IN THE SUPREME COURT OF FLORIDA

Case No. SC10-948

UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA

PETITIONER,

v.

MICHAEL WARFEL,

RESPONDENT

INITIAL BRIEF OF PETITIONER UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA

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On discretionary review of an Opinion of the Second District Court of Appeal.

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PRELIMINARY STATEMENT

The Petitioner, UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA, shall be referred to herein as "Universal."

The Respondent, MICHAEL WARFEL, shall be referred to herein as "Warfel."

References to the trial court records shall be referred to herein as "R." References to the trial transcript shall be referred to herein as "R-T."

The Second District's May 12, 2010 Opinion, which is contained in Universal's Appendix, will be cited "Op. at ___."

STATEMENT OF THE CASE AND FACTS

Background

As the Second District's Opinion explains, this matter originated with Warfel's homeowners property insurance claim for damage resulting from alleged sinkhole activity to a property located in Pasco County, Florida in August 2005 (Op. at 2). Universal hired SDII to conduct testing in accordance with section 627.7072, Florida Statutes (Op. at 2). SDII issued a report in October 2005 in accordance with section 627.7073, Florida Statutes, concluding that a sinkhole loss had not occurred (Op. at 2). Based on the SDII Report, Universal denied Warfel's claim, and he filed this lawsuit (Op. at 2).

Trial Proceedings

Before trial, Universal filed a motion to establish the applicability of the 2005 sinkhole statutes, sections 627.706, et seq., Florida Statutes, to this case, and to apply section 90.304, Florida Statutes, to the presumption set forth in section 627.7073(1)(c) (Op. at 2). The trial court entered an Order ruling that sections 627.706 and 627.707, Florida Statutes, did not apply retroactively but that sections 627.7065, 627.7072, and 627.7073, Florida Statutes, did apply retroactively (Op. at 3, n. 2). The trial court also ruled that section 90.304 applied to the presumption because it was implemented for public policy (Op. at 3).

During trial in February 2008, Warfel presented expert testimony that the cause of damage was, at least in part, due to sinkhole activity (Op. at 3). Although Warfel's experts acknowledged that the testing performed by SDII was compliant with section 627.7072, Universal's experts testified that sinkhole activity was not the cause of damage (Op. at 3; R-T 479-628 & 629-753). The only dispute was whether sinkhole activity was a contributing cause of the loss. Eventually, the parties agreed to a verdict form that read:

> After considering all of the evidence presented by the parties and considering the affirmative defenses raised by the Defendant, do you find that Mr. Warfel has established by the greater weight of the evidence that he has sustained a covered sinkhole loss that occurred during the policy period for which Mr. Warfel provided prompt notice. (R 916-1129).

While acknowledging that he had the burden to prove whether his property sustained a covered sinkhole loss, Warfel nevertheless argued that the "bursting bubble" presumption of section 90.303, Florida Statutes, should apply instead of the "burden of proof" presumption of section 90.304 (Op. at 5). Alternatively, he contended that if section 90.304 applied, the jury should be instructed on only his burden of proof but not the presumption contained in section 627.7073(1)(c).

Universal argued that section 90.304 applies and that the jury should be instructed pursuant to section 627.7073(1)(c) that SDII's Report was presumed correct and that Warfel had the "burden of proving by a preponderance of the

evidence that the findings, opinions, and conclusion of the report are not correct" (Op. at 4).

The trial court agreed with Universal and gave the following instruction:

> You must presume that the opinions, findings, and conclusions in the SDII 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. (Op. at 4).

The jury returned a verdict in favor of Universal[1] and, after denying Warfel's motion for new trial[2], the court entered a Final Judgment.[3]

Appellate Proceedings

Warfel appealed the Final Judgment to the Second District Court of Appeal. As phrased by Warfel, the two issues on appeal were:

> (1) Whether the lower court erred as a matter of law in ruling that section 627.7073, Florida Statutes (2005) applied to an insurance policy entered into before the effective date of the statute?
>
> (2) Whether, even if section 627.7073, Fla. Stat. applied to this case, the lower court erred as a matter of law in ruling that the statute creates a conclusive presumption under §90.304, Fla. Stat., and instructing the jury on the same?

