IN THE CIRCUIT COURT OF THE TWENTIEH JUDICIAL CIRCUIT,
IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC07-1641

FRANK J. TRYTEK and CATHY L. TRYTEK,

Petitioners,

vs.

GALE INDUSTRIES, INC.,
a Florida corporation, d/b/a
GALE INSULATION OF ORLANDO,

Respondent.

On Review of a Question Certified by the
Fifth District Court of Appeal as Having Great Public Importance

RESPONDENT'S AMENDED ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

This case arises from the construction of the Petitioners' residence. Petitioners hired Respondent, an insulation contractor, to perform the installation of insulation throughout Petitioners' residence. (IV: 730-733).[1] The parties' agreement was an oral contract whereby Petitioners were to pay Respondent for the work. (III: 525). Over the course of performing its work, Respondent's employees inadvertently caused a number of staples to be driven through previously installed electrical wires. (IV: 730-733). This issue was recognized by both parties, and Respondent agreed that its employees caused such condition. (IV: 730-733). Thereafter, Respondent met with Petitioners and the parties agreed that Try-Cor Electric, Inc. (hereinafter "Try-Cor"), would make the necessary repairs. (IV: 730-733). Try-Cor is an electrical contracting company which Petitioner, Frank J. Trytek, owns. (VI: 25).

On or about February 5, 2001, the Petitioners delivered an invoice to Respondent representing the purported cost associated with Try-Cor's electrical repairs, in the amount of $11,770.00. (III: 535-538). On or about March 13, 2001, Respondent recorded a Claim of Lien for the insulation work it performed at Petitioners' residence (I: 1-13). Respondent brought suit to foreclose the lien on or

[1] Roman numerals shall refer to the volume of the trial court's appeal index; Arabic numerals shall refer to the specific page of the record on appeal.

about May 29, 2001.[2] (I: 1-13). The Petitioners counter-claimed against Respondent for the damages they incurred as a result of making electrical repairs necessitated by damage from the insulation staples. (III: 535-538). The counter-claim damages included, but were not limited to, the original $11,770.00 repair invoice from Try-Cor. (IV: 535-538).[3]

During the course of the litigation, the parties agreed that Petitioners were entitled to a set-off for the electrical repairs, but disagreed as to the reasonable value of such set-off. (III: 525-526). After Respondent filed a Motion for Summary Judgment on the issue, the parties further agreed that the Respondent's Claim of Lien for the work performed on the Petitioners' residence fully complied with Florida Statutes; all notice requirements were met, the Claim of Lien was properly recorded in accordance with Florida Statutes, and the value of the labor, services and materials provided by Respondent were accurately stated in its Claim of Lien. (III: 451). Due to the parties' agreement on the procedural sufficiency of the Claim of Lien, the parties submitted an Agreed Order on Respondent's Motion for Summary Judgment to the trial court. (III: 451). The Agreed Order was rendered on May 20, 2004, approximately three (3) years after the Complaint was

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[2] Respondent's Claim of Lien was transferred to security pursuant to Section 713.24, Florida Statutes during the course of the litigation. (II: 385-388).

[3] The total amount of damages claimed by the Petitioners exceeded the amount of Respondent's lien. (III: 535-538); see also *Gale Industries, Inc. v. Trytek*, 960 So.2d 805, 806 (Fla. 5th DCA 2007).

filed, and it established that: (1) Respondent's lien was procedurally sufficient and no evidence was necessary at trial on that issue, (2) Respondent was entitled to recover the amount sought in its Complaint, less any damages that were proven by Petitioners, and (3) the only issue to be resolved at trial was the value of the Petitioners' damages as set forth in their counterclaim. (III: 451).

Trial of this matter was conducted on June 21, 2005, followed by closing arguments on September 16, 2005. (III: 535-538). At trial, the sole issue of fact to be resolved was the reasonableness of the amount sought by the Petitioners for the electrical repair work performed on their residence. (III: 535-538). At trial, in addition to seeking repair costs in the amount of $11,770, the Petitioners also sought to recover for "additional expenses" allegedly incurred as a result of the electrical repairs, for a total amount of $18,630.00. (III: 535-538); see also *Gale Industries, Inc.*, 960 So.2d at 806. Following the non-jury trial, on September 30, 2005, the trial court entered a Trial Order in which it ruled that "the Tryteks [were] entitled to repair costs in the amount of $11,200.00 – this amount to be set-off to the Gale lien of $12,725.00. This results in a net amount due to Gale of $1525." (III: 535-538).

