IN THE SUPREME COURT OF FLORIDA

AMADO TRINIDAD, **Case No.: SC11-1643**

Petitioner,

v.

FLORIDA PENINSULA INSURANCE COMPANY,

Respondent.
_____ /

APPELLEE, FLORIDA PENINSULA INSURANCE COMPANY'S ANSWER BRIEF ON THE MERITS

On Discretionary Review From A Decision of the
Third District Court of Appeal of Florida

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INTRODUCTION

In this Brief, the Respondent, FLORIDA PENINSULA INSURANCE COMPANY, shall be referred to as "Florida Peninsula," and the Petitioner, AMADO TRINIDAD, shall be referred to as the "Petitioner" or "Trinidad."

References to the decision of the district court below, *Trinidad v. Florida Peninsula Ins. Co.*, 2011 WL 1878115 (Fla. 3d DCA, May 18, 2011), shall be indicated as "*Trinidad*, at __" with the appropriate page number inserted. References to the Petitioner's Initial Brief shall be designated as (Petitioner's Brief, at __), with the appropriate page number inserted.

Citations to the record on appeal shall be indicated as (R. __), with the appropriate page number inserted. Citations to the Appendix accompanying Petitioner's Initial Brief shall be indicated as (App. __), with the appropriate page number inserted. Citations to the Supplemental Appendix accompanying this Answer Brief shall be indicated as (Supp. App. __), with the appropriate page number inserted.

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STATEMENT OF THE CASE AND FACTS

1. The Underlying Action

Petitioner, Amado Trinidad (the "Petitioner"), brought this action for breach of contract against Florida Peninsula Insurance Company ("Florida Peninsula") based upon its failure to pay him for overhead and profit in conjunction with the settlement of a covered loss under a homeowner's insurance policy Florida Peninsula issued to the Petitioner (the "Policy"). (App. 2). After a 2008 fire damaged the Petitioner's home, he submitted a claim for payment to Florida Peninsula under the policy. (App. 2). Florida Peninsula accepted coverage and paid the claim in full, per the terms and conditions of the Policy, making a payment for the full replacement cost value without deduction for depreciation. (App. 2). However, the Petitioner contended that Florida Peninsula's payment was insufficient because it did not include an amount for overhead and profit. (App. 2). Although the Petitioner had not hired a general contractor, or submitted a contract by a contractor estimating the repairs, the Petitioner claimed he was entitled to additional payment for unknown overhead and profit. (App. 2).

Initially, the Petitioner based this argument on his contention that the loss settlement provision of the policy provided for an "actual cash value" payment for the loss, but he properly conceded at oral argument that the policy provision at

issue provided for payment of "replacement cost value."[1] (App. 3). It was Florida Peninsula's contention that the Policy provided for covered losses to be settled on a replacement cost basis (not an actual cash value basis). (App. 3). Florida Peninsula argued that it had satisfied its payment obligations under the Policy by making a payment for the full replacement cost without deduction for depreciation because the clear and unambiguous policy language permitted it to withhold payment for contractor's overhead and profit until such time as those costs are incurred by the insured or a signed contract for repairs is presented to the insurer. (App. 3).

Although the Policy does not expressly refer to the payment of overhead and profit, it provides for payment under one of three alternatives, including "the necessary amount actually spent to repair or replace the damages building." (App. 4).

The loss settlement provision at issue specifically provides:

> 3. Loss Settlement. Covered property losses are settled as follows:
>
> * * *

[1] The actual cash value payment language was completely deleted from the policy by endorsement.

> b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of the loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace after application of deductible and without deduction for depreciation, *but not more than the least* of the following amounts:
>
> (a) The limit of liability under this policy that applies to the building;
>
> (b) The replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) *The necessary amount actually spent to repair or replace the damaged building*.

(R. 32) (emphasis supplied).

Based upon the Policy language, Florida Peninsula argued that it was not obligated to the Petitioner for the cost of contractor's overhead and profit because the Petitioner did not incur or contract to incur those costs, nor was likely to incur those costs in the future. (App. 4). The trial court granted summary judgment in favor of Florida Peninsula. (App. 4).