[1] R. 1545.
[2] R. 1565.
[3] R. 1564.

In its December 2009 Opinion, while finding no error with the retroactive application of section 627.7073, the Second District reversed the Final Judgment on the second issue and held that Warfel was entitled to a new trial. In its May 2010 Opinion, in response to Universal's request, 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.

The Court accepted jurisdiction, and this appeal follows.

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

The issue of statutory interpretation is a question of law, subject to *de novo* review. *Foundation Health. v. Westside EKG Associates*, 944 So. 2d 188, 194 (Fla. 2006); *see also Daniels v. Florida Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005). A trial court's application of a provision of the Florida Evidence Code is also subject to *de novo* review. *Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 598 (Fla. 1st DCA 2007).

SUMMARY OF THE ARGUMENT

For two primary reasons, the presumption codified in section 627.7073(1)(c) is governed by section 90.304 and not section 90.303 of the Evidence Code.

First, the statutory presumption was not established primarily to facilitate the determination of a particular action as provided by section 90.303. The determination of an action for breach of an insurance contract covering property damage is whether there is coverage for the loss. The statutory presumption deals only with whether a sinkhole loss occurred, not whether there is coverage for a claim. In contrast, determination of the action depends on whether there is coverage for the claim. In all-risk policies, that burden remains on the insurer.

Second, the statutory presumption was established primarily to implement Florida's public policy consistent with the Legislature's recognition that sinkhole claims were creating a crisis in Florida's insurance industry. The presumption was implemented to permit the public to rely upon accurate and reliable tracking and identification of properties affected by sinkhole activity.

The Second District's Opinion is also erroneous in that the Court failed to appreciate that Warfel invited the error of which he complained in acknowledging that he had the burden to prove that the SDII Report was incorrect. The trial court's jury instruction was consistent with that acknowledgment.

LEGAL ARGUMENTS

I. THE PRESUMPTION SET FORTH IN SECTION 627.7073(1)(C) WAS NOT ESTABLISHED PRIMARILY TO FACILITATE THE DETERMINATION OF A PARTICULAR ACTION AND THEREBY MUST BE GOVERNED BY 90.304 OF THE EVIDENCE CODE.

Section 627.7073(1)(c) (2005)[4] provides,

> The respective findings, opinions, and recommendations of the engineer and professional geologist as to the verification 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 correct (emphasis supplied).

Presumptions such as that codified in section 627.7073(1)(c) are governed by the Florida Rules of Evidence. Section 90.301, Florida Statutes, defines a presumption as "an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established." Section 90.302, Florida Statutes, provides that "every rebuttable presumption is either":

> (1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

[4] In 2006, the statute was amended and now provides that the respective findings and opinions "as to the cause of distress to the property" rather than "as to the verification of elimination of a sinkhole loss" shall be presumed correct.

> (2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

The two types of presumptions are further defined by sections 90.303 and 90.304:

> **90.303 Presumption affecting the burden of producing evidence 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.
>
> **90.304 Presumption affecting the burden of proof defined** – In civil actions, all rebuttable presumptions which are not defined in s. 90.303 are presumptions affecting the burden of proof.

Presumptions governed by section 90.303 are commonly referred to as "vanishing" or "bursting bubble" presumptions. Florida courts have construed such presumptions as those established as a matter of procedural convenience. *See State v. Rolle*, 560 So. 2d 1154, 1155 n. 2 (Fla. 1990); *Estate of Davis, In re*, 462 So. 2d 12, 13-14 (Fla. 4th DCA 1984) (en banc) (Glickstein, J., specially concurring). This was not the purpose for which the presumption set forth in section 627.7073(1)(c) was established.