Subsequent to the trial court's entry of its September 30, 2005 Order, both parties filed motions to tax attorneys' fees and costs with each arguing that, pursuant to Section 713.29, *Florida Statutes*, it was the "prevailing party" in the

action. (IV: 617-620). After hearing argument on the cross-motions the trial court rendered its Order Taxing Attorneys' Fees and Costs. (IV: 617-620). In the Order, after admitting "some uncertainty about the 'prevailing party' test in construction lien litigation within the Fifth District," the trial court ruled that it must apply the *Prosperi v. Code, Inc.*, 626 So.2d 1360 (Fla. 1993), "significant issues" test to resolve the "prevailing party" issue and properly award fees and costs. (IV: 617-620). After applying the *Prosperi* test, the trial court ruled that the Petitioners were the "prevailing party" and were entitled to recover their attorneys' fees and court costs from Respondent pursuant to §713.29, *Fla. Stat.*, despite Respondent's affirmative recovery on its lien foreclosure action. (IV: 617-620).

The parties stipulated to the amount of attorneys' fees and costs to be awarded, and the trial court rendered a Final Judgment on April 6, 2006, in favor of Petitioners for $57,728.39. (IV: 736-737). Thereafter, Respondent timely filed a Notice of Appeal of the Final Judgment to the Fifth District Court of Appeal. (IV: 738-740). The parties fully briefed the topic at issue and attended oral argument on May 23, 2007. The District Court then issued its Opinion on June 22, 2007. *Gale Industries, Inc.*, 960 So.2d 805; see also Appendix to Petitioners' Initial Brief, I. The Opinion "reverse[d] the award of attorney's fees and costs in favor of the Tryteks, and remand[ed] for imposition of a fees and cost award in favor of Gale." Id. at 809; see also Appendix to Petitioners' Initial Brief, I.

Contrary to the assertion contained in Petitioners' Initial Brief's "Statement of the Case and of the Facts," the District Court did not conclude that the trial court had "abused its discretion" in ruling that the Petitioners were the prevailing parties below. In fact, the phrase "abuse of discretion" is not found anywhere in the Opinion. See generally *Gale Industries, Inc.*, 960 So.2d 805; see also Appendix to Petitioners' Initial Brief, I. Instead, the District Court held, as a matter of law, that the "significant issues" test of *Prosperi* was not the appropriate analysis to be employed by the trial court in determining "prevailing party" status in a lien foreclosure action. Id. at 808. Rather, the Fifth District adhered to the traditional rule that "mandates an award of attorneys' fees in favor of a lienor if it is successful in recovering damages in excess of any asserted counterclaim damages *in a lien foreclosure action*." Id. at 809 (emphasis in original).

Petitioners filed a Motion for Rehearing and for Certification of a Question of Great Public Importance after the District Court's Opinion was rendered and, once again, the issue *sub judice* was briefed. The District denied the Motion for Rehearing but did certify the following question as one being "of great public importance:"

> Where a lienor obtains a judgment against a property owner in an action to enforce a construction lien brought pursuant to Section 713.29, Florida Statutes (2005), are trial courts required to apply the "significant issues" test articulated in *Prosperi v. Code, Inc.*, 626 So.2d 1360 (Fla. 1993), in

> determining which party is the "prevailing party" for the purpose of awarding attorney's fees?[4]

Appendix to Petitioners' Initial Brief, II. After the District Court rendered its Order on Motion for Rehearing and for Certification, the Petitioners timely filed their "Notice of Appeal" (which was treated as a Notice to Invoke Discretionary Jurisdiction) on August 27, 2007, and this appeal ensued.

[4] Respondent notes that the question stated by Petitioners on page 6 of their Initial Brief is not the question that was certified to this Court by the Fifth District Court of Appeal. The actual question that was certified is stated above. There may be some confusion as to the actual question at issue because the certified question stated in the Westlaw citation to the District Court's opinion differs from the actual question certified in the Fifth District Court of Appeal's August 3, 2007, Order on Motion for Rehearing and For Certification, and the District Court's Mandate. See *Gale Industries, Inc.*, 960 So.2d at 809. The question set forth above is the question that appears in the District Court's Order and Mandate.

SUMMARY OF THE ARGUMENT

This Court should either decline to exercise its discretionary jurisdiction and abstain from issuing an opinion in this matter or answer the certified question in the negative, thereby affirming the opinion of the Fifth District Court of Appeal. Contrary to Petitioners' assertions in their Initial Brief, the trial court's decision to award Petitioners "prevailing party" status in this matter based upon the *Prosperi* "significant issues" test was not entitled to the benefit of an "abuse of discretion" standard. Counsel for Petitioners admitted as much during oral argument before the District Court and, as stated above, the phrase "abuse of discretion" is not used anywhere in the District Court's opinion. Rather, the trial court committed a reversible error, as a matter of law, because it applied the incorrect rule of law to analyze "prevailing party" status in a lien foreclosure action. Therefore, the trial court's decision to anoint Petitioners as "prevailing parties" was properly subjected to a *de novo* standard of review before the District Court.