2. Summary Judgment

In granting summary judgment in favor of Florida Peninsula, the trial court decided that the loss settlement provision clearly and unambiguously permitted

Florida Peninsula to settle losses by payment of "the replacement cost of that part of the building damaged for like construction and use on the premises," and to make payment of contractor's overhead and profit when those costs are incurred by the insured or an amount is "actually spent to repair or replace" the damaged property. (App. 4). Since the Petitioner did not present a contract for repairs or actually incur the cost of overhead and profit, nor was likely to incur such costs, the trial court entered summary final judgment in favor of Florida Peninsula. (App. 4). The Petitioner then appealed to the Third District Court of Appeal, which affirmed the rulings of the trial court on May 18, 2011, in an eight-page opinion.

3. The Third District Decision

The Third District held that the Policy's clear and unambiguous language governed the outcome of this case. (App. 4, 8). In explaining its decision, the Third District stated that the Policy "unambiguously provides that Florida Peninsula pay replacement costs or the costs Trinidad actually incurs or which he demonstrates he is likely to incur." (App. 4). In addition, the Third District pointed to the fact that the Policy "specifically uses the words 'replacement cost' to cover situations where the insured does not hire a contractor and does not spend money to repair or replace the loss, and in the alternative, it provides for payment

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of money 'actually spent' when the property is actually repaired or replaced." (App. 5). The Third District's decision was summed up as follows:

> [T]he policy is a replacement cost policy, no contractor was hired, no repairs were made that required payment of overhead and profit, and no contract for such repairs was entered into or presented to Florida Peninsula. Thus, Florida Peninsula did not owe Trinidad for these costs, and the trial court correctly entered summary judgment in favor of Florida Peninsula.

(App. 7) (citing *State Farm Fla. Ins. v. Lorenzo*, 969 So. 2d 393, 395-96 (Fla. 5th DCA 2007) (holding that based on the policy language, which provided for payment on a replacement cost basis, the insurer properly withheld a portion of the loss value until such cost was actually incurred)).

In addition, the Third District addressed the mandates of section 627.7011(3), and stated that: "Our reading of section 627.7011(3), relating to depreciation holdbacks in replacement cost policies, also does not alter our conclusion in this case." (App. 7). The decision went on to explain that payment of overhead and profit is not mentioned in section 627.7011, and section 627.7011(3) only requires that replacement costs be paid without deduction for depreciation. (App. 7). The statute similarly does not require payment of overhead and profit costs which have not been incurred, nor are likely to be incurred. (App. 7).

Consequently, the district court held that the Policy's unambiguous terms required the Petitioner to either hire a contractor who charges for overhead and profit, or to incur the expenses for overhead and profit, before Florida Peninsula is required to pay for such costs. (App. 8).

On May 31, 2011, the Petitioner served several motions as to the Third District's decision, including a Motion for Rehearing, Motion for Rehearing En Banc, and Motion for Certification to the Florida Supreme Court. (Supp. App. 9-32). Florida Peninsula filed its Response to the Petitioner's Motions on June 15, 2011. (Supp. App. 33-39). The Third District entered an Order denying the Petitioner's Motions on July 19, 2011. (Supp. App. 40).

This Court accepted jurisdiction to review the decision of the Third District Court of Appeal in *Trinidad v. Florida Peninsula Ins. Co.*, No. 3D10-1087, 2011 WL 1878115 (Fla. 3d DCA May 18, 2011), based on intra-district conflict. This appeal follows.

ISSUE PRESENTED

The issue presented by this appeal is whether section 627.7011(3), Florida Statutes (2008), or the Policy required Florida Peninsula to pay contractor's overhead and profit in settling Trinidad's loss on a replacement cost basis, where no such costs were incurred, nor were likely to be incurred.

SUMMARY OF THE ARGUMENT

Although this Court accepted conflict jurisdiction, such jurisdiction was improvidently granted. The Petitioner has never shown, in any filing with this Court or the Third District, how the purportedly conflicting cases, *Allstate v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003), and *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008), are factually similar to this case, much less have "substantially the same controlling facts," which is a prerequisite to establishing a genuine conflict. Nowhere in the Third District's decision is there any mention, even by implication, that the Third District was rejecting any of the legal theories advanced in the allegedly conflicting authorities. In fact, the decision below actually cites to the Second District's holding in *Goff*, and addresses that decision in relation to the facts at issue in the instant matter.

