AA-46794-5/reo/20261405

SUPREME COURT OF FLORIDA

CASE NO. SC07-1641

On appeal from the Fifth District Court of Appeal

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

vs.

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

AMENDED REPLY BRIEF OF FRANK J. TRYTEK AND CATHY L. TRYTEK

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I. THE STANDARD OF REVIEW IS CORRECTLY STATED IN THE INITIAL BRIEF: THE ABUSE OF DISCRETION STANDARD APPLIES.

The first issue Gale Industries, Inc. ("Gale") raises in the Answer Brief is the assertion that Frank J. Trytek and Cathy L. Trytek (the "Tryteks") identified the incorrect standard of review for this Court to apply in reviewing the District Court's reversal of the trial court's determination that the Tryteks were the prevailing parties below. There are two distinct issues, each bearing its own standard of review. As noted in the Initial Brief, the determination of a trial court that a specific party should be designated as the "prevailing party" is a decision to which the abuse of discretion standard applies. ***Sorrentino v. River Run Condominium Association***, 925 So.2d 1060 (Fla. 5th DCA 2006). The Tryteks do not believe that the trial court applied the incorrect rule of law in reaching its conclusion. Therefore, it is disingenuous to suggest, as Gale does in the Answer Brief, that the Tryteks have somehow misled this Court in identifying the abuse of discretion standard as the standard of review to apply. The Tryteks agree that the assessment of whether a trial court applied the correct rule of law is an issue of law for the appellate court to consider based on the *de novo* standard. *See, e.g.,* ***Moore v. Moore***, 858 So.2d 1168 (Fla. 2nd DCA 2003). However, because the Tryteks believe that the trial court did apply the correct rule of law in reaching its conclusion in this matter, the only remaining issue is

the determination of who is the prevailing party, a determination to which the abuse of discretion standard applies.

II. THE TRIAL COURT PROPERLY APPLIED THE *PROSPERI* SIGNIFICANT ISSUES TEST IN ORDER TO CONCLUDE THAT THE TRYTEKS WERE THE PREVAIILNG PARTIES BELOW.

Gale attempts to argue in the Answer Brief that this Court's decision in ***Prosperi v. Code, Inc.***, 626 So.2d 1360 (Fla. 1993) has no application to the facts of the instant matter because the trial court's judgment in ***Prosperi*** was based upon a breach of contract claim, not the successful prosecution of a construction lien. The theme that runs through both Gale's Answer Brief as well as the Amicus Brief is that this Court should apply a harsh, bright line test, in which a construction lienor who recovers one penny or more on a construction lien should have his attorney's fees paid by the homeowner, regardless of whether the homeowner prevails on a significant counterclaim. This arbitrary application of the construction lien law is contrary to this Court's decision in ***Prosperi***, and indeed is contrary to the very policy reasons which Gale argues support this interpretation of Florida Statutes § 713.29.

While it is true that the ***Prosperi*** court considered a set of facts in which the trial court had denied the claim for a mechanic's (now construction) lien, a thorough review of the ***Prosperi*** decision mandates the reinstatement of the trial

court's ruling in this matter. First, this Court accepted jurisdiction in ***Prosperi*** based in part on the following observation by the District Court:

> We acknowledge the Supreme Court's recent opinion in ***Moritz v. Hoyt Enterprises, Inc.***, 604 So.2d 807 (Fla. 1992), in which it held that the test for determining who is the prevailing party for purposes of awarding attorney's fees in a contract action 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 810. It may be that the Supreme Court will extend that test to cases involving attorney's fees awarded under Section 713.29, Florida Statutes (1991). Indeed there is room in the statute for such an equitable approach. *See, e.g.,* ***SCM Associates, Inc. v. Rhodes***, 395 So.2d 632, 634 n.2 (Fla. 2nd DCA 1981).

609 So.2d at 59.

Gale has pointed out that the ***Prosperi*** court stated: "Therefore, had this suit been limited to a claim for a mechanic's lien, there is no question that the owner would be entitled to recover his attorney's fees." 606 So.2d at 1362. Gale argues that this statement by the ***Prosperi*** court mandates a determination in this action that Gale must be awarded its attorney's fees because it was successful in prosecuting its construction lien, even though it was in a vastly reduced amount. However, this statement by the ***Prosperi*** court does not stand for the proposition that Gale advocates. Instead, it simply means that if the only issue tried in a case is the mechanic's lien, and the lienor is successful in prosecuting that mechanic's lien, that lienor is entitled to an award of attorney's fees. That is not the situation in the case at bar, in which the issue of the

mechanic's lien was not actually litigated, and the homeowner was so successful in pursuing its counterclaim that it virtually devoured the claim of lien. Thus, this suit was not limited to a claim for a construction lien.

