

CASE NO. SC07-1641

SUPREME COURT OF FLORIDA

**FRANK J. TRYTEK and CATHY L. TRYTEK,
Appellants,**

vs.

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

**INITIAL BRIEF OF FRANK J. TRYTEK
AND CATHY L. TRYTEK**

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STATEMENT OF THE CASE AND OF THE FACTS

The above captioned appeal is an effort by Frank J. Trytek and Cathy L. Trytek (the “Tryteks”) to have this court review the decision of the Fifth District Court of Appeal dated June 22, 2007, which had the effect of reversing the trial court’s decision finding that the Tryteks were the prevailing parties in their lien foreclosure action against Gale Industries, Inc. (“Gale”). The underlying Order and Final Judgment in favor of the Tryteks awarded the Tryteks attorney’s fees and costs as the prevailing parties pursuant to Florida Statute § 713.29. (IV: 736 – 737)¹.

The facts giving rise to the underlying litigation began with the Tryteks’ construction of their home. During the course of construction, after all of the electrical wiring had already been put in place, Gale was brought in as a subcontractor in order to install insulation. (VI: 22). During the course of the insulation installation, Gale’s employees stapled the insulation to the wood framing within the walls and ceiling trusses in an unprofessional and negligent manner throughout the Tryteks’ home. (VI: 22). In over 100 locations, these staples penetrated wiring that had already been installed in the home, causing a fire

¹ Roman numerals refer to the volume of the record on appeal; Arabic numerals refer to the specific page of the record on appeal.

hazard, and potentially undermining the wirings' ability to function properly. (VI: 26). As a result, an electrical contractor had to be brought in to the Tryteks' home in order to repair the damaged wiring. (VI: 26).

Mr. Trytek is the owner of Try-Cor Electrical, an electrical contractor. (VI: 25). Gale agreed to have Try-Cor brought in to perform the repair work to the damaged wiring, and that the Tryteks would deduct the repair costs from the amount owed to Gale for the insulation installation. (VI: 24). After the work was completed, the Tryteks submitted a bill to Gale for the work performed in the amount of \$11,770.00, along with a bill from a Building Inspector brought in to inspect the damage Gale had caused with its negligent installation, and a check for \$736.00, reflecting the balance owed to Gale after the deduction. (VI: 32, 40).

Gale determined that the amount of the invoice submitted for the electrical work was unreasonable, and refused to accept payment of the balance owed. (VI: 36). Gale then immediately impressed a lien on the Tryteks' home in the amount of \$12,725.00, reflecting Gale's assessment of the value of the insulation installation work that Gale had provided. (VI: 35). Gale then sought to perfect its construction lien by filing the underlying lawsuit against the Tryteks, seeking a foreclosure on the lien pursuant to Chapter 713, Florida Statutes. (I: 1 – 13). The Tryteks responded to Gale's lawsuit by filing a counterclaim, in which the Tryteks

sought to recover the value of the services performed in repairing the defective insulation work that Gale had provided. (I: 25 – 30). Although there were some settlement discussions during the course of this litigation, with Gale’s offer ranging from \$320.00 to \$3,200.00, the parties were never able to reach an agreement on the value of the services that were provided in the form of the electrical repair work. It is the reasonableness of this electrical repair work that ultimately became the only issue to be litigated.

During the course of the litigation, Gale filed a Motion for Partial Summary Judgment on the issue of whether its claim of lien was procedurally and substantively sufficient. (I: 139 – 142). The trial court ultimately entered an *agreed* order on Gale’s Motion for Partial Summary Judgment, reflecting the conclusion that the claim of lien was procedurally sufficient, so that Gale would not have to introduce any evidence at trial on this issue. (III: 421 – 425). The order also determined that Gale would be entitled to recover the amount sought in its Complaint, less any damages proven by the Tryteks in their counterclaim. (III: 421). Finally, this order stated: “The only issue to be resolved at trial is the value of Defendants’/Counter-Plaintiffs’ alleged damages as set forth in their counterclaim.” (III: 421).