The determination of an action for breach of contract for denial of a claim for property damage is whether there is coverage for the damages. Under an all-

risk policy, all damage to covered property is covered unless otherwise excluded or excepted from coverage, subject to all conditions to coverage being met. *See Wallach v. Rosenberg*, 527 So. 2d 1386, 1388-89 (Fla. 3d DCA 1988). The insured has the burden of proof that a loss occurred to covered property and that all conditions to coverage are met or otherwise waived. Once the insured carries that initial burden, the burden of proof shifts to the insurer to prove that all damage to covered property is excluded or excepted under the policy.

When the action involves a claim for sinkhole loss, as in this case, the statutes impose additional burdens upon the insurer to prove that no sinkhole loss occurred. The insurer must prove that it retained an engineer or professional geologist to conduct testing in accordance with section 627.7072, and that a report was issued in accordance with section 627.7073. Section 627.7072 provides:

> (1) The engineer and professional 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 and for the engineer to make recommendations regarding necessary building stabilization and foundation repair.
>
> (2) Testing by a professional geologist shall be conducted in compliance with the Florida Geological Survey Special Publication No. 57 (2005).

Once the insurer satisfies these burdens, the presumption of section 627.7073(1)(c) arises and the burden of proof shifts to the insured to disprove the presumed fact, which is whether the insurer's experts' findings and opinions are correct.[5]

Contrary to the Second District's Opinion, the presumption codified in section 90.304 does not shift the burden of proof to the insured to prove that a sinkhole loss occurred, or even that a covered loss occurred; it merely imposes the burden on the insured to prove that the insurer's statutory report is incorrect. For example, the insured could show that the engineers hired by the insurer tested the wrong property, or that their testing equipment was inadequate, or that their credentials were insufficient. None of those impermissibly imposes on the insured the burden of proof on the determinative issue – whether a covered loss exists. Rather, consistent with Florida law, the insurer always has the burden to prove that all damage to covered property is not covered because an exclusion or exception applies.

In this case, the determinative issue is whether Warfel's claim was within policy coverage. The presumption regarding the correctness of the SDII Report is not one "established primarily to facilitate the determination of the particular action," because it is not dispositive on the determinative issue, and whether

[5] The presumption also applies to the findings and opinions regarding the method and cost of stabilization

Universal met its burden to prove an exception or exclusion was never addressed at the trial level.

Finally, a sinkhole trial deals with damages, and the determination of the action involves the actual cash value of those damages once sinkhole activity is shown. Section 627.707(5)(b), Florida Statutes, provides, in pertinent part,

> The insurer may limit its payment to the actual cash value of the sinkhole loss, not including underpinning or grouting or any other repair technique performed below the existing foundation of the building, until the policyholder enters into a contract for the performance of building stabilization or foundation repairs. After the policyholder enters into the contract, the insurer shall pay the amounts necessary to begin and perform such repairs as the work is performed and the expenses are incurred.

As the statute explains, the cost of repair is not recoverable until: (1) the insured enters into a contract; and (2) the expenses are incurred. The "determination of the action," therefore, requires a determination of the damages. While the statutory report is evidence on the issue of sinkhole activity, it is not determinative of the action. For this reason also, the Second District erred in holding that section 90.303 applies to the statutory presumption in section 627.7073(1)(c).

II. THE PRESUMPTION SET FORTH IN SECTION 627.7073(1)(C) WAS ESTABLISHED PRIMARILY TO IMPLEMENT PUBLIC POLICY AND THEREBY MUST BE GOVERNED BY 90.304 OF THE EVIDENCE CODE.

In its Opinion, the Second District rejected Universal's argument regarding the public policy behind section 627.7073(1)(c), and thus the applicability of section 90.304, stating:

> [T]he legislature has not declared that the presumption in section 627.7073(1)(c) is a public policy-related presumption. Nor did the legislature specifically provide that section 627.7073(1)(c) was to operate as a burden-shifting presumption under sections 90.302(2) or 90.304. Absent a clear legislative directive, we must conclude that section 627.7073(1)(c) is a "vanishing" or "bursting bubble" presumption that affected only Mr. Warfel's burden of producing evidence (Op. at 3).

