FLORIDA SUPREME COURT

CASE NO. SC15-508

BEATRIZ A. LLORENTE, P.A. and
BEATRIZ A. LLORENTE,

Plaintiffs/Petitioners,

v.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Defendant/Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Petitioners Beatrice Llorente and Beatrice Llorente, P.A. seek certiorari review of a decision from the Third District Court of Appeal that expressly and directly conflicts with several decisions from this Court on the issue of insurance policy interpretation where an ambiguity exists in the policy's contractual language. The express and direct conflict with decisions from this Court is evident from the four corners of the Third District's decision where it acknowledges that the interpretations of both the insureds, the Llorente Petitioners, and the insurer, St. Paul Insurance Company, are reasonable, yet the Third District then concludes that no insurance coverage exists for the underlying claim at issue. The Third District's decision creates express and direct conflict with several decisions from this Court by failing to apply long-standing rules of contract construction in the insurance policy context where two reasonable insurance policy interpretations exist, one favoring coverage and the other excluding coverage. Maintaining continuity in the law with respect to insurance policy interpretation is exceedingly important, not just to this one case, but rather to every case that follows in this particular arena; an arena that includes an exceptionally wide variety of insurance policies and insurance policy language. If the Court finds that an express and direct conflict exists, there is no doubt but that the Court should exercise its jurisdiction to hear

this case since it will affect so many Florida citizens and businesses who maintain insurance coverage for liabilities of all types.

STATEMENT OF THE CASE AND FACTS

The Llorente Petitioners acted as an escrow agent in connection with a real estate transaction that contemplated $1.5 million being held in trust until the conditions for the release of those funds were met. (A. 3). However, before the conditions were met, the funds were released. (A. 3). As a result, the Llorente Petitioners were sued for the alleged negligent disbursement of those funds. (A. 2).

Respondent St. Paul Insurance Company issued a professional liability insurance policy to the Llorente Petitioners that obligated St. Paul to pay damages arising out of any error, omission, or negligent act on the Llorente Petitioners' part while rendering professional services as either an attorney or a title insurance agent. (A. 2-3). The insurance policy exclusion provided that the policy did not apply to claims that arose out of "the . . . failure to . . . safeguard funds held or to be held for others." (A. 3). St. Paul contended that the Llorente Petitioners' negligent release of the funds constituted a failure to safeguard the funds. (A. 3). The Llorente Petitioners argued that the term "safeguard" was ambiguous and should be interpreted "as requiring no more than protecting the funds from something undesirable happening to them such as conversion, misappropriation, or improper commingling, leading to a loss." (A. 3). The trial court agreed with the

Llorente Petitioners' position that the term "safeguard" was ambiguous and denied St. Paul's motion for summary judgment. (A. 2).

On appeal, the Third District rejected the Llorente Petitioners' "argument that 'safeguard' is an ambiguous term." (A. 4). Judges Linda Wells and Leslie Rothenberg issued the majority opinion. (A. 1). Judge Frank Shepard issued the dissenting opinion. (A. 9). Although the majority rejected the Llorente Petitioners' argument that the failure-to-safeguard exclusion was ambiguous, the majority then clearly stated that both parties' interpretations of the term "safeguard" were correct: "We see no reason why Llorente and St. Paul's definition of the word 'safeguard' do not easily fall under the definition of safeguard." (A. 4). (Footnote omitted). The majority footnoted this sentence with the following analogy which again shows that the majority viewed the Llorente Petitioners' interpretation of "safeguard" to be equally as correct as St. Paul's interpretation: "The fact that an apple and a banana are both 'fruits' does not make the term 'fruit' ambiguous." (A. 4, n. 1).

After stating that both parties' interpretations of the term "safeguard" were reasonable, the majority accepted St. Paul's interpretation, holding as follows:

> Whether stolen or wrongfully disbursed, there was a failure to *safeguard* the $1.5 million at issue, i.e., keep it safe until disbursement was properly authorized. When this attorney/escrow agent/fiduciary disbursed the funds before the preconditions to the release of those funds had been met there is no question that she failed to guard and keep safe the funds entrusted to her.

