IN THE SUPREME COURT OF FLORIDA

APPEAL CASE NO.: SC16-479

ESSEX INSURANCE CORPORATION,

Petitioner,

vs.

INTEGRATED DRAINAGE SOLUTIONS, INC., AND OTHERS,

Respondents.

L.T. Court Case No. 10-CA-57630

RESPONDENTS, MASTEC, INC., AND MASTEC NORTH AMERICAN, INC.'S, BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Essex Insurance Corporation, ("Essex") seeks to invoke this Court's discretionary jurisdiction under Article V, Section 3(b) of the Florida Constitution to review an order entered by the Second District Court of Appeal on October 13, 2015, that granted Respondents, Mastec Inc. and Mastec North America ("Mastec"), Motion to Dismiss for Lack of Jurisdiction on the grounds that it expressly and directly conflicts with either a decision of the Florida Supreme Court or of a Florida District Court of Appeal on the same point of law. (Pet'r. Br. at 3-4). In seeking to invoke this Court's discretionary review jurisdiction, Essex cites facts not contained within the four corners of the order for which it seeks review. (Pet'r. Br. at 1-3).[1]

The Second District's order reads as follows:

> Appellees' Mastec, Inc., and Mastec North America, Inc.'s motion to dismiss for lack of jurisdiction is granted and this appeal is dismissed. See Fla. Farm Bureau Gen. Ins. Co. v. Peacock's Excavating Serv., Inc., 2015 WL 4497721 (Fla. 2d DCA July 24, 2015) and Nationwide Mut. Ins. Co. v. Harrick, 763 So. 2d 1133 (Fla. 4th DCA 1999).
>
> The oral argument schedule for October 27, 2015, is cancelled.
>
> Appellees' motion for appellate attorney's fees is granted conditioned upon the Appellees ultimately prevailing in the underlying action in an amount to be determined by the circuit court.

[1] As this Court stated in Reaves v. State, 485 So. 2d 829 (Fla. 1986), a "[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Id. at 830 (citation omitted).

> Appellees' request for costs is stricken without prejudice to Appellees' right to seek costs in the trial court.

(App. at A1).

SUMMARY OF THE ARGUMENT

This Court should dismiss Essex's petition because this Court does not have dictionary review jurisdiction. First, Essex attempts to invoke this Court's jurisdiction based on an order of dismissal that merely cites to cases not pending review in, or not quashed by, this Court, and does not contain any discussion of the facts in this case such that it could be said that the Second District expressly addressed a question of law within the four corners of the order itself. Second, even considering the facts Essex improperly cites, a direct conflict does not exist with either Canal Insurance Company v. Reed, 666 So. 2d 888 (Fla. 1996), Wilshire Insurance Company v. Birch Crest Apartments, Inc., 69 So. 3d 975 (Fla. 4th DCA 2011), or American Reliance Ins. Co. v. Perez, 712 So. 2d 1211 (Fla. 3d DCA 2011), because here the trial court did not enter a final declaration determining the existence of insurance coverage. Therefore, this Court should dismiss Essex's petition.

ARGUMENT

I. THIS COURT DOES NOT HAVE DISCRETIONARY JURISDICTION TO REVIEW UNELABORATED DISMISSALS, SUCH AS THE SECOND DISTRICT'S ORDER HERE, THAT MERELY CITE TO CASES NOT PENDING REVIEW IN, OR NOT QUASHED OR REVERSED BY, THIS COURT.

The Second District's order of dismissal constitutes an unelaborated dismissal for which this Court lacks discretionary review jurisdiction under the Florida

Constitution. Therefore, this Court should dismiss Essex's petition for lack of jurisdiction.

This Court's jurisdiction extends only to those narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. Gandy v. State, 846 So. 2d 1141, 1143 (Fla. 2003). Article V, Section 3(b) provides this Court with the discretion to review a district court of appeal's decision that "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. CONST. art. V, § 3(b)(3). The measure of conflict jurisdiction is whether the face of the district court's decision directly collides with a prior decision of this Court or another district court on the same point of law. Kincaid v. World Ins. Co., 157 So. 2d 517, 517 (Fla. 1963). A petitioner cannot satisfy this standard where a district court enters an unelaborated dismissal that merely cites to cases not pending review in, or quashed or reversed by this Court, and does not contain any discussion of the facts in the case itself because then, it cannot be said that the district court addressed a question of law within the four corners of the opinion itself. Wells v. State, 132 So. 3d 1110, 1113 (Fla. 2014) (quoting Fla. Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988)).