Contrary to the majority's conclusion, but as Judge Villanti explained in his dissent, whether or not the legislature specifically provided that the presumption operates either as a burden-shifting presumption or as a presumption that merely shifts the burden of producing evidence is irrelevant (Op. at 13).

While there are examples of the Legislature's specific creation of a burden-shifting presumption under section 90.304, as the majority noted (Op. at 6), there are also instances where a court, not the Legislature, imposed the burden-shifting presumption. In *City of Coral Gables v. Brasher*, 132 So. 2d 442, 446 (Fla. 3d DCA 1961), for example, the court analyzed a statutory presumption that any impairment of a police officer's health caused by heart disease was presumed

suffered in the line of duty "unless the contrary be shown by competent evidence." The statute contained no mention of public policy or sections 90.303 or 90.304. During trial, both parties presented conflicting expert testimony on the cause of the plaintiff's disability. *Id. at 444.* The City argued that because it was able to present expert testimony, the presumption should vanish and the burden of proof should shift back to the plaintiff. *Id at 444-445.* The court rejected the City's argument, explaining:

> For us to accept the appellant's view that following its expert's testimony, the presumption vanished and the burden of proof shifted to the plaintiff to 'positively' prove the disability was service-connected (notwithstanding the testimony of plaintiff's expert) would be contrary to Florida law and would also have the effect of negating the presumption granted by section 185.34, supra. Permitting the testimony of the defendant's expert to have the effect of rebutting the presumption created by the statute in view of the contradictory and conflicting testimony of plaintiff's expert, would be contrary to the rule expressed by the Supreme Court of Florida in Kuehmsted v. Turnwall, 115 Fla. 692, 155 So. 847, wherein it was stated that where testimony of two medical experts is hopelessly conflicting, the evidence will be considered balanced as if it has not been offered. *Id.*

Similarly, in *Caldwell v. Division of Retirement, Florida Division of Administration*, 372 So. 2d 438 (Fla. 1979), the case cited in Judge Villanti's dissent (Op. at 5), this Court addressed a case in which the relevant statute did not expressly create a burden-shifting presumption. Nevertheless, the Court concluded

that the presumption created by the statute "embodies the social policy of the state" and, therefore, was intended to shift the burden of proof. *Id. at 439.* Citing *Brasher*, the Court explained:

> The presumption would be meaningless if the only evidence necessary to overcome it is evidence that there has been no specific occupationally related event that caused the disease.
>
> The statutory presumption is the expression of a strong public policy which does not vanish when the opposing party submits evidence. Where the evidence is conflicting, the quantum proof is balanced and the presumption should prevail.

Id. at 441; *see also* Charles W. Ehrhardt, *Florida Evidence* § 304.1, at 104 (2002 ed.) ("Because of the harm that would result to society . . . if the presumed fact is disproved, a greater burden is placed upon a party to disprove the presumed fact.").

Consistent with the analyses of *Caldwell* and *Brasher*, section 627.7065 provides, in relevant part:

> The Legislature finds that there has been a dramatic increase in the number of sinkholes and insurance claims for sinkhole damage in the state during the past 10 years. Accordingly, the Legislature recognizes the need to track current and past sinkhole activity and to make the information available for prevention and remediation activities. The Legislature further finds that the Florida Geological Survey of the Department of Environmental Protection has created a partial database of some sinkholes identified in Florida, although the database is not reflective of all sinkholes or insurance claims for sinkhole damage. The Legislature determines that creating a complete electronic database of sinkhole

> activity serves an important purpose in protecting the public and in studying property claims activities in the insurance industry.

§ 627.7065, Fla. Stat. (2005). Public policy is implemented by the creation of the database as it permits the public to track and identify properties affected by sinkhole activity. The database is created largely by insurance companies filing sinkhole reports that were issued in accordance with section 627.7073 and to which the presumption applies. By creating the presumption, the legislation permits the public to rely on the database and, thus, the accuracy of the sinkhole reports.

