary (11th ed. 2019). Likewise, the Connecticut Supreme Court's *Tedesco* decision involved a criminal analysis. *See*, 175 Conn. at 292 ("The defendant was charged in an information with the crime of falsely certifying as to the administration of an oath . . . Because a specific intent to deceive is an essential element of the crime charged . . . "). A "false statement" in the criminal context differs fundamentally from a false statement under a civil contract because the former generally require

criminal intent. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56–58 n.9 (2007). Even disregarding the structure of the "Concealment or Fraud" provision, a court should not graft a criminal definition into a civil insurance contract.

Nor does *Johnson* contravene the Court's 1921 decision in *Dickerson*, as the *Trif* majority indicates. (App. 11). The term "false statements" does not appear in the policy in *Dickerson*, which focused on "false swearing." *See Dickerson*, 90 So. at 614. Consistent with this distinction, the insurer in *Dickerson* affirmatively alleged that the insured acted with intent: "That in the schedule submitted to the company as a basis of plaintiff's claim . . . the plaintiff *knowingly and willfully swore falsely, as averred, with intent*[.]" *Id.* (emphasis added). Anchor did not cast its defense as intentional false swearing. Under more recent precedent, these facts limit *Dickerson*'s application. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 882 (Fla. 2007) ("The role of precedent in insurance policy interpretation cases depends largely on whether the underlying facts and the policies at issue in the two decisions are similar.").

In addition to this conflict supporting the Court's jurisdiction, Anchor further requests that the Court reverse the Fourth District Court of Appeal's holding that the insureds' representative's indisputably false submission was

not binding on the insureds. (App. 12). This holding conflicts with *Mezadieu*, where the same court held two months before *Trif* that "when an insured relies on or adopts an estimate containing material false statements to support his or her claim, the insured is bound by the estimate and cannot avoid application of the concealment or fraud provision simply because he or she did not prepare the estimate." 315 So. 3d at 29. If the agent's actions are binding, the *Trif* majority's conclusion that the Trifs did not "make any material false statements" is incorrect under the law. (App. 12).

Further, the amount of overstatement in this case is virtually identical to the amount that *Mezadieu* found material as a matter of law. *See* 315 So. 3d at 30 ("The insured's attorney, however, admitted that the court could grant partial summary judgment . . . which would remove $11,000 from the $43,181 estimate—about a quarter of it.") (Warner, J. specially concurring). Anchor requests review of the same Court's contrary decision in *Trif.*

CONCLUSION

For the foregoing reasons, Anchor respectfully requests the Court accept discretionary review and order briefing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 16, 2021, I electronically filed the foregoing with the Florida Courts E-Portal system, which will transmit it by e-mail to counsel.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Jurisdictional Brief is Arial in 14 Point Type. This Jurisdictional Brief contains 2,465 words, including the Statement of the Issues, and 2,265 words

excluding the Statement of the Issues. *See* Fla. R. App. P. 9.210(a)(E) (excluding the Statement of the Issues from the page limit).

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