(A. 4-5). In support of this holding, the majority did not cite to any cases that address insurance policy interpretation when the issue is whether a particular provision or term is claimed to be ambiguous. (A. 5). Instead, the majority cited four cases that hold that escrow agents owe a fiduciary duty to those clients for whom they hold funds. (A. 5). The majority then distinguished two cases from other jurisdictions that the Llorente Petitioners had cited, both of which addressed the failure-to-safeguard exclusion. (A. 5-8). In conclusion, the majority stated:

> In sum, we conclude that this claim falls squarely within the policy exclusion providing that there is no coverage for any claims "arising out of the inability or failure to pay, collect, administer or safeguard funds held or to be held for others." Llorente did not "safeguard" the $1.5 million entrusted to her when she disbursed that sum before she was authorized to do so. The trial court's decision is reversed and the case remanded for entry of summary judgment in St. Paul's favor, resulting in no coverage for Llorente. (A. 8).

ARGUMENT

THE DISTRICT COURT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT ON THE ISSUE OF INSURANCE POLICY CONSTRUCTION WHERE TWO REASONABLE INTERPRETATIONS EXIST, ONE PROVIDING COVERAGE AND THE OTHER EXCLUDING COVERAGE

This Court may exercise conflict jurisdiction when a decision of the district court "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Fla.R.App.P. 9.030(a)(2)(A)(iv); *see also* Fla. Const. Art. V, § 3(b)(3). Although in some instances a district court of appeal may explicitly identify a conflicting appellate

opinion in its decision, it is not necessary that it do so for conflict jurisdiction to exist. All that is necessary is that the legal principles applied in the decision and the analysis of those principles expressly and directly conflict with decisions from other district courts of appeal or the supreme court: "[A] discussion of the legal principles which the [district] court applied supplies a sufficient basis for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion to create an 'express' conflict under (3)(b)(3)." *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981).

Moreover, a district court's failure to follow established decisional rules of construction constitutes a clear basis for conflict jurisdiction. *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973). In *Rinker*, this Court found that conflict existed where the Third District Court of Appeal failed to follow established rules of statutory construction in interpreting a municipal ordinance. *Id.* The Court identified the statutory rules of construction that the Third District failed to apply, finding that conflict existed with respect to each Supreme Court decision that established those rules of statutory construction. *Id.*

The majority's legal analysis in this case demonstrates that a conflict exists where the majority failed to apply established rules of insurance policy construction. The issue raised on appeal was whether a term utilized in an

exclusion in an insurance policy was ambiguous such that coverage existed for the insured. The rules of contract construction in the insurance policy context are well settled by numerous decisions from this Court and the district courts of appeal that have properly followed that law for decades. When two reasonable interpretations of a term in an insurance policy exist -- one favoring coverage and the other excluding coverage -- the legal result is not even remotely debatable. Under that scenario, the interpretation favoring coverage is applied, especially where the disputed term is found in an exclusion. The majority expressly elected not to follow long-standing rules of insurance policy construction reiterated by this Court over and over again. The Llorente Petitioners contend that, at a minimum, the majority decision at issue here conflicts with the following cases from this Court:

> *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943 (Fla. 2013) ("Thus where, as here, one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted.");
>
> *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779 (Fla. 2004) ("When language in an insurance policy is ambiguous, a court will resolve the ambiguity in favor of the insured by adopting the reasonable interpretation of the policy's language that provides coverage as opposed to the reasonable interpretation that would limit coverage.");
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> *Swire Pacific Holdings Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003) ("'Exclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy.'") (*quoting State Farm Mutual Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986));

> *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082 (Fla. 2005) ("However, if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous. Ambiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured.");
>
> *Flores v. Allstate Ins. Co.*, 819 So. 2d 740 (Fla. 2002) ("[I]t is axiomatic that '[i]f the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is ambiguous.'") (*quoting Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000));
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> *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998) ("[W]here policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer."); and
>
> *Williamson v. Nurses' Mut. Protective Corp.*, 194 So. 643 (Fla. 1940) ("[I]n the event of ambiguities the insured will be favored over the insurer so that liberality will be indulged for the insured or for the larger indemnity."). (Internal citations omitted).

