IN THE SUPREME COURT OF FLORIDA

UNIVERSAL INSURANCE
COMPANY OF NORTH AMERICA,

Petitioner,

vs. Case No. SC10-948

MICHAEL WARFEL,

Respondent.

ANSWER BRIEF OF RESPONDENT MICHAEL WARFEL

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

This appeal arises from a decision of the Second District Court of Appeal that reversed a judgment in favor of the Petitioner/Defendant and certified a question of great public importance. Warfel v. Universal Ins. Co. of North America, 36 So. 3d 136 (Fla. 2d DCA 2010). The underlying appeal is derived from a final judgment in favor of the Petitioner/Defendant in a sinkhole coverage action. A jury found that damage to Respondent Michael Warfel's home was not caused by a sinkhole. (VT 7, 1087) [1]

Mr. Warfel was insured by an all-risks homeowners' insurance policy which included coverage for sinkhole claims. (VR 1, 1-3) The policy was issued by Universal on March 12, 2005. In mid-August 2005, Mr. Warfel noticed progressive physical damage to the walls and floors of his residence and filed a claim with Universal for coverage under the policy. Following an investigation, Universal denied the claim. (VR 1, 1-3; VT 4, 488-92) Mr. Warfel then filed the

[1] The Respondent, Michael Warfel, will be referred to by name or as the Plaintiff. The Petitioner, Universal Insurance Company of North America, will be referred to as the Defendant or Universal.

All references to the record on appeal will be to (VR) followed by the volume and page number in the record. All references to the trial transcript will be to (VT) followed by the volume and page number in the trial transcript.

instant suit. (VR 1, 1-3) Universal continued to deny the claim, contending that the damages were excluded by the terms of the policy. (VR 1, 18-20)

About a month before trial, Universal filed a Motion to Establish Application of Florida Statute, Sections 627.706, 627.7065, 627.707, 627.7072, 627.7073 (2005) and to Establish Application of Rule 90.304 to Florida Statute 627.7073(4)(c). (VR 1, 128-140) Universal contended that the new sinkhole statutes, with effective dates of June 1, 2005, applied to this case because the statutory changes/amendments did not impair existing contract rights and had nothing to do with the obligations of either party. It claimed that the statutes merely clarified the definition of sinkholes, which had been vague, and that to the extent there was an impairment of existing contract rights, those rights were overridden by the state's interest in resolving an insurance crisis regarding sinkhole claims. (VR 2, 211-15) It also claimed that the retroactive analysis did not apply to the brand new statutes, only to §§ 627.706[2], .707. (VR 2, 223)

Universal also claimed that assuming § 627.7073 applied, "there is a presumption of correctness given by the statute upon the insurance company's

[2] The wording of the provision cited in paragraph 3 of the motion has been changed slightly and is currently contained in §627.7073(1)(c), Fla. Stat. (2007).

experts." (VR 2, 215)[3] Counsel argued that "90.304 applies if you have a specific public policy or social policy as is implemented, and I believe that is clear that that is the case here. It goes to the jury, meaning the jury can hear that there is a presumption of correctness." (VR 2, 216-18) "It is substantive law that is creating a presumption of correctness here," which is "exactly why 90.304 applies." (VR 2, 216, 229)

The Plaintiff's position was that the law in effect at the time the policy was entered into controlled, and that the new statutes and amendments could not be given retroactive application absent a specific legislative provision to that effect. (VR 2, 219-23; 8, 1139-44) He pointed out that the presumption Universal sought to apply created an obligation on the part of the policyholder to prove something he did not have to prove before, and disagreed with Universal that it simply affected how the burdens applied. (VR 2, 230-31) Mr. Warfel contended that even if the presumption created by § 627.7073 were to be applied to his case, it was "governed by the evidentiary rules set forth in Section 90.303, the evidentiary statute which merely affects the burden of producing evidence. It's a bubble-

[3] The provision in question provides that "the respective findings, opinions, and recommendations of the professional engineer or professional geologist as to the cause of the distress to the property and the findings, opinions, and recommendations of the professional engineer as to land and building stabilization and foundation repair shall be presumed correct."

bursting presumption." (VR 2, 221) "If there is not a specific provision within the statutory framework that the burden of proof shifting of Section 90.304 applies, it doesn't apply. You fall back on Section 90.303." (VR 2, 221)

The lower court ruled that the changes to §§ 627.706, .707 were substantive and should not be applied retroactively because they did in some ways impinge on a contract already in existence. (VR 2, 224-25) However, the court concluded that the other statutes were procedural and did not involve an issue of retroactivity. The judge believed that the entire legislation came from the purpose of implementing public policy, even though there was nothing in the statute (s. 627.7073) stating whether it was a bursting bubble presumption or shifting burden of proof presumption. (VR 2, 225) The court concluded that s. 90.304 applied, and that it did not involve an issue of retroactivity because it did not change the obligations of the parties. (VR 2, 225, 229)

The effect of the statutory presumption on the jury instructions was addressed at a pretrial hearing. (VR 2, 236-80) The Defendant asserted that the real issue was going to be the burden of proof and the standard that was going to have to be presented. (VR 2, 263) The Plaintiff stated that it could not be the law that the jury was going to be instructed that the Defendant's witnesses were presumed to be correct and the Plaintiff's were not. (VR 2, 269) The court

understood that the Plaintiff did not like it but "the issue is whether or not that's what the law says." (VR 2, 269) Universal took the position that the Plaintiff had to present clear and convincing evidence to overcome the presumption because the court had already ruled that this was a social policy issue to which that burden of proof applied. (VR 2, 270) The Plaintiff responded that the legislation did not say there was a burden shifting presumption and there was nothing in the statute stating that the presumption could only be rebutted by clear and convincing evidence, rather than by the preponderance of the evidence. (VR 2, 270-71) The court decided it was not going to give a clear and convincing evidence instruction. (VR 2, 272)