Thus, upon further review of the *Kaklamanos* and *Goff* decisions, there is no express and direct conflict with the decision below, and this Court should discharge jurisdiction as improvidently granted. What is clear, here, is that the Petitioner disagrees with the trial court's and the Third District's interpretation of the contract language governing the issues in this case. However, the jurisdiction of this Court is limited to the specific alternatives, which do not include mere

disagreement with a district court's decision. Therefore, the Petitioner's attempt to obtain additional review of the Third District's decision in this Court is improper.

If the Court reaches the merits, it should approve the Third District's decision that that the Policy's unambiguous terms required the Petitioner to either hire a contractor who charges for overhead and profit, or to incur the expenses for overhead and profit, before Florida Peninsula is required to pay for such costs. The Policy's language specifically uses the words "replacement cost" to cover situations where the insured does not hire a contractor and does not spend money to repair or replace the loss, and in the alternative, it provides for payment of money "actually spent" when the property is actually repaired or replaced. The Policy, therefore, provides that Florida Peninsula is obligated to pay replacement costs without deduction for depreciation *or* the costs Trinidad actually incurs or which he demonstrates he is likely to incur. It is undisputed that Trinidad has not "actually spent" any monies for overhead and profit, nor has he become contractually obligated to spend such monies by entering into a contract for repair of the alleged damage – nor does he intend to do so. Thus, based upon the Policy language and the specific facts and circumstances at issue in this case, the Third District was correct in holding that the Policy permitted Florida Peninsula to pay

replacement costs or the costs Trinidad actually incurs or which he demonstrates he is likely to incur.

Section 627.7011(3) does not in any way alter this decision. Payment of overhead and profit is not mentioned in section 627.7011, and section 627.7011(3) only requires that replacement costs be paid without deduction for depreciation. The statute similarly does not require payment of overhead and profit costs which have not been incurred, nor are likely to be incurred. Consequently, the Third District was correct in holding that Florida Peninsula is not responsible for payment of contractor's overhead and profit to Trinidad, and summary judgment was properly entered in favor of Florida Peninsula.

ARGUMENT

I. REVIEW WAS IMPROVIDENTLY GRANTED BECAUSE THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH *KAKLAMANOS* OR *GOFF*.

Article V, Section 3 of the Florida Constitution and Rule 9.030(a)(2) of the Florida Rules of Appellate Procedure provide the limited instances where this Court can exercise its discretionary jurisdiction. The principal situations justifying invocation of jurisdiction of this Court to review by certiorari decisions of district courts of appeal because of alleged conflicts are: (1) announcement of a rule of law which conflicts with a rule previously announced by this Court or another district

court of appeal, or (2) application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court or another district court of appeal. *See* art. V, § 3(b)(3), Fla. Const.

Under the first situation the facts are immaterial; it is the announcement of a conflicting rule of law that conveys jurisdiction to this Court to review the decision of the district court of appeal. However, under the second situation the controlling facts become vital because this Court's jurisdiction is only vested where the district court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting prior decisions of this Court. *See Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009); *Florida Power & Light Co. v. Bell*, 113 So. 2d 697 (Fla. 1959).

This Court appears to have accepted jurisdiction based upon conflict with this Court's holding in *Allstate v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003), and *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008). However, upon closer examination of those decisions, there is no express and direct conflict, and this Court should discharge jurisdiction as improvidently granted.