The Fifth District Court of Appeal, after applying the *de novo* standard, properly reasoned that this Court's decision in *Prosperi* was inapplicable to the case at hand and should not have been used by the trial court as the analytical framework for the "prevailing party" analysis. As acknowledged by the District Court's Opinion, the background, facts and prevailing theories of recovery presented in *Prosperi* are inapposite to the instant case. Therefore, the District

Court held that *Prosperi* should not control. Rather, in deference to factual identity and in furtherance of the laudable objectives of Florida's Construction Lien Law, the District Court's Opinion relied upon its own well-reasoned decision in, among others, *Michael David Ivey, Inc. v. Salazar*, 903 So.2d 329 (Fla. 5th DCA 2005), an opinion rendered subsequent to *Prosperi*, in determining that Respondent was the "prevailing party" under §713.29, *Fla. Stat.* For the reasons addressed herein, Respondent encourages a similar reading and application of *Prosperi* by this Court and, in doing so, further encourages this Court to either decline to exercise its discretionary jurisdiction and abstain from issuing an opinion in this matter or answer the certified question in the negative, thereby affirming the opinion of the Fifth District Court of Appeal.

ARGUMENT

I. THE TRIAL COURT'S DECISION TO EMPLOY THE *PROSPERI* "SIGNIFICANT ISSUES" TEST TO DETERMINE THE "PREVAILING PARTY" FOR PURPOSES OF AWARDING FEES AND COSTS IN A CONSTRUCTION LIEN FORECLOSURE ACTION IS NOT ENTITLED TO AN "ABUSE OF DISCRETION" STANDARD OF REVIEW.

It is evident from a reading of Petitioners' Initial Brief that their argument to this Court is centrally founded on a belief that the trial court's "prevailing party" analysis is entitled to an "abuse of discretion" standard of review. Initial Brief, pp. 9-14, 23, 24. Obviously, Petitioners contend that the Fifth District Court of Appeal departed from the framework of the "abuse of discretion" standard when it reversed the trial court's "prevailing party" determination.

While Respondent generally agrees that a trial court's application of the "significant issues" test for "prevailing party" status to the facts of a case ***in which that test applies*** would be subject to an abuse of discretion standard, see *Sorrentino v. River Run Condominium Association*, 925 So.2d 1060 (Fla. 5th DCA 2006)[5], it also agrees with the recognition made by the Fifth District Court of Appeal that the case at bar is not subject to the "significant issues" test. A trial court's violation of a known rule of law, or the decision not to apply a known rule of law, to a case before it is properly subjected to a *de novo* standard of review. See e.g. *Moore v.*

[5] It should be noted that *Sorrentino* does not involve a suit to foreclose a construction lien. See generally Id.

Moore, 858 So.2d 1168 (Fla. 2d DCA 2003). Opposing counsel conceded this point in oral argument before the District Court in the following exchange:

> **Opposing Counsel:** "Whom to appoint or anoint as the prevailing party is a matter that is within the discretion of the trial judge.
>
> **District Court:** That is if you're comparing significant issues. First, you've got to get to whether or not the significant issues test even applies. That's the cusp that we're working with here.
>
> **Opposing Counsel:** Okay. Well, I guess then there are two distinct issues that I would submit. If it is purely a question of law, then clearly the court in its position can rule . . .
>
> **District Court:** Its de novo.
>
> **Opposing Counsel:** . . . as a de novo issue. As to the factual issue of whether the trial court was correct in appointing . . .
>
> **District Court:** Abuse of discretion.
>
> **Opposing Counsel:** That would be an abuse of discretion. That's correct."[6]

[6] Oral Arguments in the Matter of *Gale Industries, Inc. v. Frank J. Trytek and Kathy L. Trytek*, No. 06-1569, (Fla. 5th DCA, May 23, 2007) (http://www.5dca.org/ArchivedOAs/2007/Aoa5-23-07.pdf#xml=http://www.5dca.org/SCRIPTS/texis.exe/webinator/search/pdfhi.txt?query=baird&pr=5DCA&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&sufs=0&order=r&mode=admin&opts=adv&cq=2&id=465b5ef72b).

The trial court in the instant matter applied the incorrect rule of law for the determination of "prevailing party" status in a construction lien foreclosure action. Accordingly, the District Court properly recognized that the "abuse of discretion" standard of review was not applicable. In turn, the *de novo* standard of review was utilized in a well reasoned reversal of the trial court's final judgment awarding Petitioners fees and costs. See *Gale Industries, Inc.*, 960 So.2d at 809.

As the District Court's Opinion noted, the traditional rule in this state has been to award "prevailing party" status to a claimant in a construction lien foreclosure action if that claimant recovers an affirmative judgment ***on its lien foreclosure claim***. Id. at 808.; see also *Hub Cap Heaven, Inc. v. Goodman*, 431 So.2d 323 (Fla. 3d DCA 1983); *DCC Constructors, Inc. v. Yacht Club Southeastern, Inc.*, 839 So.2d 731 (Fla. 3d DCA 2003); *Salisbury Construction Corp. v. Mitchell*, 491 So.2d 308 (Fla. 4th DCA 1986); *Michael David Ivey, Inc.*, 903 So.2d at 332; *Peter Marich & Associates, Inc. v. Powell*, 365 So.2d 754 (Fla. 2d DCA 1978) (holding that the prevailing party is one in whose favor an affirmative judgment is rendered even if the judgment is for less than the amount sought in the complaint).

