IN THE SUPREME COURT OF FLORIDA

Case No. SC10-948

UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA

PETITIONER,

v.

MICHAEL WARFEL,

RESPONDENT

REPLY BRIEF OF PETITIONER UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA

David J. Salmon, Esq.
Florida Bar No. 12912
Jonathan T. Hall, Esq.
Florida Bar No. 0762601
Karl A. Forrest, Esq.
Florida Bar No. 50683
GROELLE & SALMON P.A.
Waterford Plaza
7650 W. Courtney Campbell Causeway
Suite 800
Tampa, FL 33607
(813) 849-7200 (telephone)
(813) 849-7201 (facsimile)

Nancy W. Gregoire, Esq.
Florida Bar No. 475688
KIRSCHBAUM, BIRNBAUM, LIPPMAN & GREGOIRE, PLLC
1301 E. Broward Boulevard
Suite 230
Fort Lauderdale, FL 33301
(954) 617-2305 (telephone)
(954) 617-2308 (facsimile)

ATTORNEYS FOR PETITIONER

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, will be referred to as "Universal."

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

The trial record will be cited as "R ___." The trial transcript will be cited as "R-T ____."

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

The appellate record will be cited as "AR ____."

The Answer Brief will be cited as "AB ____."

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?

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.[1]

The parties agree that the central question in this case is the Legislature's intent in enacting the presumption in section 627.7073(1)(c), Florida Statutes, entitled "Sinkhole Reports" (AB 17). The only difference in their positions is whether section 90.304, Florida Statutes, applies to require a jury instruction on the presumption or whether section 90.303, Florida Statutes, applies to dispense with an instruction under a "bursting bubble" analysis. Universal's position is that in the context of the entire statutory scheme, the Legislature's express recognition of the sinkhole insurance crisis, and the specific statutory language at issue, the Legislature's intent to apply section 90.304 to the statutory presumption is evident.

In contrast, as Universal explained in its Initial Brief, application of section 90.303 requires a conclusion that the presumption in section 627.7073(1)(c) was placed there by the Legislature to facilitate determination of an action for sinkhole benefits under a property insurance policy. While that is Warfel's position, with which the Second District agreed, the Answer Brief contains no explanation of how the presumption accomplishes that purpose. Nor did Warfel give any

[1] Universal will return to the format of its Initial Brief and address Warfel's Answer Brief in that format. *See Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1122 (Fla. 1984).

explanation at the trial or appellate levels. In fact, that explanation would not be possible. The determination of an action for sinkhole benefits requires that the insured prove that a loss occurred during policy coverage and that all conditions to coverage were met including time notice of the loss and that the insurer must prove that all damage to covered property is excluded from coverage. None of these burdens are affected by the presumption.

Contrary to Warfel's position (AB 15, 17), the instruction does not improperly shift the burden of proving coverage under an all-risk insurance policy on the insured or "ignore" the settled standards for litigation of all-risk insurance policy cases. It does not change the way all-risk policies are litigated, as explained in cases such as *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988) (AB 25). Lastly, the presumption certainly does not "completely change the nature of the coverage provided by all-risk insurance policies," as suggested by Warfel (AB 31). The presumption has no affect whatsoever on coverage under an all risk insurance policy or any other insurance policy.

The *Wallach* case was correct in its interpretation of burdens of proof under an all risk policy. The insured has the burden to prove all conditions to coverage are met, and the insurer has the burden to prove that all damage to covered property is not otherwise covered, but rather is excluded. The presumption does not shift or even affect the burden of proving conditions or exclusions. It merely

puts the burden to disprove a presumed fact upon the insured, nothing more. In fact, the presumption does not even place the burden of proving that a sinkhole loss occurred on the insured. It merely requires the insured to come forward with some evidence showing that the insurer's report is incorrect. That burden could entail nothing more than showing that the insurer's expert used faulty information in preparing the report. It is then left to the jury to decide whether or not to accept the report. The jury in this case was instructed that the presumption should be weighed just as any other evidence is weighed.

Warfel is also incorrect that the section 90.304 presumption is "conclusive" or changes the way all-risk policy cases are litigated (AB 3, 28, 29, 31, 37). The presumption is not conclusive; it is rebuttable, as section 90.304 states, and as the jury instructions stated.