In Wells, the petitioner sought to invoke this Court's discretionary review jurisdiction after the First District Court of Appeal dismissed Wells' petition to

invoke the First District's all writs jurisdiction. Id. at 1111. The First District dismissed Wells' petition in an order that, in its entirety, read as follows:

> PER CURIAM
>
> DISMISSED. See Baker v. State, 878 So. 2d 1236 (Fla. 2004); see also Pettway v. State, 776 So. 2d 930 (Fla. 2000).

Id. at 1111-12 (quoting Wells v. State, 114 So. 3d 1037, 1038 (Fla. 1st DCA 2013)). This Court dismissed the petition for review based on lack of jurisdiction. Id. at 1111. This Court, based on its prior decisions in Gandy, Jenkins v. State, 385 So. 2d 1356 (Fla. 1980), and Dodi Publishing Co. v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980), and held that it:

> does not have discretionary review jurisdiction over unelaborated per curiam dismissals from district courts of appeal (1) that are issued without opinion or explanation, whether in opinion form or by way of unpublished order; or (2) that, like the First District's decision in Wells'case, merely cite to a case not pending review in, or not quashed by, this Court, or to a statute or rule of procedure, and do not contain any discussion of the facts in the case such that it could be said that the district court 'expressly addressed a question of law within the four corners of the opinion itself.'

Wells, 132 So. 3d at 1113 (quoting Fla. Star, 530 So. 2d at 288).

Here, the Second District granted Mastec's Motion to Dismiss for Lack of Jurisdiction and dismissed Essex's appeal. (App. at A1). In dismissing the appeal, the Second District, as in Wells, did not elaborate or otherwise discuss the facts of this case. Compare Wells, 132 So. 3d at 1111-12 with (App. at A1). Instead, the

Second District, similar to Wells, merely cited to two cases: (1) Florida Farm Bureau General Insurance Company v. Peacock's Excavating Service, Inc., 2015 WL 4497721 (Fla. 2d DCA 2015), and (2) Nationwide Mutual Insurance Company v. Harrick, 763 So. 2d 1133 (Fla. 4th DCA 1999). (App. at A1). Neither Peacock nor Harrick, similar to the cases cited in Wells, are currently pending review in this Court. This Court, similar to the cases cited in Wells, has not quashed or reversed Peacock or Harrick. Therefore, this Court, as in Wells, lacks discretionary review jurisdiction because it cannot be said that based on the four corners of the Second District's order expressly addressed a question of law that directly conflicts with either a decision of this Court or another district court of appeal.

II. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE SECOND DISTRICT'S ORDER OF DISMISSAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH EITHER A DECISION OF THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

Essex improperly premises its entire conflict argument on facts not contained within the four corners of the Second District's order. Wells, 132 So. 3d at 1111 (citing Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)); (Pet'r. Br. at 1-3, 4-10). Even if this Court considers these improperly cited facts, an express and direct conflict does not exist between the Second District's order and either Canal Insurance Company v. Reed, 666 So. 2d 888 (Fla. 1996), Wilshire Insurance Company v. Birch Crest Apartments, Inc., 69 So. 3d 975 (Fla. 4th DCA 2011), or

American Reliance Ins. Co. v. Perez, 712 So. 2d 1211 (Fla. 3d DCA 2011). The critical distinction is that Reed, Birch Crest, and Perez all concerned appeals from final orders finding the existence or nonexistence of coverage whereas here, Essex appealed a partial final judgment that addressed only the duty to defend.

An insurer's duty to defend is broader than the issue of coverage and arises solely from the facts and legal theories alleged in the pleading directed against the insured. Mid-Contient Cas. Co. v. Royal Crane, LLC, 169 So. 3d 174, 180 (Fla. 4th DCA 2015) (citations omitted). Courts determine the existence of coverage, and the accompanying duty to indemnify, unlike the duty to defend, based on the actual facts and circumstances of the injury. Id.; see also State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1073 n.3 (Fla. 1998); Illinois Ins. Exchange v. Scottsdale Ins. Co., 679 So. 2d 355, 358 (Fla. 3d DCA 1996) ("The duty to indemnify is narrower than the duty to defend, and there must be a determination that coverage exists before a duty to indemnify arises.") (citations omitted). As such, a determination that an insurer has a duty to defend its insured does not equate to a determination that coverage exists; indeed, "[t]he existence of coverage under an insurance policy and an insurer's duty to defend *are distinct*." Royal Crane, LLC, 169 So. 3d at 180 (emphasis added).