Given this background, the underlying claim was ultimately tried in a bench trial that took place on June 21, 2005, (VI-VII: 1 – 289) with closing argument presented on September 16, 2005. (V: 752 – 819). After hearing opening statements, the testimony of various witnesses for both sides, and closing arguments, the trial court determined that the Tryteks were entitled to a set-off for their damages in repairing the electrical wiring of their home in the amount of \$11,200.00. (III: 535 – 538). As a result, Gale’s claim of lien was reduced by this set-off amount, resulting in an award to Gale of \$1,525.00. (III: 538).

After the trial court’s ruling, both parties submitted Motions to Tax Fees and Costs, with the Tryteks’ motion filed on October 6, 2005, (III: 539 – 542) and Gale’s motion submitted on October 26, 2005. (III: 546 – 551). A hearing was held on the Cross-Motions for Attorney’s Fees and Costs on November 10, 2005. (V: 826 – 868). The trial court reserved ruling on the parties’ cross-motions in order to allow for a review of the various appellate opinions that were submitted in support of each side’s argument. (V: 867 – 868). The trial court then issued its Order Taxing Attorneys’ Fees and Costs on December 4, 2005. (IV: 617 – 620). The trial court determined based upon the language of Florida Statute § 713.29, and based upon the various appellate decisions that had been submitted for the trial court’s review, that the Tryteks had prevailed on the significant issue of the case,

namely the amount of the set-off to be awarded against the claim of lien, and therefore the Tryteks were the prevailing parties, thereby entitled to the recovery of their attorney's fees and costs incurred in the litigation. (IV: 619 – 620).

The parties stipulated to the amount of attorneys' fees and costs to be awarded, and a Final Judgment was entered on April 6, 2006. (IV: 736 – 737). Gale timely filed its Notice of Appeal to the Fifth District Court of Appeal on April 25, 2006. (IV: 738 – 740). The parties submitted briefs to the District Court, and attended oral argument on May 23, 2007. Subsequent to oral argument, the District Court issued its opinion on June 22, 2007. *Gale Industries, Inc. v. Trytek*, 960 So.2d 805 (Fla. 5th DCA 2007). In its opinion, the District Court concluded that the trial court had abused its discretion in ruling that the Trytek's were the prevailing party below, and therefore entitled to the recovery of their attorney's fees.

The District Court rejected the trial court's application of the significant issues test set forth in this Court's opinion in *Prosperi v. Code, Inc.*, 626 So.2d 1360 (Fla. 1993), which provides that the prevailing party for the determination of an award of attorney's fees is the party that prevails on the significant issues in the case. Instead, the District Court ruled that the significant issues test only applies in net judgment cases, which are limited to those cases in which the lienor fails to

foreclose on a mechanic's lien. Here, the District Court concluded that because Gale had successfully foreclosed on its mechanic's lien, even if only for a small percentage of the amount of the original lien, the *Prosperi* significant issues test did not apply, and Gale was the prevailing party entitled to the recovery of its attorney's fees.

The Tryteks timely filed a Motion for Rehearing and for Certification of a Question of Great Public Importance. The District Court denied the Trytek's Motion for Rehearing without discussion. However, the District Court did certify the following question of great public importance:

When 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), does the trial court have the discretion apply the "significant issues" test articulated in *Prosperi v. Code, Inc.*, 626 So.2d 1360 (Fla. 1993), instead of the net judgment rule in determining which party is the "prevailing party" for the purpose of awarding attorney's fees?

Gale at 809.

The Tryteks timely filed their Notice of Appeal (which was treated as a Notice to Invoke this Court's discretionary jurisdiction) with the Fifth District Court of Appeal on August 27, 2007. This Court issued its order accepting jurisdiction on October 5, 2007, and the instant appeal ensued.