Despite this line of cases, the trial court in the instant matter, after admitting confusion on the issue, chose to employ to the *Prosperi* "significant issues" test to award "prevailing party" status to Petitioners, even though Respondent received an

affirmative judgment on its lien foreclosure claim. For the reasons more fully addressed in the second argument below, a thorough and thoughtful reading of this Court's *Prosperi* decision indicates that the "significant issues" test is ***not*** the analytical framework to be utilized by trial courts when awarding fees to a prevailing party in a construction lien foreclosure action. Therefore, the trial court committed reversible error by applying the incorrect rule of law to the case at bar and, contrary to Petitioners' argument, such error must be addressed on appeal under the *de novo* standard of review. *Moore,* 858 So.2d at 1169.

II. THIS COURT SHOULD EITHER DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION AND ABSTAIN FROM ISSUING AN OPINION OR ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE, THEREBY AFFIRMING THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL, BECAUSE THE "SIGNIFICANT ISSUES" TEST OF *PROSPERI* DOES NOT APPLY TO THE CASE AT BAR.

In *Prosperi*, a contractor filed a four count complaint against a property owner and the owner counter-claimed.[7] 626 So.2d at 1361. Unlike Petitioners in this case, the ***property owner*** in *Prosperi* prevailed on the contractor's lien foreclosure count because the trial court found that the contractor submitted false affidavits in support of its claim of lien; the contractor was awarded ***no*** recovery based on its lien claim. Id. at 1361. The contractor did, however, recover pursuant to its ***breach of contract claim***, but that recovery was reduced by a set-off the

[7] The four counts of the complaint were: (1) foreclosure of a construction lien, (2) breach of contract, (3) quantum meruit, and (4) account stated.

property owner was entitled to as damages for its counter-claims. Id. Under these facts, this Court held that the significant issues test, as previously announced in *Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807 (Fla. 1992), was the proper analysis for the trial court to employ in deciding to allow recovery of attorneys' fees and remanded the case with instructions that the owner be awarded its attorneys' fees. Id. at 1362-1363.

A thorough review of the *Prosperi* opinion reveals the reasoning behind this Court's decision; this Court was dealing with a self-defined "net judgment rule" case where the contractor did not recover on its lien claim. Id. at 1362, n. 1. In *Prosperi*, this Court defined the "net judgment rule" and stated that it "comes into play when the claimant ***fails to foreclose a mechanic's lien*** but obtains a judgment for the underlying claim which exceeds any claim of the owner." Id. (emphasis added); see also *Kenmark Construction, Inc. v. Cronin*, 765 So.2d 129, 131 n. 1 (Fla. 2d DCA 2000) (holding that the net judgment rule applies when the contractor ***does not recover pursuant to a lien*** but obtains a net judgment of damages under other principles of contract or equity). Therefore, it is apparent that the case at bar is ***not*** a net judgment rule case due to the fact that Respondent recovered an affirmative judgment pursuant to its lien foreclosure action, not some other theory. The Fifth District Court of Appeal recognized as much and noted

that Respondent's recovery on its lien action was a matter of "critical importance." *Gale Industries, Inc.*, 960 So.2d at 807.

The District Court clearly understood the distinction between the facts of the instant case and *Prosperi* when it held that "***Prosperi only applies to net judgment cases***" and adhered to the long-standing rule governing the award of attorney's fees in lien foreclosure actions. Id. at 808-809 (emphasis added). Respondent understands this distinction as well and has argued before the trial court, the District Court, and this High Court, that the District Court's opinion herein and the *Prosperi* opinion can be read in complete harmony as they apply to factually distinct situations.

The facts of the instant case are closely in-line with those of *Michael David Ivey, Inc.*, 903 So.2d 329, and, as stated, differ significantly from the factual scenario presented in *Prosperi*. In *Ivey*, a contractor hired by an owner to build a residence brought an action to foreclose a construction lien on the owner's real property. Id. at 330. The owner filed a counter-claim against the contractor for breach of contract alleging that the contractor defectively performed the work. Id. The trial court found that the contractor had established the validity of its lien and adjudged that the contractor was entitled to recover $96,453.55 for the work performed. Id. However, the trial court also found that the homeowner prevailed on his breach of contract claim and was entitled to recover $50,000.00 from the

contractor. Id. The trial court then computed the $50,000.00 as a set-off to the contractor's lien recovery and awarded the contractor a final judgment in the amount of $46,453.55. Id. With regard to attorneys' fees, the trial court ordered each party to bear its own fees and costs. Id. at 330-331.