Section 627.7073 also implements public policy in that it assures that the testing upon which the report is based was done in accordance with section 627.7072's requirement that the testing comply with the protocols set forth in the Florida Geological Survey Special Publication No. 57. Publication No. 57 remains the only technical publication created by engineers and geologists who specialize in the investigation of sinkhole activity, and the Legislature's requirement of compliance with it ensures that the opinions and findings derived from the testing are eminently reliable.

Section 627.7073 further implements public policy in that it provides that the insurer must file the engineering report with the county property appraiser.[6] The purpose behind the filing is to permit the public to ascertain whether sinkhole activity has been identified at a particular piece of property. In turn, the reason for the requirement of public notice is that sinkhole activity materially affects the marketability and value of property, and it is therefore in the public interest to be able to identify properties affected with sinkhole activity and presume that the findings and opinions in the filed report are correct. It would be contrary to public policy to allow the recordation of engineering reports if those reports were generated without any standards or regulations and could not be presumed correct. Conversely, it would be contrary to public policy to legislate that those findings and opinions, once filed, are correct while denying that same presumption of correctness in a case involving a sinkhole claim.

Here, despite its conclusion, the majority recognizes the public policy implemented by the 2005 legislative changes to the sinkhole statutes:

> We recognize the legislature's desire to stem the tide of sinkhole-related insurance claims. Unquestionably, certain provisions of the statutes described earlier in this opinion reflect a concern with identifying and advising homeowners and other of potential sinkhole-prone areas. See §§ 627.7065, 627.7072, 627.7073. For example, the

[6] In 2006, the statute was amended to require the reports to be filed with the clerk of court.

> reporting and recording provisions of sections 627.7065 and 627.7073 promote public awareness (Op. at 7 n. 7).

Judge Villanti also identified the statutory scheme's social policy in his dissenting opinion:

> [T]he parties do not dispute that social policy concerns drove the legislative changes at play in this case. They only disagree as to whether the presumption that accompanied these changes was one shifting the burden of proof or one that merely vanished once countervailing evidence was adduced. I contend that because the statutory sections at issue in the case were enacted to advance social or public policy, a burden-shifting presumption applies (Op. at 9-10).

As Judge Villanti argues, section 627.7073 was implemented to promote public policy by creating uniform standards for issuing engineering and geological reports and recording those reports with the county property appraiser.

The text of the sinkhole statutes and the analyses of *Caldwell* and *Brasher* support Judge Villanti's dissent:

> To apply a "vanishing" presumption under these facts effectively negates the presumption of correctness conferred upon the report by section 627.7073 (1)(c). It is inconceivable that the legislature would enact a statute containing extensive detail regarding sinkhole testing and expert reports and that it would express its intent that the report "be presumed correct" only to have this presumption "vanish" when an expert hired by the insured simply testifies that he disagrees with the conclusions contained in the report. Allowing Mr. Warfel's experts to "vanish" the presumption created by the statute by simply testifying that they disagree with the report negates the statue's efforts to provide consistency

> in claims handling and reduce the number of disputed sinkhole claims. This type of ipse dixit logic from the insured's experts is not consistent with the history and intent of the statute (Op. at 13-14).

In contrast to the significant and detailed statutory testing and reporting burdens imposed on Universal by sections 627.7072 and 627.7073, Warfel's experts were not required to test or report. Nor did they have to meet the definitions in section 627.706(d)-(e), Florida Statutes, which delineate specific criteria that an insurer's engineers and geologists must satisfy.[7] For example, an engineer retained by an insurer must have specialization in geotechnical engineering and the identification of sinkhole activity. As Judge Villanti explains, the cost to the insurer of statutory compliance ranges from $4,000 to $8,000 and higher (Op. at 12 n. 8). An insured's expert, in contrast, may be any type of engineer, regardless of expertise or experience in sinkhole activity, who merely reviews and comments on the insurer's report.