SUMMARY OF THE ARGUMENT

The Trytek's are seeking review of the District Court's determination that the trial court abused its discretion in applying the significant issues test to reach the conclusion that the Tryteks were the prevailing parties in this construction lien litigation. Gale obtained a reversal of the trial court's entry of a Final Judgment in favor of the Tryteks for attorneys' fees and costs based upon the determination that the Tryteks were the prevailing party at the trial. The standard of review to be applied is the abuse of discretion standard, and given the trial court's thoughtful analysis of the prior decisions of this Court and of the District Courts of Appeal, the District Court erred in finding that the trial court abused its discretion in ruling that the Tryteks were the prevailing parties at trial.

The proper test for the trial court to apply is the significant issues test that this Court applied to mechanic's lien cases in *Prosperi*. That test requires the trial judge to determine from the record which party has prevailed on the significant issues tried before the court in order to determine who is the prevailing party. In this case, there was only one significant issue presented at trial: the amount that the Tryteks could recover for the electrical services that were required to repair Gale's defective installation of insulation. The amount awarded to the Tryteks, \$11,200.00, constituted virtually everything the Tryteks requested in their first

invoice to Gale before the litigation commenced, and almost completely eliminated Gale's entire mechanic's lien. Significantly, Gale's mechanic's lien was not an issue that was tried, as an agreed order on a motion for partial summary judgment had already been entered in favor of Gale prior to trial. Thus, because the Tryteks prevailed on the only significant issue that was actually tried, the trial court did not abuse its discretion in finding that the Tryteks were the prevailing parties at trial.

Gale's efforts to apply a rigid net judgment test, in which the prevailing party is determined solely by an analysis of whether an award is made on the construction lien claim, has been rejected by this Court. Instead of this mechanical analysis, this Court requires a more flexible approach in order to achieve an equitable result. That is precisely what the trial court did in the instant matter, and therefore it cannot be said that the trial court abused its discretion in ruling in favor of the Tryteks.

LEGAL ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE TRYTEKS WERE THE PREVAILING PARTIES AT TRIAL, BECAUSE THE TRYTEKS PREVAILED ON THE ONLY SIGNIFICANT ISSUE TRIED BEFORE THE COURT.

The single issue that is raised in this appeal is the propriety of the trial court's determination that the Tryteks were the prevailing parties in the underlying litigation, and therefore they had earned an entitlement to recover their attorneys' fees incurred in litigating this case. The standard of review for this Court to apply in assessing the trial court's finding that the Tryteks were the prevailing parties is the abuse of discretion standard. *Sorrentino v. River Run Condominium Association*, 925 So.2d 1060 (Fla. 5th DCA 2006); *Colonel v. Meyerson*, 921 So.2d 690 (Fla. 5th DCA 2006); *Granoff v. Seidle*, 915 So.2d 674 (Fla. 5th DCA 2005). This Court has described the abuse of discretion standard as follows:

In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

The trial court's determination that the Tryteks are the prevailing parties in this litigation, and therefore are entitled to recover their attorneys' fees, is authorized by Florida Statute § 713.29, which provides as follows:

In an 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 her or his attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions.

In a construction lien suit such as the instant action, the award of attorney's fees to the prevailing party is mandatory. *Pennington & Associates, Inc. v. Evans*, 932 So.2d 1253 (Fla. 5th DCA 2006); *Heidle v. S&S Drywall & Tile, Inc.*, 639 So.2d 1105 (Fla. 5th DCA 1994).

The central issue in this appeal is whether the trial court abused its discretion in finding that the Tryteks were the prevailing parties for the purpose of awarding attorneys' fees pursuant to Florida Statute § 713.29. At the heart of this issue is the methodology that the trial court applied in analyzing who the prevailing party should be. A review of the applicable opinions of the District Courts and this Court reveals that the trial court applied the correct standard to the analysis of which party should be deemed to be the prevailing party in this litigation, and

therefore it cannot be said that the trial court abused its discretion in reaching the conclusion that the Tryteks were the prevailing parties at trial.

The methodology behind the prevailing party analysis must begin with the opinion of this Court in *Prosperi* court answered the following question of great public importance in the affirmative:

Does the test of *Moritz v. Hoyt* for determining who is the prevailing party for the purposes of awarding attorneys' fees apply to fees awarded under Section 713.29, Florida Statutes?