The contractor appealed the final judgment arguing, among other things, that the trial court erred by not awarding it attorneys' fees under §713.29, *Fla. Stat.* Id. at 331. The Fifth District Court of Appeal agreed with the contractor and quoted the following language from *DCC Constructors, Inc.*, 839 So.2d at 733, *quoting Hub Cap Heaven, Inc.*, 431 So.2d at 324:

> When a claimant in a mechanic's lien action recovers a judgment in ***any*** amount, a trial court errs in not finding the claimant the prevailing party and awarding attorneys' fees pursuant to section 713.29, Florida Statutes.

Id. at 331-332 (emphasis in original). Thus, the District Court held that the trial court was "required to award [contractor] attorney's fees pursuant to section 713.29." Id. at 332.

Therefore, under the authority of *Ivey*, the trial court in the instant action erred by awarding Petitioners their attorneys' fees and by failing to award Respondent its attorneys' fees. Indeed, the factual scenarios in the instant case and *Ivey* are nearly identical: (1) a contractor sues to foreclose its claim of lien, (2) the contractor obtains affirmative monetary recovery pursuant to its lien foreclosure

count, (3) the property owner counter-claims for breach of contract related to the contractor's defective work, (4) the property owner is awarded damages under its breach of contract counter-claim, and (5) the property owner's damages are set-off from the contractor's lien recovery.[8]

Petitioners point out that the *Ivey* Court also cited the "significant issues" language from *Prosperi* and, in an incredible jump of logic, argue that the *Ivey* Court considered Ivey's affirmative recovery on its lien as just one issue to be given weight in the "significant issues" test.[9] Initial Brief, p. 20. Contrary to Petitioners' argument, however, the *Ivey* Court spoke in very clear language. The Court quoted directly from the *DCC Constructors, Inc.* opinion but ***applied its own emphasis*** to the word "any" in the phrase "recovers a judgment in ***any*** amount." Id. The *Ivey* Court could easily have added a proviso to the opinion relegating affirmative recovery to a mere element of the ultimate analysis, but it chose not do

[8] Petitioners try to distinguish *Ivey* by arguing that "there is nothing contained within the [*Ivey*] opinion to suggest that the homeowner even raised as an issue that he should have been deemed to be the prevailing party. Thus, the Ivey court was left with no alternative but to appoint the contractor as the prevailing party." Initial Brief, p. 21. However, the Answer Brief filed in that case shows that the homeowners did contend that they "were the sole prevailing parties." Answer Brief of Appellee/Cross-Appelant, p. 6.

[9] Petitioners point out the *Ivey* Court's reference to *Prosperi* but gloss over the *Ivey* Court's citation to language from *DCC Constructors, Inc.*, a case supportive of Respondent's argument.

so.[10] Thus, it is clear that in *Ivey* the Fifth District Court of Appeal set forth the traditional bright-line rule that a contractor who affirmatively recovers pursuant to a construction lien foreclosure action must be awarded attorneys' fees as the "prevailing party" under §713.29, *Fla. Stat.*

However, even assuming *arguendo* that *Ivey* somehow confuses the "prevailing party" analysis by citing two different standards, the proper way to reconcile the conflicting citations and interpret *Ivey* in light of *Prosperi* is to consider the specific factual scenarios and bases of recovery presented in both *Ivey* and *Prosperi*, and determine which standard is more properly applied to the instant case. In considering the specific factual scenario and theories of recovery in the instant case, it is clear that the *Ivey* standard is appropriate for the determination of the "prevailing party" under §713.29, *Fla. Stat.* In addition, it is evident that the Fifth District Court of Appeal clarified their holding in *Ivey* and the traditional rule for the award of fees in lien foreclosure cases by issuing the opinion in the instant case. *Gale Industries, Inc.*, 960 So.2d at 809.

As stated, *Prosperi* is readily distinguishable from *Ivey* and the instant case. In *Prosperi*, this Court was forced to look beyond §713.29, *Fla. Stat.* and into

[10] In addition, the Fifth District Court of Appeal has now cited the *Ivey* opinion three times since that opinion was rendered and such a qualification was never added or "read in" to the decision. See generally *Pennington & Associates, Inc. v. Evans*, 932 So.2d 1253 (Fla. 5th DCA 2006); *Siegel v. Whitaker*, 946 So.2d 1079 (Fla. 5th DCA 2006); *Gale Industries, Inc.*, 960 So.2d 805.

"significant issues" because, as stated, the contractor ***did not prevail on its lien foreclosure count.*** Rather, the contractor recovered pursuant to its breach of contract claim. The *Prosperi* Court stated "had this suit been limited to a claim of lien, there is no question that the owner would be entitled to his attorney's fees" because the owner prevailed on the lien foreclosure count. 626 So.2d at 1362. Thus, unlike *Ivey*, *DCC Constructors, Inc.*, *Salisbury Construction Corp.*, and the District Court in instant case, all of which applied the traditional rule for the award of fees, the *Prosperi* Court was forced to deal with competing recoveries pursuant to several different causes of action, none of which involved the contractor obtaining affirmative relief under its construction lien claim. Therefore, the holding in *Prosperi* should not apply to the facts under review.