Consequently, the cases cited by Essex do not directly conflict with the Second District's order because Reed, Perez, and Birch Crest all concerned appeals

from final coverage determinations. To be sure, Birch Crest concerned a multi-count lawsuit against an insurer for breach of contract, bad-faith (common law and statutory), and a declaratory judgment. Birch Crest, 69 So. 3d at 975. The parties moved for summary judgment on the issue of coverage based on the applicability of certain policy exclusions. Id. at 975-76. The trial court entered a partial judgment that completely resolved the coverage issue and declared coverage existed under the policy. Id. Similarly, in Perez, the trial court entered a partial final judgment that found insurance coverage existed. Perez, 712 So. 2d at 1212. The Fourth District in Birch Crest and the Third District in Perez both accepted jurisdiction under Reed.

In Reed, the insured was sued for negligence after a passenger in his vehicle was injured. Reed, 666 So. 2d at 890. The insured brought a third-party action against his insurer for liability coverage. Id. The trial court severed the third-party action for coverage into a distinct action. Id. Ultimately, the trial court conducted a trial on the coverage claim. Id. After the trial, the trial court entered a final judgment that found the insurer was required to provide liability coverage for the accident. Id. The First District held that the order was not appealable until a final judgment was entered in the underlying personal injury action. Id. This Court, however, quashed the First District's decision and held that final declaratory judgments determining insurance coverage are appealable as final orders regardless of whether the judgement arises from a third-party action or a separate suit. Id. at 891.

Here the trial court only found Essex has a duty to defend Mastec. (Pet'r. Br. at 2). Such a determination, however, does not equate to a final coverage determination because "[t]he existence of coverage under an insurance policy and an insurer's duty to defend *are distinct*." Royal Crane, LLC, 169 So. 3d at 180 (emphasis added); Harrick, 763 So. 2d at 1134. As such, unlike in Reed, Perez, and Birch Crest where the trial courts entered judgments that completely resolved the issue of whether coverage existed, Reed, 666 So. 2d at 891; Birch Crest, 69 So. 3d at 975; Perez, 712 So. 2d at 1212, here the trial court has yet to enter a final order determining the existence of coverage. (Pet'r. Br. at 2). As such, the question of law at issue in Reed, Perez, and Birch Crest—whether a district court has jurisdiction to consider a final order determining the existence of coverage—differs from the question of law at issue here—whether a district court has jurisdiction to consider a partial final judgment that does not determine the existence of coverage.

The Fourth District's treatment of Birch Crest and Harrick illustrates the difference between the two issues. If a trial court determines the existence of coverage and, as in Birch Crest and Perez, multiple claims involving the same parties remain pending, then a district court considers the jurisdictional interaction of Rule 9.110(m), Florida Rules of Appellate Procedure, and Rule 9.110(k), Florida Rules of Appellate Procedure. Id; Perez, 712 So. 2d at 1212. However, if, as in Harrick, a trial court just determines an insurer has a duty to defend, then the district court need

not consider whether the order, or partial final judgment, is appealable under Rule 9.110(m), Florida Rules of Appellate Procedure, because as the Fourth District in Royal Crane made clear "[t]he existence of coverage under an insurance policy and an insurer's duty to defend *are distinct*." Royal Crane, LLC, 169 So. 3d at 180 (emphasis added). Therefore, this case, unlike Reed, Birch Crest, and Perez did not determine the existence of nonexistence of coverage and therefore, did not require the Second District, as in Reed, Birch Crest, and Perez, to decide how Rule 9.110(m), Florida Rules of Appellate Procedure, and Rule 9.110(k), Florida Rules of Appellate Procedure interact. Instead, the legal question considered by the Second District was, similar to Harrick and Peacock, whether an insurer can appeal a partial final judgment Rule 9.110(k), Florida Rules of Appellate Procedure.

CONCLUSION

Based on the above argument and authorities, this Court should dismiss Essex's petition and decline to exercise its discretionary review jurisdiction.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Florida Rules of Appellate Procedure, and is prepared in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 13, 2016, pursuant to Fla. R. Jud. Admin. 2.516 and Fla. R. Civ. P. 1.080, a true and correct copy of the foregoing has been furnished via e-mail to the below service list:

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