Id. at 1361. In reaching this conclusion, the Florida Supreme Court adopted the following language as being applicable to the prevailing party analysis in any mechanic's lien action:

It is our view that the fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court.

Id. at 1363; quoting *Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807, 810 (Fla. 1992).

In expanding the significant issues test enunciated in *Moritz* to construction lien cases in which attorney's fees are at issue pursuant to Florida Statute § 713.29, this Court recognized the net judgment rule, but found that the party that obtains a net judgment in its favor is not automatically the prevailing party in all situations.

In fact, the *Prosperi* court specifically rejected the rigid net judgment analysis that Gale has advocated below. In reaching the conclusion that the discretion to determine the prevailing party should be vested in the trial court and not in some arbitrary numerical analysis, the Florida Supreme Court stated as follows:

As we see it, the net judgment rule itself was originated as a device to do equity. For example, under most circumstances it would be unfair to require a contractor who recovers the bulk of its claim to pay attorney's fees for failure to meet the technical requirements of the mechanic's lien law. In some of the later cases, however, the net judgment rule appears to have been applied mechanically without regard to the equities. We believe that *Moritz* now requires a more flexible application. The fact that the claimant obtains a net judgment is a significant factor but it need not always control the determination of who should be considered the prevailing party. ***We hold that in considering whether to apply the net judgment rule, the trial judge must have the discretion to consider the equities and determine which party has in fact prevailed on the significant issues.***

Prosperi at 1363. (Emphasis added).

This Court's formulation as quoted above is directly contrary to the position that Gale has advocated below. Whereas Gale has argued that the trial court should be reversed because there was a net judgment entered in favor of Gale, the *Prosperi* decision makes clear that a trial judge must consider the equities and determine which party prevailed on the significant issues. That is precisely what the trial court did in the instant action, and therefore it cannot be said that the trial

court abused its discretion in reaching the conclusion that the Tryteks were the prevailing parties, and were therefore entitled to the recovery of their attorneys' fees.

The Fifth District Court of Appeal recently reviewed the proper approach for determining whether a party should be deemed to be the prevailing party for the purpose of an award of attorney's fees pursuant to Florida Statute § 713.29. In *Corley v. Rivertown, Inc.*, 863 So.2d 1244 (Fla. 5th DCA 2004), the District Court reviewed a trial court order that denied both parties' respective Motions for Attorney's Fees in a construction lien foreclosure action brought pursuant to Florida Statute § 713.29. The District Court unequivocally set forth the appropriate analysis for a determination of which party should be deemed to be the prevailing party for the purpose of the award of attorney's fees, stating as follows:

The test to determine the prevailing party provides that the party that prevailed on the significant issues tried before the court is the prevailing party entitled to an award of attorney's fees.

Id. at 1246; citing *Prosperi* and *Moritz*.

The Fifth District Court of Appeal revisited the issue of the appropriate test for determining the prevailing party in *Sorrentino, supra*. The Fifth District stated in *Sorrentino*: "To determine which party prevailed, the court should focus on

which one prevailed on the significant issues involved in the litigation. A measure of this test is the result obtained at the close of the case.” *Id.* at 1065.

Thus, both this Court and the Fifth District Court of Appeal have firmly established that the significant issues test is the test to apply in determining which party is the prevailing party for the purpose of the analysis of an award of attorney’s fees pursuant to Florida Statute § 713.29. Applying the significant issues test to the facts of the instant litigation reveals that the trial court made the proper determination that the Tryteks were the prevailing parties at trial. It certainly cannot be said that no reasonable person would agree with the trial court’s determination, and therefore Gale cannot demonstrate an abuse of discretion in order to obtain a reversal of that decision.