The case proceeded to trial in early February 2008. Anthony Randazzo, a geologist,testified on behalf of Mr. Warfel. (VT 4, 515, 545) In formulating his opinions, he relied on the report prepared by SD II on October 7, 2006, and also made a site visit. (VT 4, 515-18, 551-52) Dr. Randazzo testified that he believed "that evidence of sinkhole activity was discovered through SD II investigation and that sinkhole activity must be considered a cause of distress at this residence." (VT 4, 555) Although he occasionally feels more testing is necessary, he did not feel that way in this case; rather, he felt the evidence was rather compelling as it stood and did not warrant any further testing. (VT 4, 555-56)

Arthur Baker also testified on behalf of Mr. Warfel. Mr. Baker is an engineer whose involvement in this case was to review the SD II report data and formulate an opinion about whether or not sinkhole activity was a contributing cause of the damage to Mr. Warfel's home. (VT 5, 633-34, 636) His opinion was that "sinkhole activity could not be eliminated as a contributing cause of the damage to that structure." (VT 5, 637) Mr. Baker looked at all the SD II data and visited this site and concluded that a sinkhole was responsible at least in part for the damage. (VT 5, 637)

Mike Biller is a structural engineer who also testified on behalf of Mr. Warfel at trial. (VT 5, 685) He visited the site and reviewed the reports prepared in the case. The damage he noted included cracking in the interior walls, cracking in the driveway, pool deck, and interior wall and ceiling surface. (VT 5, 690) Some of the cracking had been repaired, but Mr. Biller observed new cracking in the area. (VT 5, 690) The cracking he saw was indicative of differential settlement of the building's foundation's system. Differential settlement means one portion of the structure settled at a different rate than another adjacent portion of the structure. (VT 5, 691) Mr. Biller also conducted a floor elevation survey in order to measure the elevation differences in the floor slab surface. The measurement showed a downward floor slope from the southeastern portion of the structure toward a low

point in the center of the north family room area. (VT 5, 693) It did not matter to Mr. Biller whether there had been an addition or not to the house with regard to the cause of the cracking, which was differential movement of the foundation. (VT 5, 711)

After Mr. Warfel rested his case, Universal moved for a directed verdict on the grounds that he had not "overcome the presumption of correctness that applies in this case that's already been ruled on by this Court." (VT 5, 714) Universal argued that SD II's investigation complied with the testing and requirements mandated by Florida law and at that point, the burden of proof switched over to Mr. Warfel who did not present evidence on whether a sinkhole loss occurred at the property. (VT 5, 715) Universal noted that the SD II report said that the damage was caused by shrinkage, thermal stress and was aggravated by minor differential movement, all causes excluded by the policy. It claimed that the statute was very clear that it was the Plaintiff's burden of proof to show that there was a sinkhole loss as specifically defined by statute. (VT 5, 716-17) The Plaintiff countered that the policy definition of sinkhole controlled, and that according to the witnesses it was actual physical damage to the property, not structural damage as Universal's attorneys proposed. (VT 5, 719) The lower court denied the motion. It found that Dr. Randazzo and Mr. Baker testified that a sinkhole caused damage

to the building, and that Plaintiff's testimony indicated that the damage occurred after he bought the house. (VT 5, 721-22)

Brian Terjung is a structural engineer who performed the evaluation on Mr. Warfel's residence for SD II. (VT 6, 557-59) His opinion was that differential settlement of the foundation caused cracking to occur in three places in the home – an addition at the southeast corner of the house, the northeast corner of the master bedroom and the pool deck. (VT 6, 764-72) Mr. Terjung's opinion is that much of the damage to the house is related to drying and shrinkage of the masonry units and to the effects of thermal expansion and contraction over time, except for the three areas he mentioned that are subsidence-related. (VT 6, 811-17)

Ken Hill is a geotechnical engineer who was involved in Universal's subsidence investigation by SD II at Mr. Warfel's home. (VT 6, 827-30) The widths and shapes of the cracks he saw were consistent with what he expected to see in a residence affected by material shrinkage and thermal stress. He felt that the damage at the house was very minor considering it was a 50-year old Florida house. (VT 6, 841-44) It was his opinion that any settlement at the house was just normal settlement that was typical of masonry block houses in New Port Richey, and that the majority of the damage in the exterior walls related to expansion and

contraction and shrinkage forces of masonry blocks, mortar, etc. (VT 6, 847) Mr. Hill did not believe that there was a sinkhole at Mr. Warfel's house. (VT 6, 850)

Sam Upchurch, a geologist with SD II Global, also testified on behalf of Universal. (VT 7, 977-81) He was retained by Universal to investigate Mr. Warfel's house and do a subsidence investigation. The insurance company wanted an opinion on whether or not there was sinkhole activity at the residence. (VT 7, 981-82) Relying on the field data collected by SD II, it was Dr. Upchurch's opinion that there was not sinkhole activity at Mr. Warfel's house. (VT 7, 983-84)

During closing arguments, defense counsel told the jury:

> Now, there is another instruction that you are going to receive from Judge Bray, and that pertains to a presumption. You will be instructed by Judge Bray that you must presume that the opinions, findings, and conclusions in the SD II report as to the cause of damage and whether a sinkhole loss has occurred are correct.
>
> You must presume that report is correct. That report is the only report in evidence. You can take it back in the room. You will presume – the judge will instruct you[,] you must presume that's correct.