Given the considerable difference in the statutory burdens, the considerable cost of the insurer's compliance, and the considerable threat to Florida's residents' ability to obtain property insurance because of the sinkhole claim crisis, the presumption contained in section 627.7073(1)(c) should be that codified in section 90.304. That interpretation promotes two policy goals, both of which address the

[7] Warfel's experts did not conduct any testing; their opinions were based solely on their review of the SDII Report (Op. at 2).

problems described above: (a) it reduces the number of disputed sinkhole claims in Florida; and (b) it reduces the overall costs associated with sinkhole losses in Florida.

This public policy was identified in a report that was commissioned by the Legislature to conduct an in depth study of sinkhole loss claims and their effect on the insurance industry and on the Florida economy (Op. at 11). They study identified that from 1999 to 2003 the number of sinkhole claims increased from 348 in 1999 to 1,018 in 2003 (Op. at 11). The total amount of loss payments grew from approximately $22 million in 1999 to approximately $65 million in 2003 (Op. at 11).

The Study recommended numerous statutory changes to the then existing laws governing sinkhole losses, including the creation of a uniform approach to identify sinkholes in order to provide consistency in claims handling and a reduction of the number of disputed sinkhole claims (Op. at 11-12). According to Judge Villanti, it was evident that a collapse of the sinkhole insurance market was imminent without legislative reform (Op. at 12). Against that backdrop, the Legislature revised the sinkhole statutes (Op. at 12).

As Judge Villanti explains, it is clear that the Florida Legislature understood and recognized the overwhelming public policy concerns regarding insurance coverage, availability and affordability to its citizens (Op. at 13). It was in

response to that continuing crisis regarding the availability and affordability of sinkhole coverage, that the Florida Legislature enacted the new statutes, including section 627.7073 and its subsection creating the presumption to assist in the adjusting and investigating of sinkhole claims and in the testing for and reporting of sinkhole losses.

Finally, the Opinion correctly accepts that section 627.7073 may be applied retroactively because it does not impair contract rights (Op. at 3 n. 2). *See, e.g., Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 778-79 (Fla. 1979) (holding that statutory changes could become effective and binding on existing contracts if the legislative intent in amending the statute overrides the degree of impairment of the existing statute). In this case, as the Opinion recognizes, the balancing process weighs in favor of application of the statute. The only question is whether the burden of proof presumption of section 90.304 should apply. For the forgoing reasons, it should. As Judge Villanti explained, if it does not, the statute is useless to the insurer, to the industry, and to the people of Florida.

III. THE SECOND DISTRICT COURT OF APPEAL COMMITTED REVERSIBLE ERROR IN FINDING ERROR WITH THE JURY INSTRUCTION ON THE PRESUMPTION OF CORRECTNESS.

While not relevant to the issue certified to the Court, the Second District also erred in remanding the case for new trial based upon a jury instruction concerning the presumption. The instruction was an accurate statement of law, any error was not fundamental or harmful, but was invited by Warfel.

The basis for the Second District's reversal was that "the trial court should not have instructed the jury on an evidentiary presumption that impermissibly shifted the burden of proof to him" (Op. at 1). The jury instruction in dispute was,

> You must presume that the opinions, findings and conclusion in the SDII 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 in the report are not correct (Op. at 4).

This was the only jury instruction on the burden of proof. The instruction is an accurate recitation of section 627.7073 (1)(c) and is consistent with the case law governing section 90.304 presumptions. The only jury instruction that Warfel requested was:

> Mr. Warfel has the burden of proof to establish by the greater weight of the evidence that he sustained actual physical damage to his home during the time the home was insured by Universal Insurance Company of North American (Universal Insurance), which was caused, at least in part, by sinkhole activity. (R 1374-1403)

Thus, although Warfel argued that the section 627.7073(1)(c) presumption was a "vanishing" or "bursting bubble" presumption that should not go to the jury (Op. at 5-6), he agreed that he had the burden of proof on whether his property sustained sinkhole damage (R 1374-1403).