A. No Conflict Exists With *Kaklamanos*.

To the extent this Court exercised discretionary jurisdiction on asserted conflict with *Allstate v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003), jurisdiction was improvidently granted. In *Kaklamanos*, this Court held that a district court of appeal is required to construe and apply any policy provision that is in conflict with the Florida Statutes in full compliance with the insurance code. *See id*. at 896. In other words, even if a trial court's interpretation is supported by the plain language of the policy provision, a policy provision that is inconsistent with Florida's insurance statutes must be construed and applied to be in full compliance with the insurance code. *Id.*

The Petitioner contends that this Court's holding in *Kaklamanos* serves as a basis for the exercise of discretionary jurisdiction because the decision below permitted Florida Peninsula to benefit from a policy provision that does not comply with the requirements of section 627.7011(3), Florida Statutes (2008). *See* Petitioner's Brief, at 4, 10. However, as more fully discussed *infra* § II (B), section 627.7011(3) does not require Florida Peninsula to pay contractor's overhead and profit as part of the replacement cost value, where no such costs have been incurred, nor are likely to be incurred. Contrary to the Petitioner's assertions, section 627.7011(3) supports the decision below.

The Third District specifically addressed the mandates of section 627.7011(3) in its decision, and stated that: "Our reading of section 627.7011(3), relating to depreciation holdbacks in replacement cost policies, also does not alter our conclusion in this case." (App. 7). The Third District went on to explain that payment of overhead and profit is not mentioned in section 627.7011, and only requires that replacement costs be paid without deduction for depreciation. (App. 7). The statute similarly does not require payment of overhead and profit costs which have not been incurred, nor are likely to be incurred. (App. 7). Consequently, the Third District's holding does not construe the Trinidad Policy in contravention to section 627.7011(3), and this Court's holding in *Kaklamanos* does not present an express and direct conflict which would serve as a basis for the exercise of discretionary jurisdiction to review the decision below.

B. No Conflict Exists With *Goff*.

To the extent this Court exercised discretionary jurisdiction on asserted conflict with *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008), jurisdiction was improvidently granted. The Petitioner contends that the Second District's holding in *Goff* serves as a basis for the exercise of discretionary jurisdiction because the decision below conflicts with the Second District's

definition of "replacement cost," as set forth therein. *See* Petitioner's Brief, at 4. However, *Goff* is factually distinguishable from the instant matter.

Unlike *Goff*, this case does not involve an actual cash value policy. More importantly, however, the issue addressed in *Goff* does not apply to the factual circumstances at issue in this case. Therefore, the holding in *Goff* does not present a conflict which would serve as a basis for the exercise of discretionary jurisdiction to review the decision below.

The specific legal issue addressed in *Goff* was not whether overhead and profit can, in every case, be withheld from an actual cash value payment. Rather, the issue was whether overhead and profit is depreciable in determining actual cash value. *See Goff*, 999 So. 2d at 689 (considering that "[a]s replacement cost policies are intended to operate, following a loss, both actual cash value and the full replacement costs are determined. The difference between those figures is withheld as depreciation until the insured actually repairs or replaces the damaged structure." (quoting Leo John Jordan, *What Price Rebuilding?,* 19 ABA Fall Brief 17, 21 (1990)). Based upon this definition, the Second District held that the amount for overhead and profit could be depreciated because the facts of the case demonstrated that the insurer had already determined overhead and profit to be a

necessary cost of repair, and had included the amount for overhead and profit in its determination of the replacement cost. *Goff*, 999 So. 2d at 689

In reaching its decision, the Second District considered the issue of whether actual cash value necessarily includes overhead and profit. In reliance upon the two Pennsylvania cases referred to in the Petitioner's Brief, *Mee v. Safeco Ins. Co. of Am.*, 908 A.2d 344, 348 (Pa. Super. Ct. 2006), and *Gilderman v. State Farm Ins. Co.*, 649 A.2d 941, 945 (Pa. Super. Ct. 1994), the district court stated that "[a]ctual cash value includes overhead and profit where the insured is reasonably likely to need a general contractor for repairs."[2] *Id.* This statement, upon which the Petitioner heavily relies, *is not at odds* with the Third District's decision in this case.

In the decision below, the Third District held that the Policy's clear and unambiguous language governed the outcome of this case. (App. 4, 8). In explaining its decision, the Third District stated that the Policy "unambiguously provides that Florida Peninsula pay replacement costs or the costs Trinidad actually incurs or which he demonstrates he is likely to incur." (App. 4). In

[2] Like *Goff*, both of these cases determined that an actual cash value payment includes a general contractor's overhead and profit charges *in circumstances where the policyholder would be reasonably likely to need a general contractor in repairing or replacing the damaged property in issue*.

addition, the Third District pointed to the fact that the Policy "specifically uses the words 'replacement cost' to cover situations where the insured does not hire a contractor and does not spend money to repair or replace the loss, and in the alternative, it provides for payment of money 'actually spent' when the property is actually repaired or replaced." (App. 5).