(VT 7, 1061) Defense counsel reminded the jurors throughout closing that the findings and the conclusions in the SD II report were presumed to be correct. (VT 7, 1057-77) In addition, the lower court instructed the jury that:

> You must presume that the opinions, findings, and conclusions in the SD II report as to the cause of damage and whether or not a sinkhole loss has occurred are correct. This presumption is rebuttable.

> The Plaintiff has the burden of proving by a preponderance of the evidence that the findings, opinions, and conclusions of the report are not correct.

(VT 7, 1090) The jury ultimately returned a verdict in favor of Universal. (VT 7, 1097)

The Plaintiff sought a new trial, claiming, in part, that the lower court erred in instructing the jury that the opinions and conclusions contained in the SD II report were presumed to be correct. (VR 9, 1556-58) At the April 25, 2008 hearing, Plaintiff contended that the lower court erred in giving retroactive application to Section 627.7073 and erred in applying a presumption in favor of Universal. (VR 2, 283-85) The Plaintiff pointed out that there was no express legislative intent to apply the statute retroactively, which the Florida Supreme Court has said must occur. (VR 2, 285) Plaintiff also contended that even if the statute did apply to the case, the court should have used Section 90.303 instead of Section 90.304 because there was no express statement by the legislature that the latter provision applied. (VR 2, 287-89, 295-96) Universal again argued that if statutory changes were due to public policy, those changes applied to existing contracts and that was also why Section 90.304 applied with respect to the burden of proof. (VR 2, 300-01) The lower court denied Plaintiff's motion for a new trial.

(VR 2, 304; 9, 1565) Final judgment for the Defendant was entered on May 20, 2008. (VR 9, 1564)

The matter was appealed to the Second District Court of Appeal. The court found no error in the lower court's ruling that the statutes were procedural and did not involve an issue of retroactivity. 36 So. 3d at 137 n. 1. However, the court agreed with Mr. Warfel that "the section 627.7073(1)(c) presumption was a 'vanishing' or 'bursting bubble' presumption, a presumption affecting the burden of producing evidence but not one shifting the burden of proof to him." Id. at 138. The court also agreed with Mr. Warfel that "the statutory scheme reflected no legislative intent to apply a public or social policy presumption so as to shift the burden of proof to the homeowner." Id. Because "the trial court misapplied the presumption at work" in the case and "gave a jury instruction improperly shifting the burden of proof," the court ruled that Mr. Warfel was entitled to a new trial. Id. at 140.

Universal moved for Rehearing En Banc and/or Certification of a Question of Great Public Importance. The Second District denied the Motion for Rehearing En Banc; however, recognizing that its ruling "may affect insurance claims for sinkhole losses throughout Florida," the court certified the following question to this Court as one of great public importance:

> DOES THE LANGUAGE OF SECTION 627.7073(1)(C) CREATE A PRESUMPTION AFFECTING THE BURDEN OF PROOF UNDER SECTION 90.304 OR DOES THE LANGUAGE CREATE A PRESUMPTION AFFECTING THE BURDEN OF PRODUCING EVIDENCE UNDER SECTION 90.303?

36 So. 3d at 140. Universal then timely invoked the jurisdiction of this Court.

ISSUE ON APPEAL

DOES THE LANGUAGE OF SECTION 627.7073(1)(C) CREATE A PRESUMPTION AFFECTING THE BURDEN OF PROOF UNDER SECTION 90.304 OR DOES THE LANGUAGE CREATE A PRESUMPTION AFFECTING THE BURDEN OF PRODUCING EVIDENCE UNDER SECTION 90.303?

STANDARD OF REVIEW

A question of statutory interpretation is "purely a legal matter and therefore subject to the de novo standard of review." Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1220 (Fla. 2010); Sanders v. City of Orlando, 997 So. 2d 1089, 1093 (Fla. 2008).

SUMMARY OF THE ARGUMENT

The Second District was absolutely correct in ruling that Michael Warfel was denied a fair trial in this sinkhole insurance coverage case because the lower court erroneously concluded that the presumption contained in § 627.7073, Fla. Stat. (2005), fell within the scope of § 90.304, Fla. Stat., affecting the burden of proof, rather than § 90.303, affecting the burden of production. Because of that error, the jury in this case was instructed about the presumption in favor of the insurance company's report, and that it had to decide if Mr. Warfel presented sufficient evidence to overcome that presumption. Nowhere in § 627.7073 is there a legislative directive stating that §90.304 applied to the presumption. Likewise, nowhere in the statutory scheme is there any indication that the presumption was enacted to implement and promote the type of social policies associated with the non-vanishing presumptions that have been specifically recognized by the legislature.

The Second District also correctly ruled that the error in instructing the jury on the presumption was not harmless and requires a new trial. The trial court's instruction had the effect of improperly placing the burden on Mr. Warfel to prove that his home was damaged by a sinkhole. That is a change in the way "all-risks" insurance policy claims are litigated—a fact that Universal continues to ignore.

Furthermore, it has long been the law in Florida that the giving of a jury instruction which erroneously shifts the burden of proof cannot be considered harmless error. Because there is a reasonable possibility that the jury in this case was mislead or confused, a new trial is warranted.

The doctrine of invited error has no application to this case. Mr. Warfel's jury instruction and verdict form were submitted after the trial court had ruled in January, 2008 that section 627.7073 applied to the case, and after the court ruled that the presumption was a section 90.304 presumption shifting the burden of proof. Additionally, the proposed jury instruction submitted by Mr. Warfel stated that it was being made pursuant to the trial court's ruling on Universal's Motion to Establish Application of § 627.7073 and § 90.304, Fla. Stat. The proposed instruction specifically stated that Mr. Warfel believed the trial court's ruling on Universal's motion was erroneous, and that by submitting the instruction, he did not intend to waive his right to address the trial court's ruling on appeal. Mr. Warfel's compliance with the rulings of the lower court simply cannot be likened to invited error. The decision of the Second District Court of Appeal should be approved.