Respondent readily admits that the Petitioners are correct in one regard. This Court, in *Prosperi*, did in fact answer the following certified question "in the affirmative:"

> DOES THE TEST OF *MORITZ V. HOYT* FOR DETERMINING WHO IS THE PREVAILING PARTY FOR THE PURPOSES OF AWARDING ATTORNEY'S FEES APPLY TO FEES AWARDED UNDER SECTION 713.29, FLORIDA STATUTES?

626 So.2d at 1363. Petitioners argue that this Court's answer to the posed question, in and of itself, should determine the outcome in this matter. Initial Brief, p. 11. Such an argument suggests that the import of *Prosperi* can be

completely summed up by a reading of the certified question at the very beginning of the opinion, and then by blindly scrolling to the end of the opinion where that certified question is answered "in the affirmative." However, there are three pages of background, facts, analysis and application in between those two end points where it is clear, as the District Court properly noted herein, that the *Prosperi* Court was dealing with a self-defined "net judgment case" where the lienor ***failed*** to obtain affirmative recovery on its lien claim. *Gale Industries, Inc.*, 960 So.2d at 807-808.

Contrary to Petitioners' argument, the import of *Prosperi* is obtained from a thorough reading of the ***entire*** opinion and a substantive understanding of the factual/procedural posture this High Court was addressing, not from a truncated review of the first and last pages of the opinion. As this Court has stated "if we blinded ourselves to the ***unique facts of each case***, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general." *J.A.S. v. State*, 705 So.2d 1381, 1387 (Fla. 1998) (emphasis added); see also *Gammon v. Cobb*, 335 So.2d 261, 265 (Fla. 1976) (stating that a court should consider advances and changes in law and society rather than reviewing an issue in a vacuum).

Throughout the proceedings at both the trial and appellate levels, Petitioners have been unable to cite to a ***single case***, whether in memoranda of law, briefs, or

oral arguments, where the *Prosperi* significant issues test was applied to award an ***owner*** "prevailing party" status pursuant to §713.29, *Fla. Stat.* when the contractor obtained affirmative recovery, in any amount, ***in a lien foreclosure action***. Even *Corley v. Rivertown, Inc.*, 863 So.2d 1244 (Fla. 5th DCA 2004), a case heavily relied upon by Petitioners in their Initial Brief, does not stand for such a proposition.[11] Petitioners' counsel admitted as much during oral argument before the District Court during the following exchange:

District Court:	"Has *Prosperi* been applied to a similar circumstance? That is, a construction lien in which the general contractor has received some, but not all, of the award that he is seeking. Has *Prosperi* been applied to that finding by the District Courts?
Opposing Counsel:	As a holding in a case? No."[12]

[11] Petitioners also argue that the District Court herein "elected to ignore the *Corley* decision that reiterates the substantial issue test." Initial Brief, p. 19. However, a review of oral arguments below reveals that the District Court discussed the *Corley* opinion with the undersigned; evidence that the impact of the decision was not "ignored." Oral Arguments in the Matter of *Gale Industries, Inc. v. Frank J. Trytek and Kathy L. Trytek*, No. 06-1569, (Fla. 5th DCA, May 23, 2007) (http://www.5dca.org/ArchivedOAs/2007/Aoa5-23-07.pdf#xml=http://www.5dca.org/SCRIPTS/texis.exe/webinator/search/pdfhi.txt?query=baird&pr=5DCA&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&sufs=0&order=r&mode=admin&opts=adv&cq=2&id=465b5ef72b).

[12] Oral Arguments in the Matter of *Gale Industries, Inc. v. Frank J. Trytek and Kathy L. Trytek*, No. 06-1569, (Fla. 5th DCA, May 23, 2007) (http://www.5dca.org/ArchivedOAs/2007/Aoa5-23-07.pdf#xml=http://www.5dca.org/SCRIPTS/texis.exe/webinator/search/pdfhi.txt?query=baird&pr=5DCA&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq

Petitioners' failure to find such a case is not surprising because, based upon the undersigned's and, apparently, the Fifth District Court of Appeal's research, such a case ***does not exist***.

III. THIS COURT SHOULD EITHER DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION AND ABSTAIN FROM ISSUING AN OPINION OR ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE, THEREBY AFFIRMING THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL, TO AVOID HARMFUL PUBLIC POLICY IMPLICATIONS.

This Court must take into account the real-world impact and the effects on public policy that would arise should the Court rule that the *Prosperi* "significant issues" test applies in the instant case. First, applying the "significant issues" test to lien foreclosure lawsuits would encourage parties to litigate minute and stipulated issues all the way through trial, thereby unnecessarily burdening the court system. Second, the stated objectives of Florida's Construction Lien Law would be undermined if §713.29, *Fla. Stat.* was subject to a "significant issues" determination. Finally, contrary to Petitioners' arguments, Florida law already affords property owners adequate means of recovering attorney's fees in construction lien foreclosure lawsuits.