The ***Prosperi*** court cited favorably to the opinion of the Second District Court of Appeal in ***Emery v. International Glass & Manufacturing, Inc.***, 249 So.2d 496 (Fla. 2nd DCA 1971). In ***Emery***, the court stated:

> It was obviously not the intent of the Legislature to award attorneys' fees to a defendant in a mechanics' lien foreclosure merely because he successfully defends against the impression of a lien yet is nevertheless found liable in damages, in the same case, for labor and/or materials furnished for his benefit. To conclude otherwise would be anathema to the purpose of the mechanics' lien law which is to afford the laborer or materialmen adequate assurance of being fully compensated for his labor or services.

Emery, 249 So.2d at 500.

The ***Prosperi*** court observed that it is the purpose of the net judgment rule to avoid absurd or unjust results. The ***Prosperi*** court stated:

> 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 his claim to pay attorney's fees for failure to meet the technical requirements of the mechanic's lien law.

Prosperi, 626 So.2d at 1363. The converse of this statement is also true. This rule was created as a device to allow the trial court to reach an equitable result. Just as 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 construction lien law, so too would it be unfair to force an innocent homeowner who pursues a counterclaim that almost completely evicerates the value of the construction lien to pay the attorney's fees of the negligent contractor who created the harm.

The ***Prosperi*** court was critical of those decisions that apply the test rigidly, without thought of the equities, which is precisely the position that Gale advocates in the instant action. This Court stated in ***Prosperi***:

> 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.

Id. Thus, this Court has already sharply criticized the approach that Gale advocates for application here, and which the Fifth District Court of Appeal wrongfully adopted below.

After engaging in the foregoing analyis and concluding that in a construction lien case brought pursuant to Florida Statutes § 713.29, the trial court should have the flexibility to reach an equitable result, this Court concluded as follows:

> 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.

Id. Gale argues in the Answer Brief that the Tryteks did not provide enough analysis of the ***Prosperi*** decision, and that the Tryteks' logic is flawed. To the contrary, it is Gale's logic that is flawed, as a close reading of ***Prosperi*** mandates the determination that the trial court's judgment be reinstated in the instant action. Gale's position that ***Prosperi*** should be simply ignored because the trial court ruled against the lienholder on its construction lien claim is without foundation. As previously noted, this Court in ***Prosperi*** answered the following 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?" This Court's analysis in ***Prosperi*** could not be more clear, and its application to the facts of the instant matter are likewise evident.

This Court ruled in ***Prosperi*** that the purpose of the net judgment rule is to do equity. The instant lawsuit is a perfect example of why the bright line test that Gale advocates in the Answer Brief is anything but equitable. Here, a contractor negligently performed its services. There is no dispute about the fact that Gale negligently installed insulation resulting in thousands of dollars of damage to the Tryteks' home. The innocent homeowner then was forced to effectuate repairs on the home, in order to rectify damages for which the

construction lienholder was directly responsible. Then, the construction lienholder played hard ball with the homeowner, refusing to reduce its charge by a reasonable amount, and in effect forcing the homeowner to litigate the value of the repairs. If the word equity is to have any meaning at all, then this Court cannot countenance a situation in which a negligent contractor holds an innocent homeowner as a litigation hostage, forcing the homeowner to litigate through trial the proper value of the repair work necessitated by the contractor's negligence, only to force the homeowner to pay the negligent contractor's attorney's fees. A contractor should not be allowed to negligently perform its work, and then add insult to injury by forcing an innocent homeowner to pay the contractor's attorney's fees, literally forcing the homeowner to pay tens of thousands of dollars only because of the contractor's own negligent acts. Such a rule of law would mark the abandonment of homeowners in the state of Florida.

III. APPLYING THE SIGNIFICANT ISSUES TEST OF *PROSPERI* TO CONSTRUCTION LIEN CASES WOULD NOT UNDERMINE THE PURPOSE OR POLICIES BEHIND THE CONSTRUCTION LIEN STATUTE.