LEGAL ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY RULED THAT 627.7073, FLA. STAT. (2005), CREATES A PRESUMPTION AFFECTING THE BURDEN OF PRODUCING EVIDENCE UNDER SECTION 90.303, AND THEREFORE IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY ON THE STATUTORY PRESUMPTION

Universal devotes a large portion of its brief to the proposition that the public policy and purposes behind the enactment of §627.7073, Fla. Stat. (2005), justified application of a presumption shifting the burden of proof in this case. Universal claims there is no question that §627.7073, Fla. Stat., was enacted to serve public policy rather than for procedural convenience or to shift the burden of producing evidence in a situation where the party who has the evidence is not the party who has the burden of proof. It also claims the statutory presumption was intended to act as a presumption affecting the burden of proof as defined in §90.302(b), because it promotes social policies. These claims are without merit.

At the outset, it is important to keep in mind that Mr. Warfel's residence was insured under an "all-risks" insurance policy. These policies provide "'a special type of coverage extending to risks not usually covered under other insurance.'" Wallach v. Rosenberg, 527 So. 2d 1386, 1388 (Fla. 3d DCA 1988) (quoting Phoenix Ins. Co. v. Branch, 234 So. 2d 396, 398 (Fla. 4th DCA 1970)). "All-risks" insurance contracts are generally given a liberal construction. Wallach, 527 So. 2d

at 1388. Unless the policy expressly excludes a loss from coverage, "this type of policy provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts." Fayad v. Clarendon National Insurance Co., 899 So. 2d 1082, 1085 (Fla. 2005); Hudson v. Prudential Property and Casualty Insurance Co., 450 So. 2d 565, 568 (Fla. 2d DCA 1984). It has been observed that:

> 'Insureds with all-risks insurance likely have heightened expectations because of the comprehensive nature of the coverage and the greater premium rates. These expectations would not often be given effect if recovery was denied whenever an exception or exclusion contributed to the loss.'

Murray v. State Farm Fire and Casualty Co., 509 S.E. 2d 1, 14 (W. Va. 1998) (quoting R. Fierce, Insurance Law—Concurrent Causation: Examination of Alternative Approaches, 1985 S.Ill.U.L.J. 527, 544 (1986)) (emphasis added).

It is also important to keep in mind that for many years sinkhole claims were excluded from insurance coverage by the earth movement exclusion. Section 627.706 was ultimately enacted to require property insurers to make sinkhole coverage available. Insurance coverage for sinkholes was mandated by the legislature for the benefit of Florida's property owners; not for the benefit of

insurance companies. See, e.g., Diaz-Hernandez v. State Farm Fire & Casualty Co., 19 So. 3d 996, 999 (Fla. 3d DCA 2009).

Effective June 1, 2005, "the legislature amended sections 627.706 to 627.707, Florida Statutes (2005), and enacted sections 627.7065, 627.7072, and 627.7073 relating to database information, testing standards, and reporting requirements for sinkhole claims." Warfel v. Universal Ins. Co., 36 So. 2d at 136. Section 627.7073, entitled "Sinkhole Reports", requires a professional engineer or geologist to issue a report and certification to the insurer and policyholder upon completion of testing required by § 627.707, as well as § 627.7072. Section 627.7073 (1) (c), Fla. Stat. (2005) provides that:

> The respective findings, opinions, and recommendations of the engineer and professional geologist as to the verifications or elimination of a sinkhole loss and the findings, opinions, and recommendations of the engineer as to land and building stabilization and foundation repair shall be presumed to be correct.

The question addressed below, and presented here, is whether the jury should have been instructed on this statutory presumption. This Court should approve the Second District's ruling that giving such an instruction constituted reversible error.

A. The Presumption in §627.7073 (1)(c), Florida Statutes (2005), is a Vanishing Presumption.

Over 25 years ago, Judge Glickstein aptly observed that "a reading of academicians' varied and conflicting expressions upon the subject of presumption could be equated with the floor debate of a myriad of political parties in some European country." In re: Estate of Davis, 462 So. 2d 12, 13 (Fla. 4th DCA 1984) (Glickstein, J., specially concurring). That observation holds true today. After wading through the many cases on the subject, the following rules emerge. A presumption is "an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established." Hack v. Janes, 878 So. 2d 440, 442 (Fla. 5th DCA 2004) (citing § 90.301, Fla. Stat.). Except for presumptions "that are conclusive under the law from which they arise, presumptions are rebuttable." § 90.301 (2), Fla. Stat. Florida recognizes "two types of presumptions. The first type is the 'vanishing' presumption." International Alliance of Theatrical Stage Employees and Moving Picture Technicians v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators Holding Company, Inc., 902 So.2d 959, 963 (Fla. 4th DCA 2005). With this type of presumption:

> Florida follows generally [albeit not always] what is sometimes called the Thayerian rule to the effect that when credible evidence comes into the case contradicting the basic fact or facts giving rise to the presumption, the presumption vanishes and the issue is determined on the evidence just as though no presumption has ever existed. Conversely, if the basic facts are sufficiently proven so as to give rise to the presumption and not thereafter

> contradicted by credible evidence, the party in whose favor the presumption exists becomes entitled to a directed verdict. Thus, in either event, the presumption is productive of these procedural consequences but is not a matter for the jury to consider.