As noted above, the significant issues test traces its roots back to this Court’s opinion in *Moritz*, in which the Court instructed trial courts to determine the prevailing party by looking at, “which party has in fact prevailed on the significant issues *tried before the court.*” *Moritz* at 810. (Emphasis added). In this case the only issue that was tried before the court was the amount of recovery that the Tryteks could obtain in order to act as a set-off against Gale’s mechanic’s lien. The trial court determined that the Tryteks were entitled to more than 95% of what was charged in the original invoice that the Tryteks sent to Gale after the repair work

had been performed on the Tryteks' home. Although there were additional supplemental bills that were later submitted, which did not become part of the Final Judgment in this case, the trial court was clearly acting well within its discretion to determine that the Tryteks had been successful in obtaining a favorable result on the one significant issue that was tried in this case.

Gale's mechanic's lien was not even an issue that was tried in this case. This was a factor that the trial court considered in finding that the Tryteks were the prevailing parties, and therefore worthy of an award of attorneys' fees under Florida Statute § 713.29. In reaching this conclusion, the trial court stated as follows:

In this case, the court finds that the Tryteks are the prevailing parties. There was never an issue about Gale performing the insulation work at the Tryteks' residence nor was there ever an issue about whether Gale was entitled to payment for its work. Early in the case, there was an agreed order on plaintiff's Motion for Partial Summary Judgment which recognized the validity and amount of Gale's lien. The real issue in the case was how much money should be set-off from the lien amount as compensation to the Tryteks for repairing the damage done by Gale during its installation of the insulation. The Tryteks prevailed on their counterclaim to the extent of almost extinguishing the Gale lien. It was this aspect of the case that required expert testimony, document production, document analysis and trial time. The Tryteks recovered \$11,200.00 on their counterclaim. Gale only offered a discount of from \$320.00 to \$3,200.00. Therefore, this court finds that the Tryteks

prevailed on the “significant issue” of this case and are the prevailing parties entitled to recover attorneys’ fees and costs pursuant to § 713.29, F.S.

(IV: 619 – 620).

Thus, as the *Moritz* court made clear, and as the trial court below understood, in order to assess who is the prevailing party on the significant issues, one need look to those issues that are actually tried. In this case, there was only one significant issue that was tried before the trial court, and that was the Tryteks’ counterclaim for the damages caused by the defective installation of insulation by Gale. In successfully litigating the counterclaim, the Tryteks were able to obtain a set-off that almost completely eliminated Gale’s mechanic’s lien. Under these circumstances, the inescapable conclusion is that the Tryteks prevailed on the significant issue in the case, and therefore *Prosperi* mandates a rejection of the District Court’s opinion, and an affirmance of the trial court’s decision.

This Court has rejected the position that Gale has advocated as being too mechanical and inflexible. Gale would prefer a rule of law that applies a rigid form of the net judgment rule. Its application to the facts of the instant case would lead to the conclusion that although the Tryteks were successful in eliminating more than 88% of Gale’s mechanic’s lien, Gale should still be determined to be the prevailing party only because a judgment in some amount was entered in its favor.

In support of this contention, Gale has cited to judicial opinions that are either inapposite to the facts of this case or that are in conflict with the Supreme Court's formulation in *Prosperi*.

Gale's position is that when a claimant in a mechanic's lien action recovers a judgment on the lien in any amount, a trial court errs in not finding the lienor the prevailing party and awarding attorney's fees pursuant to § 713.29 of Florida Statutes. In support of this contention, Gale cites to *DCC Constructors, Inc. v. Yacht Club Southeastern, Inc.*, 839 So.2d 731, 733 (Fla. 3rd DCA 2003), and *Hub Cap Heaven, Inc. v. Goodman*, 431 So.2d 323 (Fla. 3rd DCA 1983). In addition, in support of its argument, Gale has cited to the opinion of the Second District Court of Appeal in *Peter Marich & Associates, Inc. v. Powell*, 365 So.2d 754 (Fla. 2nd DCA 1978). It should be noted that both *Hub Cap Heaven* and *Peter Marich* predate this Court's decision in *Prosperi* by several years. To the extent that the Second District and Third District Courts of Appeal adopted the rigid net judgment test for a determination of who is the prevailing party in those cases, both of those decisions should be deemed to have been superseded by the subsequent *Prosperi* decision.