At no point did Warfel object that he did not have the burden of proof or request any instruction on the burden of proving exclusions or exceptions, which under Florida law always remains with the insurer in the context of an all-risk policy. The only issue that was presented to the jury was whether a sinkhole loss occurred, not whether an exception or exclusion applied. In fact, Warfel submitted a requested verdict form acknowledging his burden of proof:

> After considering all of the evidence presented by the parties and considering the affirmative defenses raised by the Defendant, do you find that Mr. Warfel has established by the greater weight of the evidence that he has sustained a covered sinkhole loss during the time the home was insured by Universal Insurance Company of North America? (R 1374-1403)

Consistent with Warfel's position throughout trial, the jury was given an agreed verdict form instructing it:

> After considering all of the evidence presented by the parties and considering the affirmative defenses raised by the Defendant, do you find that Mr. Warfel has established by the greater weight of the evidence that he has sustained a covered loss that occurred during the policy period, for which Mr. Warfel provide prompt notice. (R-T 916-1129)

In ruling strictly on the basis of the jury instruction, while ignoring the verdict form, the Second District failed to consider whether there was a sufficient record, whether the purported error was preserved, whether the purported error was fundamental, whether the purported error was harmful, and whether the purported error was invited error.

The first issue that should have been addressed is the sufficiency of the record. The single question agreed verdict form imposed three burdens of proof on Warfel: (a) that a covered sinkhole loss occurred; (b) that it was within the policy period; and (c) that prompt notice of the loss was provided. If Warfel failed to prove any one of the three, the jury was required to return a verdict for Universal. The record does not establish that Warfel carried his burden on the three. Under Florida law, the burden to prove these three conditions remains with the insured. The jury instruction has no bearing on the conditions. The jury could easily have found that Warfel failed to meet his burden to prove that a loss occurred during the policy period or that prompt notice was given. Any of those findings would have resulted in a verdict for Universal.

Because the Second District, without foundation, assumed that the jury relied upon the jury instruction in returning a verdict for Universal, it should not have reached the jury instruction issue. As the Fourth District said in *Silver Star Citizens' Committee v. City Council of Orlando*, 194 So. 2d 681, 682 (Fla. 4th

DCA 1967), "[w]e are governed, not by what might be shown, but what is in fact shown by the record now before this court." Here, in contrast to the guidelines articulated in *Silver Star*, the Second District impermissibly assumed, without any record support, that the jury relied upon the jury instruction in returning its verdict and that Warfel failed to prove that a sinkhole loss occurred because of the jury instruction. There is no record basis on which the Second District could have validly reached those conclusions.

When this case reached the Second District, it should have first considered whether the purported jury instruction error was preserved. Because of the agreed verdict form and ensuing verdict, there is no basis to presume that the jury returned its verdict based on the jury instruction alone. Therefore, even assuming that the jury instruction was erroneous, the court should have considered whether the error was fundamental. Fundamental errors are those which deprive a litigant of a fair trial and which could not have been prevented by an objection and curative instruction. *See Harlan Bakeries, Inc. v. Snow*, 884 So. 2d 336, 339-40 (Fla. 2d DCA 2004). The error here was not fundamental. Warfel could have requested a curative instruction that clarified that Universal had the burden to prove that there was no coverage under the all-risk policy, as Florida law requires. Such an instruction would have properly put the ultimate burden of proof on Universal and

returned the jury instruction to its rightful place – to impose the burden of proof on Warfel only to show that the SDII Report was not correct.

Even assuming that the jury instruction error was preserved, the Second District should next have considered whether the instruction was an incorrect statement of the law. An appellate court does not have discretion to grant a new trial based upon an instruction that was an accurate statement of law. *See Lake Worth Boating Center, Inc. v. Bomzwas*, 591 So. 2d 235, 236 (Fla. 4th DCA 1991). The instruction was an accurate statement of law, and the jury was properly instructed on the presumption. Presumptions governed by 90.304 are presented to the jury. *See Jones v. Crawford*, 552 So. 2d 926, 927-28 (Fla. 1st DCA 1989).