Id. at 963; § 90.302 (1), Fla. Stat.[4] The jury is never told of this type of presumption. Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 600 (Fla. 1987); Nationwide Mutual Ins. Co. v. Griffin, 222 So. 2d 754 (Fla. 4th DCA 1969).

"Bursting bubble" or "vanishing" presumptions are employed "primarily to facilitate the determination of an action," rather than "to implement public policy." C. Ehrhardt, Florida Evidence § 303.1 (2003 Edition). In other words, the function of this type of presumption "is to compel the trier of fact to find the presumed fact if no credible evidence is introduced to disprove the presumed fact. Id. at § 302.1. An example of this type of presumption includes the rear-end collision presumption explained in Clampitt v. D.J. Spencer Sales, 786 So. 2d 570 (Fla. 2001). Other examples given by Ehrhardt include that a letter mailed is received by the addressee, that the owner of a car is presumed to have consented to use by a

[4] This type of presumption is statutorily defined "In a civil action or proceeding, unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy is a presumption affecting the burden of producing evidence." § 90.303, Fla. Stat.

third party, negligence of bailor, authority of attorney, and the continuation of an agency relationship. Ehrhardt, at p. 103-05.

The second type of presumption is the "social policy" presumption, which affects the burden of proof. § 90.302 (2), Fla. Stat.[5] When evidence rebutting this type of presumption is introduced:

> The presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case.

International Alliance, at 963. When a presumption shifts the burden of proof, "the presumption remains in effect even after evidence rebutting the presumption has been introduced and the jury must decide if the evidence is sufficient to overcome the presumption." 902 So.2d at 964 (internal citations omitted); Valcin, 507 So. 2d at 600. Presumptions of this nature "are expressions of social policy; e.g., the validity of marriage, sanity in civil cases, legitimacy of a child born in wedlock, and the correctness of judgments. See C. Ehrhardt, Florida Evidence 68-79 (2d ed. 1984)." 902 So. 2d at 964.

There is no clear evidence in section 627.7073 (1) (c), Fla. Stat. (2005), or any legislative analysis for that matter, suggesting a legislative intent to apply the

[5] Section 90.304, Fla. Stat., provides that in civil actions, "all rebuttable presumptions which are not defined in s. 90.303 are presumptions affecting the burden of proof."

statute in the manner suggested by Universal. At most, § 627.7065, Fla. Stat., recognized that there had been "a dramatic increase in the number of sinkholes and insurance claims for sinkhole damage in the state during the past 10 years." There is nothing in the statutory scheme indicating that the legislature intended to favor insurance companies by the application of a § 90.304 presumption.

Moreover, when the legislature intends to create a presumption under section 90.304, and entirely shift a burden of proof, the legislature knows exactly how to do so. See, e.g., §61.14(5) (a), Fla. Stat. (expressly providing in alimony and child support enforcement proceeding that a 'presumption is adopted as a presumption under s. 90.302(2) [which is the presumption affecting the burden of proof under §90.304] to implement the public policy of this state that children shall be maintained from the resources of their parents'); Mallardi v. Jenne, 721 So. 2d 380 (Fla. 4th DCA 1998) (addressing s. 61.14); §409.256(10)(d), Fla. Stat. (expressly providing in paternity proceeding that genetic-testing results shall be admitted into evidence and that "statistical probability of paternity that equals or exceeds 99 percent creates a presumption, as defined in s. 90.304, that the putative father is the biological father of the child."); §733.107(2), Fla. Stat. (expressly providing in will contest proceeding that "[t]he presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a

presumption shifting the burden of proof under ss.90.301-90.304"); Diaz v. Ashworth, 963 So. 2d 731 (Fla. 3d DCA 2007) (addressing s. 733.107); §742.12, Fla. Stat. (expressly providing in paternity proceeding test that test results are admissible in evidence and that '[a] statistical probability of paternity of 95 percent or more creates a rebuttable presumption, as defined by s. 90.304, that the alleged father is the biological father of the child'); Jones v. Crawford, 552 So. 2d 926 (Fla. 1st DCA 1989) (addressing s. 742.12); §932.703(4), Fla. Stat. (expressly providing in contraband forfeiture proceeding for presumption 'in the manner provided in s. 90.302(2)' which is the presumption affecting the burden of proof under §90.304).

The presumption involved in this case, unlike those cited above, in no way "expresses a policy that society deems desirable." C. Ehrhardt, Florida Evidence § 304.1 (2003 Edition). It also cannot be said that harm would result to society and the individual if the presumed fact (no sinkhole) was disproved, so that a greater burden should have been placed upon Mr. Warfel to disprove the presumed fact. Id. Furthermore, it is disingenuous to argue that the statutory report was not determinative of the action in this case, or that it did not shift the burden of proof to Mr. Warfel to prove that a sinkhole loss occurred. (Initial Brief p. 11-12) Universal, in fact, argued at trial that the statute was very clear that it was Mr.

Warfel's burden of proof to show that there was a sinkhole loss. (VT 5, 716-17) The general rule of evidence when construing all-risks policies is that once the insured shows that a loss occurred to his property while the policy was in effect, the burden is placed on the insurer "to prove that the loss was caused by an excluded risk." Wallach v. Rosenberg, 527 So. 2d at 1388. The insured is not required "to disprove any excepted causes." Hudson, 450 So. 2d at 568. Under an all-risks policy, the jury is instructed that the insurer has "the burden of proof to show by the greater weight of the evidence that the exclusion in the insurance policy was the sole, proximate cause of damage or loss to the property.…" Wallach v. Rosenberg, 527 So. 2d at 1389. See also, Fireman's Fund Insurance Co. v. Hanley, 252 F.2d 780, 783 (6th Cir. 1958) (cited in Wallach); West Best, Inc. v. Underwriters at Lloyds, London, 655 So. 2d 1213, 1214 (Fla. 4th DCA 1995).