The decision also points to the Second District's holding in *Goff* and states that it is undisputed that if the Policy "provided for payment of Trinidad's loss on an actual cash value basis, Florida Peninsula would have been required to include payment for overhead and profit when making actual cash value payments *where it is reasonably likely that a general contractor would be needed to make the repairs*." (App. 5-6) (citing *Goff*, 999 So. 2d at 689 (emphasis added)). Here, however, the Policy is a replacement cost policy, and no contractor was hired, no repairs were made that required payment of overhead and profit, and no contract for such repairs was entered into or presented to Florida Peninsula. (App. 6). Thus, the Third District held that Florida Peninsula did not owe Trinidad for these costs, and the trial court correctly entered summary judgment in favor of Florida Peninsula. (App. 6).

In sum, the decision below does not expressly and directly conflict with *Goff* because that decision addressed different rules of law and applied those rules under

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materially different factual circumstances. Therefore, Florida Peninsula respectfully requests that this Court discharge jurisdiction as improvidently granted. *See, e.g., Curry v. State*, 682 So. 2d 1091, 1091-92 (Fla. 1996) (discharging jurisdiction as improvidently granted because the allegedly conflicting decisions addressed different propositions of law which were not in conflict).

II. NEITHER SECTION 627.7011(3) OF THE FLORIDA STATUTES, NOR THE POLICY REQUIRED FLORIDA PENINSULA TO PAY CONTRACTOR'S OVERHEAD AND PROFIT IN SETTLING TRINIDAD'S LOSS ON A REPLACEMENT COST BASIS, WHERE NO SUCH COSTS HAVE BEEN INCURRED, NOR ARE LIKELY TO BE INCURRED.

A. Standard Of Review

The interpretation of an insurance policy to determine coverage is a matter of law subject to *de novo* review. *Auto-Owners Ins. Co. v. Above All Roofing, LLC*, 924 So. 2d 842 (Fla. 2d DCA 2006); *Meyer v. Hutchinson*, 861 So. 2d 1185, 1187 (Fla. 5th DCA 2003); *Barnier v. Rainey*, 890 So. 2d 357, 359 (Fla. 1st DCA 2004). This case arises from a trial court order granting summary judgment, which also implicates the *de novo* standard of review. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

B. Section 627.7011(3) Did Not Require Florida Peninsula To Pay Contractor's Overhead And Profit Where No Such Costs Have Been Incurred, Nor Are Likely To Be Incurred, And Supports The Decision Below.

"The plain meaning of the statute is always the starting point in statutory interpretation." *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007). Where the language of the statute is clear and controlling, it is also the ending point and no further inquiry is required. *See, e.g., Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992) ("When the language of a statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning."); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) ("When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." (quotation omitted)).

The relevant text of section 627.7011(3), Florida Statute (2008), is entirely clear: "In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property." Fla. Stat. § 627.7011(3)

(2008).[3] "[R]eplacement cost . . . is measured by what it would cost to replace the damaged structure on the same premises." *Davis v. Allstate Ins. Co.*, 781 So. 2d 1143, 1144 (Fla. 3d DCA 2001) (citing *Kumar v. Travelers Ins. Co.*, 211 A.D.2d 128, 627 N.Y.S.2d 185, 187 (4th Dep't 1995)). Depreciation is defined as "[a] decline in an asset's value because of use, wear, or obsolescence." *Black's Law Dictionary* 452 (7th ed. 1999). Replacement cost insurance, therefore, allows recovery for the actual value of property at the time of loss, without deduction for deterioration, obsolescence, and similar depreciation of the property's value. *See* Leo L. Jordan, *What Price Rebuilding?*, 19 ABA Fall Brief 17 (1990).