Gale attempts to argue in the Answer Brief that there are three separate public policy implications that would result from this Court following the ***Prosperi*** opinion and reinstating the trial court's judgment that the Tryteks are the prevailing parties based upon the significant issues test. First, Gale alleges that applying the significant issues test to determine the prevailing party in a

construction lien case would result in protracted litigation, because no contractor would ever agree to the entry of a judgment on a construction lien, and therefore every claim would be litigated to its conclusion, presumably at trial. Gale's argument is flawed in several respects. First, in the instant case, the Tryteks did not contest the construction lien. By definition, the adversary process requires an adversary to contest a claim. A contractor would have no alternative but to accept the entry of a judgment, as there is no means by which a party can fight an issue that is not being contested.

Moreover, Gale's contention is misguided, because the bright line test that Gale advocates actually causes more litigation, not less. If there were an arbitrary bright line rule in place that allowed for an award of attorney's fees with the award of a single penny on a construction lien, negligent contractors such as Gale would not hesitate to litigate counterclaims to the end, knowing that the system is set up in their favor so that continuing to litigate will not cost them anything in terms of fees. The instant lawsuit is a perfect example, in which Gale thought it could take an unreasonable position with regard to the Tryteks' counterclaim, simply because it thought, mistakenly, that all it had to do was be awarded a single penny on its construction lien to be able to recover its attorney's fees. Thus, this policy concern actually favors the Tryteks.

The second stated policy reason that Gale advocates in favor of the arbitrary bright line test for the determination of the prevailing party weighs even more heavily in favor of the Tryteks. Gale correctly points out that one court has stated that 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. 3rd DCA 2000). It is ironic that Gale would point this out, because this statement also supports the Tryteks' arguments on appeal. Apparently, Gale has read the first half of this statement, and omitted the second half. The fundamental purpose of the construction lien law is not to afford suppliers and laborers the greatest protection possible, it is to afford suppliers and laborers the greatest protection *compatible with justice and equity*. An arbitrary, bright line rule that awards attorney's fees to negligent contractors such as Gale is simply not compatible with justice and equity. Justice and equity demand that the innocent homeowner who is fighting for his rights against a large corporation that can easily absorb financial hits cannot be made to pay the attorney's fees of that negligent corporation when it actually did prevail on the significant issues that were tried in the Circuit Court. A result that is compatible with justice and equity demands that the Tryteks be found to be

the prevailing parties, because they did, in fact, prevail on the significant issues that were actually tried before the Circuit Court.

The third policy reason that Gale cites in support of the contention that its arbitrary rule of law should be adopted in construction lien cases is that homeowners such as the Tryteks have other avenues to recover attorney's fees. Gale argues that if the Tryteks had offered to pay $1,525.00 during the litigation, or if the Tryteks had served a proposal for settlement pursuant to Florida Statutes § 768.79, the Tryteks could have been entitled to an award of their attorney's fees. However, the mere existence of other statutory sources of fee awards does not justify the arbitrary rule of law that Gale advocates in the instant matter. Once again, what this Court's ***Prosperi*** opinion teaches is that the purpose of the net judgment rule is to allow the trial court to reach an equitable result. The only way that can occur in the instant matter is through a careful, reasoned analysis of the facts leading to a determination of which party was successful on the significant issues that were tried. The Tryteks succeeded on the significant issues that were tried in this case, and therefore the trial court's carefully reasoned decision naming the Tryteks the prevailing party must be reinstated.

IV. THE *PROSPERI* SIGNIFICANT ISSUES TEST IS PERFECTLY COMPATIBLE WITH FLORIDA STATUTES § 713.29.

The last issue raised in Gale's Answer Brief is that the inflexible rule of law that awards attorney's fees to a lienor if it collects one penny on its construction lien is consistent with the language of Florida Statutes § 713.29. For the reasons set forth below, the ***Prosperi*** significant issues test is more consistent with this statutory provision than the arbitrary rule of law that Gale advocates. Further, Gale's reliance on Florida Statutes § 57.041(1) is misplaced.

First, Florida Statutes § 713.29 provides that, "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 …" Interestingly, the statute itself indicates that the fee is for trial. The construction lien issue was not tried in this case. Thus, on that basis alone Gale's argument fails.

Gale's argument also fails because of its reliance on the application of Florida Statutes § 57.041(1). In support of this contention, Gale cites to the fact that the provision of Florida law awarding fees provides that the fee, "must be taxed as part of the prevailing party's costs, as allowed in equitable actions." Gale then makes the unwarranted leap to the conclusion that this language means that Florida Statutes § 57.041(1) should apply. This last issue raised in the Answer Brief is really not an issue at all. There is no dispute that the prevailing party is entitled to an award of attorney's fees in construction lien litigation. However, the mere fact that the construction lien statute in question

provides for an award of attorney's fees as a taxable cost does not implicate Florida Statutes § 57.041(1), and Gale's argument adds nothing to the analysis of who the prevailing party is in the instant matter, and how a trial court should make that determination. The flexible, and equitable, significant issues test of ***Prosperi*** is the appropriate means to determine the identity of the prevailing party, and nothing within Florida Statutes § 57.041(1) adds any insight to this analysis.