The same cannot be said of the Third District's opinion in *DCC Constructors*, however to the extent that this Third District Court of Appeal

decision conflicts with this Court's formulation in *Prosperi*, the *DCC Constructors* opinion should be rejected. The *DCC Constructors* opinion is also distinguishable from the facts of the instant case, and therefore it should not be used as a basis to determine that the trial court abused its discretion in concluding that the Tryteks were the prevailing parties at trial.

The decision itself is inconsistent with regard to whether the property owner succeeded in its counterclaim. At one point, the court pointed out that the contractor was awarded \$1,875,893.00, which was subject to a set-off of \$355,676.00, for a net award of \$1,520,217.00. *Id.* at 732 – 733. Then, in concluding that the contractor should have been awarded attorney's fees, the court stated as follows: "Since DCC received a net award after arbitration on its sole cause of action, *and also successfully defeated all of the defendants' affirmative defenses and counterclaims*, it was entitled to attorney's fees as the prevailing party under Section 713.29." *Id.* at 733. Obviously, the property owner could not have been both successful and unsuccessful on its counterclaims. Either way, *DCC Constructors* has no application to the instant matter. Whether the basis of the *DCC Constructors* ruling was the fact that the counterclaim was defeated, or the fact that the counterclaim only reduced the lien amount to \$1,520,217.00, the contractor clearly prevailed on the significant issues in the case, thereby warranting

an award of attorney's fees as the prevailing party. Here, the counterclaim has almost completely swallowed Gale's construction lien. *DCC Constructors* should therefore have no bearing on the court's analysis of the instant matter.

Before the District Court, Gale elected to ignore the *Corley* decision that reiterates the substantial issue test, and instead relied on *Michael David Ivey, Inc. v. Salazar*, 903 So.2d 329 (Fla. 5th DCA 2005), for the proposition that the trial court here abused its discretion in refusing to find that Gale was the prevailing party. The facts of *Ivey* are similar in a general sense to the facts of the instant case, however it is readily apparent that when one examines the detail of the *Ivey* decision, it does not support Gale's contention. In *Ivey*, a contractor filed suit to recover under a mechanic's lien, and the court found that the contractor was entitled to recover \$96,453.55. However, as is the case here, the homeowner also had a counterclaim against the contractor for defective work. The trial court found that the homeowner was entitled to \$50,000.00, which was then used as a set-off, resulting in the contractor being awarded \$46,453.55. This Court concluded that Ivey was entitled to recover its attorneys' fees pursuant to Florida Statute § 713.29, because Ivey prevailed on the mechanic's lien claim and was entitled to \$46,453.55 after calculating the set-off. The District Court then went on to quote from the *DCC Constructors* opinion, that 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 attorney's fees pursuant to Section 713.29, Florida Statutes. *Id.* at 332.

However, what is interesting to note about the *Ivey* opinion is that the Fifth District Court of Appeal also quoted the *Prosperi* significant issues test in reaching its conclusion, stating:

The test to determine the prevailing party provides that the party that prevailed on the significant issues tried before the court is the prevailing party entitled to an award of attorney's fees.

Id. Thus, *Ivey* applied the net judgment rule as part of the significant issues test in determining who was the prevailing party for the purpose of an award of attorney's fees. This analysis is appropriate, and was contemplated by this Court in *Prosperi*. ("The fact that a claimant obtains a net judgment is a significant factor but it need not always control the determination of who should be considered the prevailing party." *Prosperi*, 626 So.2d at 1363).

However, contrary to Gale's argument, the result in *Ivey* does not mandate a rejection of the trial court's ruling here. What is readily apparent from a review of the *Ivey* decision is that the contractor obtained an award based on its mechanic's lien in the amount of \$46,453.55. This amount was slightly less than half of what the contractor was seeking to recover. The trial court in *Ivey* did not award fees to

either party, as one of the issues addressed by the court is the fact that an award of attorney's fees is mandatory in a § 713.29 claim. Thus, the abuse of discretion by the trial court was the failure to identify either party as the prevailing party, and thereby substantiate an award of fees. The *Ivey* court, once the conclusion was reached that the failure to award fees to either party was an abuse of discretion, was left with the decision of which party would be the prevailing party in that litigation. There is nothing contained within the 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. Therefore, the *Ivey* decision should be restricted to the specific facts of that case, as the opinion does not have precedential value in the light of *Prosperi*.