=500&rlead=500&sufs=0&order=r&mode=admin&opts=adv&cq=2&id=465b5ef72b).

A. Applying the *Prosperi* "significant issues" test to construction lien foreclosure suits would encourage needless litigation and unnecessarily burden the courts.

If the trial court is upheld and the rule announced there made law, then, as a practical matter, this could be the last case in which a lienor agrees to a summary judgment or stipulates to the procedural sufficiency or validity of its lien. If the "significant issues" test of *Prosperi* is held applicable to the facts at bar, then Petitioners herein have provided a roadmap to victory to all property owners that find themselves defendants in lien foreclosure actions; (1) immediately stipulate to the procedural sufficiency of the claim of lien, (2) immediately stipulate to the amount of the claim of lien, (3) continue litigating only the owner's counter-claim for damages related to defective workmanship, and, then, (4) argue, under *Prosperi*, that the owner is entitled to attorney's fees, despite the lienor's recovery, because the owner prevailed on the only "significant issue" tried before the court. Such legal gamesmanship, which would surely arise if *Prosperi* was held to apply, should not be sanctioned by this Court.

In recognizing that property owners would gain the upper hand by using the strategy outlined above, the lienor will determine that it is better served by litigating ***all*** aspects of the lien (even aspects that are uncontested) in order to preserve the lien related issues for trial in hopes that those issues will be the "significant issues" involved in the litigation. This real world impact would be

anathema to the lofty principles of the "just, speedy, and inexpensive determination of every action." Florida Rule of Civil Procedure 1.010; see also Florida Rule of Judicial Administration 2.110. However, the bright-line traditional rule adhered to by the District Court herein offers litigants a predictable foundation on which to base their litigation strategies and settlement decisions. It also allows litigants to agree to the pre-trial determination of lien related issues without fear, thereby narrowing the issues that will ultimately use up a trial court's time and resources.

B. Applying the traditional rule found in *Ivey* and *DCC Constructors, Inc.*, and adhered to by the District Court herein, would further the stated objectives of Florida's Construction Lien Law.

The traditional rule adhered to by the Fifth District Court of Appeal herein to determine the "prevailing party" for purposes of §713.29, *Fla. Stat.* is supportive of the laudable policy objectives of Florida's Construction Lien Law. The ***fundamental purpose*** of Florida's Construction Lien Law is to afford suppliers and laborers "the greatest protection compatible with justice and equity." *WMS Construction, Inc. v. Palm Springs Mile Associates, Ltd.*, 762 So.2d 973, 974 (Fla. 3d DCA 2000) (emphasis added); see also *Prosperi*, 626 So.2d at 1362 (the purpose of the mechanics' lien law is to afford the laborer or materialman adequate assurance of being fully compensated for his labor or services). Therefore, Chapter 713, Florida Statutes is to be liberally construed in a ***laborer or supplier's*** favor. Id. (emphasis added); *Centex-Winston Corp. v. Crown Paint, Inc.*, 294

So.2d 694, 695 (Fla. 3d DCA 1974). The reasoning used by the District Court herein, and by the *Ivey* and *DCC Constructors, Inc.* courts, in addition to being based on a much more similar fact patterns, furthers the fundamental purpose of the Construction Lien Law more so than the "significant issues" test as espoused in *Prosperi*, because it awards attorneys' fees any time a contractor obtains affirmative recovery on its lien foreclosure claim.

Whether it is a general contractor, subcontractor, laborer or supplier, a lienor that has provided its time, skill or material to a construction project should not face the possibility of paying two attorneys' fees when it is forced to file a lawsuit to recover amounts owed for its services. Applying *Prosperi* to lien foreclosure actions would require lienors to face such a danger if the property owner follows the same game plan as the Petitioners herein. Not only does that game plan encourage unnecessary litigation, it could lead to trial level results that contradict the spirit and purpose of Florida's Construction Lien Law if the *Prosperi* "significant issues" test was to be applied.

C. Florida law already affords property owners ample opportunity to obtain attorney's fees in construction lien litigation.

Petitioners critique the District Court's opinion by arguing that it would "encourage . . . contractors to perform their work negligently" while forcing "a homeowner to pay thousands of dollars in legal fees as a punishment." Initial Brief, pp. 22-23. Petitioners' argument fails, however, to take into account the

various protections already afforded by Florida law to property owners who contract for improvements to real property, especially those protections related to the award of attorney's fees. These mechanisms grant a property owner ample opportunity to set herself up for an award of attorney's fees after successfully litigating her counter-claim for damages related arising from a lienor's defective work.