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[3] Section 627.7011(3) was amended in May 2011, and the current version of this section provides as follows:

> (3) In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:
>
> (a) For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred. If a total loss of a dwelling occurs, the insurer shall pay the replacement cost coverage without reservation or holdback of any depreciation in value, pursuant to s. 627.702.

Fla. Stat. § 627.7011(3) (2011).

Thus, by definition, replacement cost coverage may result in the insured being better off than he or she was prior to the loss, since the insured may end up with a more valuable property. *See, e.g., Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 352 (Ind. 1982) ("Replacement cost coverage . . . reimburses the insured for the full cost of repairs, if he repairs or rebuilds the building, even if that results in putting the insured in a better position than he was before the loss."). Of course, as the Petitioner suggests, a consumer pays a premium for this kind of "replacement cost" coverage. *See* Petitioner's Brief, at 12-13. However, as noted by the Third District in *State Farm Fire & Casualty Co. v. Patrick*, 647 So. 2d 983 (Fla. 3d DCA 1994), "[r]eplacement cost insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property. *It is insurance on a property's depreciation*." 647 So. 2d at 983 (citing Leo L. Jordan, *What Price Rebuilding?*, 19 ABA Fall Brief 17 (1990) (emphasis added)). In other words, the premium applicable to a replacement cost policy is attributable to the insured's ability to recover the value of the property without deduction for depreciation, and is not tied to the recovery of overhead and profit.

As the Third District appropriately pointed out in its decision below, payment of overhead and profit is *not* mentioned in section 627.7011, and nothing

in subsection (3) of the statute requires payment for overhead and profit that has not been incurred, nor is likely to be incurred. (App. 7). No reading of section 627.7011(3) supports the Petitioner's assertion that an insurer is required, in every case, to include payment for a contractor's overhead and profit as part of a replacement cost payment to settle a covered loss. The statute simply does not state that overhead and profit shall be included in every case, without regard to whether such costs are incurred or are likely to be incurred. *See Fla. Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815 (Fla. 2007) (finding a statute's plain language did not support reading additional language into its terms). Instead, the statute's plain language only requires that replacement costs be paid without a holdback for *depreciation in value*, regardless of whether repairs are actually made. *See* Fla. Stat. § 627.7011(3) (providing that "the insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property.").

In line with this, Florida Peninsula's Policy stated that "replacement cost" meant there would be no "deduction for depreciation" and that payment would not exceed the least of the following amounts: 1) the limit of liability that applies to the building; 2) the replacement cost of that part of the building damaged for equivalent construction and use on the same premises; or 3) the necessary amount

actually spent to repair or replace the damaged building. (R. 32). The Policy, therefore, provides that Florida Peninsula is obligated to pay replacement costs *or* the costs Trinidad actually incurs or which he demonstrates he is likely to incur. *See Citizens Property Ins. Corp. v. Ceballo*, 934 So. 2d 536 (Fla. 3d DCA 2006), *approved*, 967 So. 2d 811 (Fla. 2007) (holding that an insured must present proof of expenses incurred in order to obtain recovery for additional covered amounts; in the absence of proof that the insureds actually incurred the additional expenses, payment would give the insureds "a windfall"). The replacement cost provision is an additional coverage which, on a theoretical basis, provides the insured with an option to replace the building, without deduction for depreciation, rather than to simply receive payment for the actual cash value of the damage sustained by the insured building.

Based upon the Policy language, the Third District was correct in holding that the Policy permitted Florida Peninsula to pay replacement costs or the costs Trinidad actually incurs or which he demonstrates he is likely to incur. The Petitioner has misconstrued the decision below. The decision does not stand for the proposition that Trinidad must actually make repairs in order to obtain the replacement cost value, as is suggested in his brief. *See* Petitioner's Brief, at 11. Instead, the decision holds that, based upon the Policy language, Trinidad is

entitled to recover replacement cost value without deduction for depreciation where the insured does not hire a contractor and does not spend money to repair or replace the loss, and in the alternative, is entitled to payment of money "actually spent" when the property is repaired or replaced. (App. 5).