The issue before the jury in this case should have been simple: whether the loss to Mr. Warfel's residence "was caused by an event excluded under the policy or whether it was caused by sinkhole activity." Warth v. State Farm Fire and Casualty Co., 695 So. 2d 906, 908 (Fla. 2d DCA 1997). The burden should have been on Universal to prove that the loss arose solely from a cause excluded from the policy. Wallach, supra. The jury instruction given in this case completely changed the burden of proof by not only requiring Mr. Warfel to overcome the

presumption of correctness of the report by coming forward with evidence to rebut the presumption, but by telling the jury that it had to accept the findings, opinions and conclusions contained in the SD II report as to the cause of damage and whether or not a sinkhole loss has occurred were correct unless Mr. Warfel showed by the greater weight of the evidence that they were not correct. (VT 7, 1090) In the absence of a clear expression of legislative intent establishing that §90.304 applied to the instant presumption, the Second District was quite correct in ruling that it was reversible error to charge the jury that it could consider the presumption along with other evidence presented in the case.

The Second District's ruling will not result in the presumption having no evidentiary effect in litigation for all litigated sinkhole losses. (Initial Brief p. 21) The court did not invalidate the presumption. It still applies to sinkhole litigation, and requires homeowners to come forward with evidence that a sinkhole was a cause of loss to their property. Once they do, the presumption vanishes. If they do not, the insurance company is entitled to a directed verdict. As the Second District noted, that is a change in the way all-risks insurance policy claims are litigated (36 So. 3d at 138-39)—a fact that Universal continues to ignore. See, Wallach, and Hudson, supra. Given the complete lack of any legislative directive indicating that the statute was intended to overrule Hudson and Wallach, the Second District

correctly ruled that it was error to apply it to this case as a section 90.304 presumption.

As the Second District also noted, the legislature knows how to create a burden of proof shifting presumption when it intends to do so. 36 So. 3d at 139. Jones v. Crawford, supra, cited in Universal's Initial Brief (p. 26), references such a presumption. Section 742.12, Fla. Stat., specifies that in paternity proceedings, tests resulting in a "statistical probability of paternity of 95 percent or more [create] a rebuttable presumption, as defined by s. 90.304, that the alleged father is the biological father of the child." Had the legislature intended a similar result here, it could have easily said so. Absent such a clear directive, the Second District was quite correct in ruling that "section 627.7073(1)(c) is a 'vanishing' or 'bursting bubble' presumption that affected only Mr. Warfel's burden of producing evidence." 36 So. 3d at 139. See, e.g., Leonetti v. Boone, 74 So. 2d 551, 552-53 (Fla. 1954); In re: Estate of Davis, 462 So. 2d 12, 13-14 (Fla. 4th DCA 1984) (en banc) (Glickstein, J., concurring specially).

Although not mentioned by Universal, after the Second District issued its December, 2009 decision, a bill was submitted in the legislature that would have overruled the court's decision and amended section 627.7073 to provide that the presumption was one shifting the burden of proof under section 90.304. Universal

cited Proposed Florida House of Representatives Bill HB 1447 titled "Comprehensive Insurance Fraud Investigation and Prevention Act of 2010", and the accompanying Florida House of Representatives Bill Detail page for HB 1447, in support of its Motion for Rehearing En Banc and/or Certification of a Question of Great Public Importance. The bill died in committee. Thus, it appears that the legislature has at least tacitly approved, rather than rejected, the Second District's construction of section 627.7073(1)(c), as being a bursting bubble presumption rather than a presumption affecting the burden of proof. See generally Burdick v. State, 594 So. 2d 267, 271 (Fla. 1992).

Universal relies on the Insurance Study of Sinkholes Report in support of its public and social policy arguments that §627.7073 contains a conclusive presumption that does not vanish with the production of contrary evidence. (Initial Brief p. 20) No doubt the concerns raised in the report were valid and merited legislative attention. Insurance coverage for sinkholes in Florida is a pressing issue, but it is an issue that affects a fairly limited number of homeowners living primarily in central Florida. (Report p. 42-44, 63) Those numbers pale in comparison to the millions of Floridians who are confronted on a daily basis with issues involving the validity of marriage, legitimacy, sanity, correctness of judgments, validity of wills, etc. As previously explained, these are the type issues

that warrant application of a presumption shifting the burden of proof and, in fact, the legislature has clearly said so. The so-called "public policy" regarding sinkhole insurance coverage simply does not rise to the same level so as to warrant application of a conclusive presumption to cases like the instant one, particularly in the absence of a clear legislative statement to that effect. Thus, Universal's reliance on the Sinkhole Study is simply no substitute for a clear expression of such a legislative intent, an intent that is missing here.

Universal's reliance on Caldwell v. Division of Retirement, 372 So. 2d 438 (Fla. 1979), also is misplaced. The "firefighter presumption" contained in §112.18(1), Fla. Stat., clearly reflects the social policy of Florida which recognizes that "firemen are subjected during their career to the hazards of smoke, heat, and nauseous fumes from all kinds of toxic chemicals as well as extreme anxiety derived from the necessity of being constantly faced with the possibility of extreme danger. The legislature recognized that this exposure could cause a fireman to become the victim of tuberculosis, hypertension, or heart disease." Butler v. City of Jacksonville, 980 So. 2d 1250, 1251 (Fla. 1st DCA 2008); Punsky v. Clay County Sheriff's Office, 18 So. 3d 577 (Fla. 1st DCA), rev. den., 22 So. 3d 539 (Fla. 2009). The reasoning behind the statutory presumption regarding the impairment of a police officer's health is similar. See City of Coral Gables v.