V. THE AMICUS CURIAE BRIEF CONTAINS ARGUMENTS THAT ECHO THOSE OF GALE, AND SHOULD BE SIMILARLY REJECTED.

An Amicus Curiae Brief has been filed on behalf of the Southeastern Association of Credit Management and Florida Independent Concrete & Associated Products, Inc. (collectively "SACM/FICAP"), in support of Gale's position in this appeal. Although the author of the Amicus Brief stated that there would be an attempt to state issues other than those raised by Gale in the Answer Brief, inevitably and predictably, the arguments essentially echo those raised in Gale's Answer Brief, and should be rejected for the reasons set forth above.

SACM/FICAP argues that the arbitrary bright line test regarding the determination of the prevailing party in construction lien cases should be adopted by this Court because businesses favor predictability over flexibility. It

is no doubt true that businesses do prefer predictability over flexibility. One problem with this philosophy, however, is that it allows large corporations to use their financial power to vitiate the rights of individual consumers, such as the Tryteks here. Predictability over flexibility works as a business model; it fails, however, as a rule of equity in a court of law. As this Court recognized in ***Prosperi***, the underpinning of the net judgment rule is to provide a trial court with the ability to reach an equitable result. SACM/FICAP rather brazenly advocates the arbitrary bright line test as a means to promote business interests over individual's rights. That is not an appropriate function of a court of law.

SACM/FICAP asserts, with no foundation, that no one will represent construction lienors if there is no guarantee of an award of fees. This is pure speculation, and likely not true in light of the fact that cases in which construction lienors have a good possibility of being the prevailing party will be awarded fees, which will attract counsel.

SACM/FICAP appears to misunderstand the trial court's ruling and its impact. At one point, the Amicus Curiae states that the lienor will be punished if an owner has small dollar defenses, that if a defense results in a minor subtraction of the construction lien, the lienor will be deprived of its right to attorney's fees. This is a misstatement of the significant issues test, and ignores the equitable principles that will guide trial courts in the future. Under the

scenario described in the Amicus Curiae Brief, if there were only a minor reduction in the amount of the lien, it is a near certainty that a trial court would find that the lienor is the prevailing party, and order the homeowner to pay the attorney's fees of the lienor. Thus, the Amicus Curiae's fears are misdirected.

SACM/FICAP suggests that applying the significant issues test would punish negligent lienors because even if there were a "small dollar set-off" the lienor would be deprived of the award of attorney's fees. Once again, this is a blatant misrepresentation of the trial court's application of the significant issues test. The rule of law that is being advocated herein is not that a lienor should be deprived of an award of attorney's fees if the amount of the lien is reduced by a single penny. Such a rule of law would be as arbitrary as the rule of law that Gale has advocated in this lawsuit. What the Tryteks advocate is a flexible approach to the determination of the prevailing party in a construction lien lawsuit, in which the trial court can assess the equities, determine the party that was successful on the significant issues tried before the court, and determine the prevailing party based upon this analysis.

SACM/FICAP argues that the only actions that matter on the part of contractors are that notices and warnings are properly posted, and the statement of the amount owed for services rendered must be stated accurately. According to the Amicus Curiae, this should be so even where, as here, the contractor has

performed its services so negligently that the value of the repairs that are required almost completely swallow the value of the work that is the subject of the lien. As a practical matter, this is purely non-sensical, and unfair to the citizens of the state of Florida. Negligent contractors cannot be rewarded for their negligence by compelling an innocent homeowner to pay for the contractor's attorney's fees in a situation in which the overwhelming majority of the amount of the construction lien has been eliminated by the homeowners' counterclaim. Under these circumstances, the significant issues test of ***Prosperi*** is the equitable rule of law to apply, is consistent with this Court's pronouncements in this field, and will provide a consistent rule of law that will allow trial judges to reach the correct result based upon a careful, reasoned assessment of the facts of each case.

CONCLUSION

For the reasons stated herein, and for the reasons set forth in the Initial Brief, the Tryteks respectfully request that this Court quash the opinion of the District Court, and remand this cause to the trial court for the reinstatement of the judgment entered in favor of the Tryteks.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 16th day of January, 2008 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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