Nothing in section 627.7011(6) prevents the parties to an insurance policy from contracting to terms which would permit an insurer to withhold payment for overhead and profit until such time as those costs are actually incurred or a contract for repairs is presented to the insurer when settling a loss covered under a replacement cost policy. Section 627.7011(6), Florida Statutes (2008) states the following, in this regard:

> (6) This section does not prohibit an insurer from limiting its liability under a policy or endorsement providing that loss will be adjusted on the basis of replacement costs to the lesser of:
>
> (a) The limit of liability shown on the policy declarations page;
>
> (b) The reasonable and necessary cost to repair the damaged, destroyed, or stolen covered property; or
>
> (c) The reasonable and necessary cost to replace the damaged, destroyed, or stolen covered property.

Fla. Stat. § 627.7011(6) (2008).

The language of Florida Peninsula's Policy is perfectly consistent with section 627.7011(6), and with the rules governing construction of insurance coverage. There is nothing in section 627.7011(6) prohibiting an insurer from including policy language which would permit it to make a loss settlement payment on the basis of replacement cost, or in the alternative, based upon the amount actually spent to repair or replace the damaged part of the premises. *See, e.g., Patrick*, 647 So. 2d 983 (involving a replacement cost policy which stated that the insurer would not pay more than the amount actually spent to repair or replace the lost or damaged property). To the contrary, unless restricted by statute or public policy, insurance companies have the same right as individuals to limit their liability and impose conditions upon their obligations. *Reliance Mut. Life Ins. Co. of Ill. v. Booher*, 166 So. 2d 222, 225 (Fla. 2d DCA 1964) (citing *Zipperer v. State Farm Mutual Automobile Insurance Co.*, 254 F.2d 853 (5th Cir. 1958); and *Jefferson Ins. Co. v. Fischer*, 166 So. 2d 129 (Fla. 1964)); *accord Canal Ins. Co. v. Giesenschlag*, 454 So. 2d 88 (Fla. 2d DCA 1984). Florida Peninsula's argument and Policy language is consistent with the statute in this regard.

The only thing that Trinidad contests in this case is Florida Peninsula's failure to include in its replacement cost payment the cost of contractor's overhead and profit. However, no such costs have been incurred, nor are likely to be

incurred, and there is nothing in section 627.7011(3) which mandates payment of overhead and profit under these circumstances. Therefore, the Third District's decision, which was based upon a correct interpretation of the clear and unambiguous Policy language, as well as the specific facts and circumstances at issue in this case, did not in any way conflict with the provisions of section 627.7011(3).

C. The Policy Did Not Require Florida Peninsula To Pay Contractor's Overhead And Profit Where No Such Costs Were Incurred, Nor Were Likely To Be Incurred.

"Under Florida's binding law . . . courts are not free to rewrite the terms of an insurance contract and where a policy provision is clear and unambiguous, it should be enforced according to its terms." *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, 395 Fed.Appx. 659, 663 (11th Cir. 2010) (quoting *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565, 573 (Fla. 1st DCA 2010)). Insurance policy provisions are to be enforced according to their plain meaning. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005); *accord State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569 (Fla. 2011) ("In interpreting an insurance contract, we are bound by the plain meaning of the contract's text."); *see also Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993) ("Insurance contracts are construed in accordance with the plain language of

the policies as bargained for by the parties."). Here, the Policy clearly instructs on when a loss settlement payment is due and how that payment is to be made. In this regard, the Policy specifically provides:

> 3. Loss Settlement. Covered property losses are settled as follows:
>
> * * *
>
> b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of the loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace after application of deductible and without deduction for depreciation, *but not more than the least* of the following amounts:
>
> (a) The limit of liability under this policy that applies to the building;
>
> (b) The replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) *The necessary amount actually spent to repair or replace the damaged building*.

(R. 32) (emphasis supplied).