Gale attempted to distinguish *Prosperi* at the District Court by pointing out that the contractor in *Prosperi* failed to make any recovery on his mechanic's lien claim, and therefore the issue was merely a breach of contract matter, which is distinguishable from the instant matter in which Gale was able to obtain an award of \$1,525.00 on its mechanic's lien. Gale's restrictive view of the holding in *Prosperi* simply ignores this Court's language. As noted above, this Court answered a very broad question about the applicability of the *Moritz* test for

determining the prevailing party to claims brought under Florida Statute § 713.29 in the affirmative. There is no suggestion in this Court's *Prosperi* decision that the one determinative factor is whether there is a specific recovery on the mechanic's lien. Thus, Gale has read a restriction into the *Prosperi* opinion that has no basis in the language of the opinion itself. Further, Gale's interpretation amounts to the very same mechanical application of the net judgment rule that the *Prosperi* court explicitly rejected.

If this Court were to adopt Gale's rigid position advocated below and adopted by the Fifth District Court of Appeal, the result would be a lien law that actually accomplishes the opposite of its drafters' intent: to allow a trial court to reach an equitable result. The lien law was not designed to force a homeowner to pay thousands of dollars in legal fees as a punishment for simply seeking to enforce its own rights after having done nothing wrong. Here, it was Gale that performed negligently, and yet according to the Fifth District Court of Appeal's opinion, it is the Tryteks who have to pay for that negligence.

It cannot be the law of Florida that a contractor can perform negligently on a project, file a lien for its own negligent work, litigate through trial *only* the value of the services performed to repair that negligent work, and then expect to have the homeowner pay the contractor's attorney's fees if the repair bill falls one dollar

short of the bill for the negligent work performed. Such a regime would allow, and even encourage, unscrupulous contractors to perform their work negligently, and then to litigate aggressively at the expense of the citizens of the state of Florida. Florida public policy demands incentives to contractors to perform well, disincentives to litigation, and protections for the consumers of services in this state. The Fifth District Court of Appeal's opinion in this case undermines all three public policies, and cannot be allowed to stand.

Given the history of judicial interpretation of Florida Statute § 713.29, and specifically the methodology behind the determination of who constitutes a prevailing party in a mechanic's lien case, the inescapable conclusion is that the trial court did not abuse its discretion in ruling that the Tryteks were the prevailing parties in the instant matter. The Tryteks prevailed on the one substantial issue that was actually tried, the amount of money that should be paid for the services rendered in repairing Gale's defective workmanship. The Tryteks recovered virtually everything that they requested in their initial invoice for services rendered, and that amount almost completely eliminated the amount to be awarded on Gale's mechanic's lien, an amount that was not litigated at trial. The trial court authored a detailed analysis of both the methodology that should be applied in determining how the prevailing party should be selected, as well as the application

of that methodology to the specific facts of this case in reaching the conclusion that the Tryteks were the prevailing parties at trial. Given the trial court's proper application of *Prosperi*, it cannot be said that the trial court abused its discretion in finding that the Tryteks were the prevailing parties at trial. Therefore, the Final Judgment of attorneys' fees and costs in favor of the Tryteks is proper and should be reinstated, and the decision of the Fifth District Court of Appeal should be quashed.

CONCLUSION

For the reasons stated herein, the Tryteks respectfully request that this court issue an opinion quashing the District Court's June 22, 2007 opinion, and ordering that the trial court's Order and Final Judgment finding the Tryteks to be the prevailing parties be reinstated.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 30th day of October, 2007 to all parties on the attached service list.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla. R. App. P. 9.100 (l). This document is being submitted in New Times Roman 14 point font.

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