For purposes of determining whether a conflict exists, "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 this Court." *Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003). The fact relevant here is the majority's statement that two reasonable interpretations existed for the word at issue. On two occasions, the majority confirms that in its view the Llorente Petitioners' interpretation of the term "safeguard" was equally as reasonable as St. Paul's. First, after discussing the parties' two different interpretations of the term safeguard, the majority states: "We see no reason why Llorente and St. Paul's

definition of the word 'safeguard' do not both easily fall under the definition of safeguard." (A. 4). (Footnote omitted). At that point in the analysis, the rules of insurance policy construction set out in this Court's decisions listed above should have been applied by the majority, but they were not.

Tellingly, the majority did not reference a single appellate decision to support its analysis *in the context of insurance policy construction* after making this statement. The majority's citation to cases that hold that an escrow agent is a fiduciary are irrelevant to the issue the court was considering which was whether a term in an insurance policy exclusion was or was not ambiguous. The absence of legal support for the majority's decision to accept and apply the insurance company's interpretation of the term at issue which defeats coverage when the insured had presented an equally plausible interpretation that provides coverage clearly demonstrates the existence of express and direct conflict.

The second example of the majority's view that the Llorente Petitioners' interpretation was as valid as the one offered by St. Paul is found in the footnote to the statement quoted above. The majority posited the following analogy: "The fact that an apple and a banana are both 'fruits' does not make the term 'fruit' ambiguous." (A. 4, n. 1). In this analogy, fruit is synonymous with safeguard -- the term at issue. The majority's meaning was clear: the Llorente Petitioners' interpretation that the term "fruit" should be held to mean "apple" is as correct as

St. Paul's interpretation that the term "fruit" should be held to mean "banana." Again, in the majority's view, both parties held different but correct interpretations of the term. The problem with the majority's analogy is that it demonstrates the conflict with this Court's prior decisions. The issue is not whether the term "fruit" is unambiguous because in general it can mean either apple or banana, but rather, whether the term "fruit" is ambiguous when coverage would exist if "fruit" meant apple as opposed to banana. The majority's analogy demonstrates why this Court's rules of insurance policy construction exist; the fact that those rules should have been applied; and most importantly here, the fact that the majority disregarded those rules; thereby creating conflict with this Court's decisions.

The legal basis for the majority's decision in this case is irreconcilable with the decisions from this Court identified above which, if applied, would dictate a different result. One of the tests for determining conflict jurisdiction is met when appellate decisions are irreconcilable. *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166-67 (Fla. 2006) ("The holdings of *Aravena* and *Kelly* are irreconcilable, which is one of the tests for conflict jurisdiction."). *See also Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992) ("concluding that because the court below 'reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated' the result reached by the alleged conflict case, a conflict of decisions existed that warranted accepting jurisdiction"). In the end, "this Court has the final

and inherent power to determine what constitutes express and direct conflict." *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).

Here, the Court should conclude that express and direct conflict exists where the majority's decision recites the key fact, more than once, that the Llorente Petitioners' interpretation of the word "safeguard" was as reasonable as St. Paul's interpretation; yet, the majority then held that St. Paul's interpretation would be accepted and applied, finding no coverage for the claim. When two reasonable interpretations exist for a term in an insurance policy (particularly a term in an exclusion) and one of those interpretations favors coverage, the interpretation favoring coverage is the one that must be applied as held numerous times by this Court. The majority disregarded these rules of insurance policy construction and reached the opposite result which establishes the conflict necessary for this Court to accept jurisdiction. To allow a decision to remain unchallenged that fails to apply the rules of contractual construction set by this Court will adversely impact the state of the law in this area. Given the wide application of decisions in this context and the fact that conflict exists, the Llorente Petitioners urge the Court to accept this case for review based on the existence of express and direct conflict.

CONCLUSION

The Llorente Petitioners request that this Court exercise its conflict jurisdiction to review the Third District Court of Appeal’s decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 2.516(b)(1), Florida Rules of Judicial Administration, a true and correct copy of the foregoing has been furnished by electronic mail only on Friday, March 27, 2015, to:

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By: /s/ KIMBERLY L. BOLDT
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CERTIFICATE OF FONT COMPLIANCE

Counsel for Petitioners hereby certifies that this Petition has been prepared in 14 point Times New Roman.

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