Brasher, 132 So. 2d 442 (Fla. 3d DCA 1961. No such "danger" exists here so as to justify applying the type of presumption advocated by Universal in the absence of a clear legislative directive to that effect. Additionally, police and firefighters' presumption cases are typically administrative in nature and are not decided by a jury. Moreover, in the absence of a legislative mandate that the presumption affected the burden of proof, instructing the jury that the opinions, findings and conclusions of Universal's expert were presumed correct amounts to an improper comment on the evidence by the trial judge. Section 90.106, Fla. Stat.

Universal also contends that public policy is served by the presumption of correctness as to the repair recommendations of the experts that are held to the uniform investigative standards outlined in Fla. Stat. §627.7073. (Initial Brief p. 19) It claims that while an expert retained by the insurance company is held to those standards, other experts such as those retained by the insureds are not. However, the statute does not contain such a limitation, nor does §627.7072, Fla. Stat., contain such limiting language. The more reasonable interpretation of both statutes is that any professional engineer or geologist "shall perform such tests as sufficient, in their professional opinion, to determine the presence or absence of sinkhole loss or other cause of damage within reasonable professional probability."

Mr. Warfel's experts did, in fact, express their opinions within a reasonable professional probability at trial. (VT 4, 555; 5, 639)[6]

Contrary to Universal's assertions, it also is not clear from the language of §627.7073 that the legislature anticipated the number of disputed sinkhole claims would decrease by increasing the likelihood that the insured would rely upon the findings of the expert hired by the insurer who conducted the statutorily required investigation. (Initial Brief p. 18-20) It certainly is not clear that the legislature intended, in the name of "public policy", to impose a conclusive presumption against an insured who disagrees with those findings or to completely change the nature of the coverage provided by all-risks insurance policies. Wallach v. Rosenberg, 527 So. 2d 1386 (Fla. 3d DCA 1988).

In addition, presumptions affecting the burden of proof under s. 90.304 "place a greater burden on the one asserting the nonexistence of a presumed fact because of the greater harm to the individual or to societal stability that would ensue, should the presumed fact be disproved." Section 90.304, Fla. Stat**.,** Law Revision Council Note—1976. Needless to say, greater harm to the individual or to societal stability would not ensue should the presumed fact (no sinkhole) be

[6] Ironically, Mr. Warfel's experts also based their opinions, in part, on testing done by Universal's experts--testing that Universal has claimed throughout these proceedings complied with the high statutory standards.

disproved. Thus, the Second District was quite correct in declining to conclude that the legislature's desire "to stem the tide of sinkhole-related insurance claims", absent clear legislative direction, "extends to the micromanagement of trial proceedings between private parties." 36 So. 3d at 139 n. 7. The decision under review should be approved.

B. The Second District Correctly Ruled that Mr. Warfel is Entitled to a New Trial.

Universal is correct in its assessment that the arguments made on pages 22 through 29 of its Initial Brief are irrelevant to the issue before this Court. Not only are they irrelevant, they were not raised by Universal at trial or in its brief below. Thus, they are not properly before this Court, and the Court need not address them.

Even if these arguments were preserved for review, they are without merit. First of all, Mr. Warfel did not "invite" the trial court's erroneous ruling by submitting the proposed jury instruction and verdict form as Universal claims in its Brief. (Initial Brief p. 22-26, 28-29) Universal completely omits any reference to the fact that the instruction and verdict form were submitted after the trial court had ruled in January, 2008 that section 627.7073 applied to the case, and after the court ruled that the presumption was a section 90.304 presumption shifting the burden of proof. Also omitted by Universal is any reference to the fact that the

proposed jury instruction submitted by Mr. Warfel clearly stated that it was being made pursuant to the trial court's ruling on Universal's Motion to Establish Application of § 627.7073 and § 90.304, Fla. Stat. (VR 9, 1399) The proposed instruction also clearly stated that: "Plaintiff respectfully maintains that the Court ruled erroneously on Defendant's Motion and is submitting this proposed instruction which is consistent with that ruling. By submitting this instruction, Plaintiff does not [intend] to waive any right to address the Court's ruling on appeal." (VR 9, 1399) Mr. Warfel can hardly be faulted for complying with the rulings of the lower court.

Universal next argues that the Second District failed to consider whether the jury instruction was an incorrect statement of the law. (Initial Brief p. 26-28) As explained in the previous section, it was. Universal also ignores the applicable law regarding review of erroneous jury instructions. Certainly, the decision to give a particular jury instruction "is within the sound discretion of the trial court, and absent prejudicial error, such decisions should not be disturbed on appeal." Poole v. Lowell Dunn Co., 573 So. 2d 51, 53 (Fla. 3d DCA 1990 (emphasis added). However, reversible error has been found when the jury instructions given, as a whole, create a reasonable possibility that the jury may have been mislead by the failure to give the requested instruction. See, Barkett v. Gomez, 908 So. 2d 1084,