There is no ambiguity in the plain meaning of this provision. Instead, it is clear that payment for a loss under this Policy is to be made according to one of the

three alternatives: (a) for the limit of liability that applies to the building; (b) for the replacement cost of that part of the building damaged; or (c) for the necessary amount actually spent to repair or replace the damaged building. Because no repairs were actually made to the building, and no amount was actually spent to repair or replace the damaged part of the building, payment in this case was made under subsection (b): for the replacement cost of that part of the building damaged for like construction and use on the same premises. Nothing in the Policy required Florida Peninsula to pay the cost of contractor's overhead and profit that was not incurred, nor was likely to be incurred, as part of its payment based upon the replacement cost value. Courts have no power to create insurance coverage, if it does not otherwise exist by the terms of the policy. *Telemundo Television Studios, LLC v. Aequicap Ins. Co.*, 38 So. 3d 807 (Fla. 3d DCA 2010).

It is undisputed that general contractors who coordinate and schedule the work to be performed by subcontractors are entitled to overhead and profit, and that the Policy provides for the payment of overhead and profit where such costs are necessarily incurred, or likely to be incurred. However, it is common knowledge that not all repairs require the services of a general contractor, and Trinidad did not plead in his complaint that a general contractor was necessary to complete the repairs. Therefore, in the absence of a contract for repairs obligating

Trinidad to incur such costs, or such costs actually being spent to repair or replace the damaged part of the property, Florida Peninsula was not obligated under the Policy to pay the cost of a contractor's overhead and profit as part of its payment based for replacement cost value. *See, e.g.*, *Mills v. Foremost Ins. Co.*, No. 8:06-CV-00986, 2010 WL 3861014 (M.D. Fla. Sept. 29, 2010) (noting that whether or not insureds are entitled to payment of general contractor's overhead and profit in the repair or replacement of their covered property loss will be determined by whether or not it was reasonably likely that they would incur the cost of a general contractor).

As the Third District pointed out in its opinion, the Policy specifically used the words "replacement cost" to cover situations where the insured does not hire a contractor and does not spend money to repair or replace the loss, and in the alternative, provides for payment of money "actually spent" when the property is actually repaired or replaced. (App. 5). Thus, based upon the clear and unambiguous language in the Policy, until such time as Trinidad actually incurs the expense of contractor's overhead and profit, or becomes contractually obligated to do so, Florida Peninsula is not required to pay any amount for contractor's overhead and profit. Not all repairs require the services of a general contractor,

and it is undisputed that the Petitioner did not hire one or become contractually obligated to pay one in this case – nor did he intend to do so.[4]

Based upon the Policy language and the specific facts and circumstances at issue in this case, the Third District's decided that:

> [T]he policy is a replacement cost policy, no contractor was hired, no repairs were made that required payment of overhead and profit, and no contract for such repairs was entered into or presented to Florida Peninsula. Thus, Florida Peninsula did not owe Trinidad for these costs, and the trial court correctly entered summary judgment in favor of Florida Peninsula.

(App. 7). All claims under the Policy were adjusted on a replacement cost basis without deduction for depreciation, according to the terms of the Policy.

Consequently, neither section 627.7011(3), Florida Statutes (2008), nor the Policy required Florida Peninsula to pay contractor's overhead and profit in settling Trinidad's loss on a replacement cost basis, where no such costs were incurred, nor were likely to be incurred. Under the facts of this case, the Third District's decision was proper and should be approved.

[4] Although the Petitioner asserts in his brief that the services of a general contractor were required, no such assertion was made in the action below. *See* Petitioner's Brief, at 22. In fact, there is no evidence in the record below demonstrating that Trinidad needed the services of a general contractor, or entered into a contract with a general contractor.

CONCLUSION

Because the Third District's decision does not expressly and directly conflict with either *Kaklamons* or *Goff*, this Court should dismiss this case, holding that jurisdiction was improvidently granted. Alternatively, this Court should approve the Third District's decision, and hold that the Third District correctly found that Florida Peninsula was entitled to summary judgment based upon the clear and unambiguous Policy language and the specific facts and circumstances at issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served via U.S. Mail on this ____ day of August, 2012, to: Kelly L. Kubiak, Esq., Merlin Law Group, P.A., Counsel for Petitioner, 777 South Harbour Island Boulevard, Suite 950, Tampa, Florida 33602; and Raymond T. Elligett, Jr., Esq., Buell & Elligett, P.A., Counsel for Petitioner, 3003 W. Azeele Street, Suite 100, Tampa, Florida 33609.

By: _____

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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