When evidence rebutting a social policy presumption is introduced, the presumption does not automatically disappear; rather, 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. *See International Alliance of Theatrical Stage Employees and Moving Picture Technicians v. International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operators Holding Company, Inc*., 902 So. 2d 959, 963-64 (Fla. 4th DCA 2005).

In this case, if the Second District found that the instruction was not an accurate statement of law, the next prong of analysis should have been whether the

error was harmful. Harmful error occurs only if the jury would have reached a different verdict had the instruction not have been given. The error, assuming it was error, was harmless because of the verdict form that was submitted. The verdict form itself placed the burden of proof upon Warfel. Whether the verdict form was error is not at issue and is not being contested in this appeal.

The Second District found error in how the presumption was applied and that it gave a jury instruction which improperly shifted the burden of proof upon Warfel. Notwithstanding how the presumption was applied and the instruction that followed, the jury could have returned the same verdict with or without the instruction given the verdict form, and there is nothing in the record to show that the jury relied upon the instruction in returning its verdict. Moreover, the record does not establish whether the jury even determined that a sinkhole loss occurred. The jury could have found that the loss did not occur during the policy period or that prompt notice was not provided and, in doing so, reached the same result.

The jury was also instructed to give the evidence whatever credibility or weight it believed the evidence should be given. The jury was instructed as follows,

> You have heard opinion testimony on certain technical subjects from persons referred to as expert witnesses. Some of the testimony before you was in the form of opinion about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill,

> experience, training, or education of the witnesses, the reasons given by the witness for the opinion expressed, and all the other evidence in the case. (R-T 916-1129).

The jury was instructed to weigh the evidence based upon what it believed was credible. The jury was not precluded from giving whatever weight it chose to the testimony from Universal's and Warfel's experts. The jury instruction did not impermissibly preclude the jury from weighing the evidence equally and deciding the case on its merits. There is nothing in the record to suggest that the jury was impermissibly swayed by the trial court's instruction. The Second District failed to consider any other jury instruction other than the one at issue, and therefore failed to consider whether other instructions could have cured any purported error. In *Ruiz v. Cold Storage and Insulation Contractors, Inc*., 306 So. 2d 153, 155 (Fla. 2d DCA 1975), the court held that "jury instructions must be examined and considered as a whole in determining whether a jury was properly instructed."

If the Second District found that the error was harmful, the final step in its analysis should have been whether the error was invited. In this case, the record establishes that, to the extent the instruction was error, it was invited by Warfel. In *Fuller v. Palm Auto Plaza, Inc.,* 683 So. 2d 654, 654 (Fla. 4th DCA 1996), the court held that "a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make." Warfel requested an instruction and a verdict in which he accepted the burden of

proof on whether a sinkhole loss had occurred. He failed to argue any distinction between burden of persuasion and burden of proof; rather, he argued that the presumption shifted the entire burden of proof to himself.

Florida law regarding jury instructions is well settled that the standard of review is abuse of discretion. *See Brown v. State of Florida*, 11 So. 3d 429, 432 (Fla. 2d DCA 2009). The test for determining whether prejudicial error occurred is whether there is a "reasonable possibility that the jury could have been misled by the failure to give the instruction." *Barkett v. Gomez*, 908 So. 2d 1084, 1086 (Fla. 3d DCA 2005). The same test applies when a jury instruction that was given was purportedly done in error. Here, there is no record evidence to establish that the jury was misled by the jury instruction at issue, which was an accurate statement of law and was necessary to inform the jury of the substantive law governing the trial.

As Judge Villanti wrote in his dissenting opinion,

> I fail to see how a trial court can abuse its discretion by giving an instruction that merely tracks the governing law. In fact, it would have been an abuse of discretion for the trial court to deny giving the requested instruction, since it was undisputed that Universal met its obligations under the new legislation and that Mr. Warfel's claim both arose and was filed *after* the statute's effective date (Op. at 4).

CONCLUSION

Based on the foregoing reasons, the Court should hold that section 627.7073(1)(c) creates a presumption that is governed by section 90.304, and therefore, reverse the Second District's Opinion with instructions to reinstate the Final Judgment.

CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

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

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