1086 (Fla. 3d DCA 2005); Tilley v. Broward Hospital District, 458 So. 2d 817, 818 (Fla. 4th DCA 1984); Ruiz v. Cold Storage and Insulation Contractors, Inc., 306 So. 2d 153, 155 (Fla. 2nd DCA), cert. denied, 316 So. 2d 286 (Fla. 1975). The appellate court "need not determine the jury was in fact confused or misled—only that the erroneous instruction could reasonably have led to that result." Rosenfeld v. Seltzer, 993 So. 2d 557, 561 (Fla. 4th DCA 2008) (Polen, J., dissenting). See also, International Alliance of Theatrical Stage Employees and Moving Picture Technicians v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators Holding Company, Inc., 902 So.2d 959, 963 (Fla. 4th DCA 2005) (miscarriage of justice arises when jury instructions are reasonably calculated to confuse or mislead jury). This Court has long recognized that if there is a reasonable possibility that the jury could not have properly resolved the issues before them, a new trial should be granted. See, Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990); Carmona v. Carmona, 779 So. 2d 337 (Fla. 2d DCA 2000); Schreidell v. Shoter, 500 So. 2d 228, 231-232 (Fla. 3rd DCA 1986), rev. denied, 511 So. 2d 299 (Fla. 1987).

Universal nevertheless claims there is nothing in the record to suggest that the jury was impermissibly swayed by the trial court's instruction. (Initial Brief p. 24-27) This claim misstates the law. An appellate court need not determine the

jury was in fact confused or misled—only that the erroneous instruction could reasonably have led to that result. Carmona v. Carmona, 779 So. 2d 337, 339 (Fla. 2d DCA 2000); Ruiz v. Cold Storage & Insulation Contractors, Inc., 306 So. 2d 153, 155 (Fla. 2d DCA 1975). In cases like this one, where the jury might reasonably have been confused or misled by a particular instruction, a "miscarriage of justice" pursuant to §59.041, Fla. Stat. results, which constitutes prejudicial error requiring reversal. Id.; Goldschmidt v. Holman, supra. It also is reversible error to instruct the jury on a statute if the statute is inapplicable under the evidence and the improper instruction affected the jury's deliberations by misleading or confusing it. Eaton Construction Co. v. Edwards, 617 So. 2d 858 (Fla. 5th DCA 1993). Likewise, it has long been the law in Florida that the giving of a jury instruction which erroneously shifts the burden of proof cannot be considered harmless error. Powell v. American Sumatra Tobacco Co., 17 So. 2d 391 (Fla. 1944); Loftin v. Skelton, 12 So. 2d 175 (Fla. 1943); Metropolitan Dade County v. St. Claire, 445 So. 2d 614, 618 (Fla. 3d DCA 1984).

These principles were explained in Hudson v. Prudential Property and Casualty Insurance Co., supra, which also involved an all-risks homeowners' insurance policy. The appellate court held that the trial court misinstructed the jury by improperly placing the burden of proof on the homeowners to prove existence

of sinkhole, a covered event, rather than requiring the insurer to prove that a cause excluded from coverage brought about the loss. The court noted that there was a direct conflict in the evidence regarding the cause of to damage to the insureds' home; therefore, the allocation of the burden of proof on the issue of the insurer's liability was of critical importance. Since the insurer's defense was based on an exclusion to the policy:

> The court's instruction had the effect of improperly placing the burden on the Hudsons to prove that their home was damaged by a sinkhole. Consequently, the jury was apparently under the mistaken impression that the Hudsons, as plaintiffs, had to 'tip the scales' to prove that sinkhole activity caused the damage.

450 So. 2d at 568.

There also was a direct conflict in the evidence regarding the cause of damage to Mr. Warfel's home; that is, whether the cause of the damages to Mr. Warfel's residence was a covered or excepted peril.[7] Thus, the jury had to rule out sinkhole activity as a cause of damage to Mr. Warfel's home before concluding that there was no coverage for any of the damage. As explained above, the Wallach court approved a jury instruction imposing the burden on the insurer to show by the greater weight of the evidence that an exclusion in the insurance

[7] The lower court recognized the conflict when it denied Universal's motion for directed verdict. (VT 5, 721-22)

policy was the sole proximate cause of them damage or loss to the property. Here, the instruction given changed the burden of proof and required Mr. Warfel to overcome the presumption of correctness of the report by coming forward with evidence to rebut the presumption. To make matters worse, the jury was then told that it had to accept the findings, opinions and conclusions contained in the SD II report unless Mr. Warfel showed by the greater weight of the evidence that they were not correct. The confusion continued because the jury was also instructed that it could accept or reject the expert opinion testimony or give it whatever weight it thought the testimony deserved. (VT 7, 1089) In light of the conclusive presumption given to Universal's witnesses, the jury likely believed that the instruction applied only to Mr. Warfel's expert witnesses. The fact that this was a three day trial filled with complex expert witness testimony, and yet, the jury deliberated only about thirty minutes, shows that is quite probably what happened. (VT 7, 1096) The Second District recognized that instructing the jury on an evidentiary presumption that impermissibly shifted the burden of proof to Mr. Warfel could have led to such a result. See, e.g., Schief v. Live Supply, Inc., 431 So. 2d 602, 603 (Fla. 4th DCA 1983) (instruction by trial court that a finding of fraud in and of itself may support award of punitive damages was erroneous and substantially altered plaintiff's burden of establishing entitlement to punitive

damages and was, therefore, reversible error). To paraphrase Butler v. MacDougal, 120 So. 2d 832, 834 (Fla. 3d DCA 1960), Mr. Warfel should not have been required to parade his evidence regarding the presence of a sinkhole before the jury "while burdened by having this albatross of a presumption hung about [his] neck." The Second District's decision ordering a new trial should be approved.

CONCLUSION

For all the foregoing reasons, the ruling of the Second District Court of Appeal should be approved, and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following by (X) U.S. Mail; ( ) Facsimile; and/or ( ) Hand Delivery on September 21, 2010:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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