The coverage provided by an all-risk or any other type of property insurance policy remains the same with or without the presumption. The presumption merely imposes a burden on the insured to disprove a presumed fact, the presence or absence of a sinkhole loss, not to prove coverage – a fact that Warfel fails to recognize. Whether or not there is coverage goes far beyond whether or not a sinkhole loss occurred. The mere absence of a sinkhole loss is not dispositive of the issue of coverage. The insurer still must identify a cause(s) of the damage and show that such cause(s) are excluded under the policy. Universal's interpretation

is, therefore, consistent with the burden shifting historically accepted in all-risk insurance policy cases. The fact that an all-risk policy is involved in this case should have no impact at all on the Court's decision, as Warfel argues (AB 17-18), because the presumption does not distinguish between one type of property insurance and another.

Furthermore, in this case the jury did not find that the damage to Warfel's home "was not caused by a sinkhole," as Warfel states (AB 1), because the jury was not asked that question. The jury was asked, on an agreed verdict form, only whether Warfel "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 1545). The jury answered only "No," and because the form is one single compound question, there is no way to determine whether it found no covered sinkhole loss, no covered loss during the policy period, no prompt notice, or some combination of those factors.[2] As Judge Villanti stated in his dissent, to reverse the trial court for giving a jury instruction entirely consistent with the verdict form it was given has no support in Florida law.

Universal also disagrees with Warfel that its interpretation of the statutory presumption is inconsistent with any legislative directive (AB 15, 18-19, 22-24, 28-30). Warfel's position is that Universal's interpretation – and that of the trial

[2] This is the reason that Universal argued that the Second District should conclude that no error was preserved for review.

court and Judge Villanti – could not possibly be correct because the Legislature did not expressly direct that section 90.304 applies, as it did in a series of other statutes. No such express directive is required. While the Legislature clearly knows how to create a presumption when it wishes to do so, in this case it was unnecessary and Warfel's argument misunderstands the interplay between sections 90.303 and 90.304. The test, as expressed in section 90.304 itself, is that it applies unless the presumption was established primarily to facilitate the determination of a particular action as required for application of section 90.303. As Universal explained above, the presumption here does not meet the section 90.303 requirement. The section 90.304 presumption must, therefore, apply.

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.

Universal's interpretation – and that of the trial court and Judge Villanti – is also consistent with the Legislature's intent to benefit property owners, and thus comport with social policy, because it alleviates at least one problem recognized in the 2005 amendments. As the Legislature explained, the statutory scheme is to address an insurance crisis that was negatively affecting the ability of Florida's property owners to obtain property insurance. While Warfel apparently disagrees with the Legislature's recognition of the scope of the problem (AB 22-23, 28), there is widespread recognition that sinkhole activity in Florida has reached serious proportions that are affecting Florida's citizens' ability to obtain insurance.

Over the years, as Warfel recognizes (AB 18-19), the Legislature has periodically amended the sinkhole legislation as necessary to meet Florida's needs. *See City of Winter Park v. Montesi*, 448 So. 2d 1242, 1243 (Fla. 5th DCA 1984) (discussing the infamous Winter Park Sinkhole that led to amendments at that time); *Zimmer v. Aetna Ins. Co.*, 383 So. 2d 992, 993 (Fla. 5th DCA 1980) (discussing the 1969 inception of the legislation). In 1969 and 1984, however, Florida was not facing the insurance crisis it faced in 2005. Most insurance companies and property owners had never experienced a sinkhole loss, and insurance companies were not withdrawing from markets in Florida because of the

expense of investigating and paying claims for sinkhole and other catastrophic losses. As the Legislature expressed in 2005 when it amended the statutes governing claims for sinkhole loss and codified the presumption, it did so because of the crisis.

The appellate court recognized the social policy that is furthered by section 627.7073 in footnote 7 of its written decision (Op. at 7).

> 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 reflects a concern with identifying and advising homeowners and others of potential sinkhole-prone areas…For example, the reporting and recording provisions of sections 627.7065 and 627.7073 promote public awareness.

The presumption furthers "public awareness" by permitting the public to rely upon the accuracy and validity of the opinions set forth in the reports which are issued in compliance with 627.7073, Florida Statutes. The presumption assist the public with identifying potential sinkhole-prone areas by giving the citizens of Florida reports recorded with the Clerk of Court that they can rely upon. The citizens can rely upon it because the report was required to comply with stringent standards that are imposed upon the engineers and geologist issuing the report.