First, this Court has ruled that "in order to be a prevailing party entitled to the award of attorney's fees pursuant to section 713.29, a litigant must have recovered an amount exceeding that which was earlier offered in settlement of the claim." *C.U. Associates, Inc. v. R.B. Grove, Inc.*, 472 So.2d 1177, 1179 (Fla. 1985). Therefore, if Petitioners had offered to pay Respondent the set-off of $1,525 in full settlement during the litigation, and Respondent had rejected that offer, Respondent would not have been the "prevailing party" because it did not recover more than that amount.[13] Second, an owner is afforded protection by use of the Proposal for Settlement pursuant to Fla.R.Civ.P. 1.442 and §768.79, *Fla. Stat.*[14] Taken in conjunction with the District Court's opinion herein, the property

[13] In fact, Petitioners would be the "prevailing parties" under that scenario because, is a lien foreclosure case, there must always be a "prevailing party." See e.g. *Heidle v. S&S Drywall and Tile, Inc.*, 639 So.2d 1105, 1106 (Fla. 5th DCA 1994).

[14] The record on appeal reflects that Petitioners never served a Proposal for Settlement to Respondent pursuant to Fla.R.Civ.P. 1.442 and §768.79, *Florida Statutes*, nor did Petitioners ever offer to pay Respondent money in settlement during the litigation of this case.

owner's ability to utilize these protection mechanisms reinforces the notion that property owners who claim set-offs for defective work should still be obligated to pay its contractor those sums that the owner believes are properly due and owing. Identifying this policy implication, the District Court herein asked Petitioners' counsel at oral argument why Petitioners had not paid the difference or set-off, or offered to settle by paying the difference or set-off, between the lien amount due to Respondent and Petitioners' initial repair invoice.[15] Opposing counsel answered that it was Petitioners' "tactical decision" not to offer such payment.

IV. THIS COURT SHOULD EITHER DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION AND ABSTAIN FROM ISSUING AN OPINION OR ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE, THEREBY AFFIRMING THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL, TO COMPLY WITH THE PLAIN LANGUAGE OF APPLICABLE STATUTES.

The plain language of the applicable statutes must be central to the determination of the rule to be applied to claims for attorney's fees in construction lien foreclosure actions. See e.g. *Zalay v. Ace Cabinets of Clearwater, Inc.*, 700 So.2d 15, 17 (Fla. 2d DCA 1997) (as a creature of statute, construction lien laws must be strictly construed). Section 713.29, *Florida Statutes*, states:

> In any action brought to enforce a lien or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the

[15] The undersigned is paraphrasing.

> court, which fee must be taxed ***as part of the prevailing party's costs, as allowed in equitable actions***. (emphasis added).

The legislature has mandated that attorney's fees in construction lien cases be taxed as "part of the prevailing party's costs, as allowed in equitable actions." Therefore, the statute applicable to taxation of costs in equitable actions must be considered. Section 57.041(1), *Florida Statutes*, "applies to all civil actions except those that are governed by specific statutes containing more particular provisions concerning the taxation of costs." Philip J. Padavano, 5 Florida Practice Series, *Civil Practice* §13.3 (West 2007-08 ed.). The statute states:

> The party ***recovering judgment*** shall recover all his or her legal costs and charges which shall be included in the judgment; but this section does not apply to executors or administrators when they are not liable for costs. (emphasis added).

This Court has held that this statute "need not be construed" because it "expressly demands that the party recovering judgment be awarded costs." *Hendry Tractor Co. v. Fernandez*, 432 So.2d 1315, 1316 (Fla. 1983). The same rule should be applied when determining entitlement to attorney's fees in construction lien foreclosure actions because §713.29, *Fla. Stat.*, unambiguously states that fees shall be taxed as part of the "prevailing party's ***costs, as allowed in equitable actions***." (emphasis added).

Attorney's fees are regarded as "costs" in construction lien foreclosure actions and are to be taxed as allowed in "equitable actions." Id.; *Zalay*, 700 So.2d at 18. §57.041(1), *Fla. Stat.*, which is applicable to the award of costs in "equitable actions," mandates that costs are to be awarded to the "party recovering judgment." Therefore, in deference to the unambiguous language of these pertinent statutes, this Court should either decline to exercise its discretionary jurisdiction and abstain from issuing an opinion, or answer the certified question in the negative, thereby affirming the opinion of the Fifth District Court of Appeal.

CONCLUSION

The trial court committed reversible error in ruling that the Petitioners were the "prevailing parties" pursuant to the "significant issues" test of *Prosperi*. The Fifth District Court of Appeal, after properly applying a *de novo* standard of review, correctly recognized that the *Prosperi* decision was not applicable to the instant case by its own terms. Therefore, the District Court properly adhered to the traditional rule relating to the award of attorney's fees in a lien foreclosure action. For the reasons expressed herein, Respondent respectfully requests that this Court either decline to exercise its discretionary jurisdiction in this case and abstain from issuing an opinion or answer the certified question in the negative, thereby affirming the opinion of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic and U.S. Mail on this ___ day of December, 2007, to Michael R. D'Lugo, Esquire, Wicker, Smith, O'Hara, Graham & Ford, P.A., Post Office Box 2753, Orlando, Florida 32802-2753.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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