The section at issue here, section 627.7073, clarifies that part of the Legislature's purpose in addressing the crisis was to establish specific, detailed requirements for insurers faced with sinkhole loss claims. Among those detailed

and expensive requirements are the reports at issue here. As Universal explained in its Initial Brief, the reports are of immense benefit to Floridians because they create a database of sinkhole damage and remediation to Florida property. That database is available to insureds, insurers, taxing entities, environmental entities, and buyers and sellers of Florida real estate to ensure stability in the Florida real estate market. The presumption of correctness permits a reliance on the reports that is otherwise not available.

To subject property insurers to those requirements and the accompanying expense, while providing no concomitant protection in ensuing litigation for insurers forced to prepare the reports, does nothing to alleviate the insurance crisis. To the contrary, it serves only to drive insurers further from Florida's borders. Furthermore, to mandate the creation of these detailed and expensive reports while allowing their presumption of correctness to be only a "bursting bubble" in litigation involving them, as Warfel contends (AB 21), completely erodes the Legislature's purpose in mandating their creation. Those results cannot have been the Legislature's intent. Furthermore, Warfel's argument that the property owners' experts are equally likely to prepare the statutory reports and are held to the same rigid standards is inconsistent with the remainder of the statutory scheme, which unquestionably places the burden of retaining the experts and obtaining the report on the insurer, not the insured (AB 30-31). *See, e.g.*, § 627.707, Fla. Stat.

Finally, contrary to Warfel's argument (AB 27-28), the Legislature's intent cannot be determined by the fact that House Bill 1447 died in committee. The bill contained numerous amendments to section 627.7073(1)(c). There is no record evidence of ***why*** the bill died in committee and certainly no evidence that it "appears" that the Legislature has "approved" the Second District's Opinion (AB 28). There were numerous issues surrounding the bill and numerous reasons why it might not have passed, including issues such as premiums caps. Warfel has not provided the Court with any evidence that opposition to the bill was based on the inclusion of the section 90.304 presumption, and there is no evidence supporting that position.

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

Universal agrees that the jury instruction at issue came after the trial court's ruling that the section 90.304 presumption applies, but disagrees that the issue is not properly before this Court (AB 16, 32-38). *See State v. Sigler*, 967 So. 2d 835, 844 n. 4 (Fla. 2007). Universal believes that to preserve the alleged error, Warfel was required to request jury instructions consistent with his own theory of the case, and he did not do so.

Warfel's position is that the error was not invited because the requested jury instruction and verdict form came after the trial court's ruling on the application of the section 90.304 presumption (AB 32). His position is that he can "hardly be faulted for complying with the rulings of the lower court" (AB 33). In contrast, the trial court can "hardly be faulted" for giving the jury instruction and verdict form that Warfel requested. The jury instruction and verdict form were simple and correct – that Universal's expert's report was presumed correct. There is no basis on which this Court could conclude that the jury was misled by the instruction.

As to Universal's failure to make this argument before the Second District, Warfel is correct. That fact, however, does not prevent this Court from addressing it.

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 4th day of October, 2010.

George A. Vaka, Esq. and Nancy A. Lauten, Esq., Vaka Law Group, P.L., 777 South Harbour Island Boulevard, Suite 300, Tampa, Florida 33602 (Fax: 813-549-1780) Attorneys for Respondent/Appellant.

Joshua E. Burnett, Esq., Marshall Thomas Burnett, 200 North Pierce Street, First Floor, Tampa, Florida 33602 (Fax: 813-227-8900) Co-Counsel for Respondent/Appellant.

GROELLE & SALMON P.A.
Waterford Plaza
7650 West Courtney Campbell
Causeway, Suite 800
Tampa, FL 33607
(813) 849-7200 (telephone)
(813) 849-7201 (fax)

BY: /s/ Karl A. Forrest
DAVID J. SALMON, ESQUIRE
Florida Bar No. 12912
JONATHAN T. HALL, ESQUIRE
Florida Bar No. 0762601
KARL A. FORREST, ESQUIRE
Florida Bar No. 50683

CERTIFICATE OF COMPLIANCE

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

/s/ Karl A. Forrest
Jonathan T. Hall, Esquire
Florida Bar No. 0762601
Karl A. Forrest, Esquire
Florida Bar No. 50683
Attorneys for Petitioner