IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMADO TRINIDAD,

Petitioner,

CASE NO.: SC11-1643

vs.

FLORIDA PENINSULA INSURANCE COMPANY,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Trinidad insured his home with Florida Peninsula Insurance Company under a policy that required Florida Peninsula to pay covered losses at "replacement cost" (R 31-33, policy pp. 9-11). The home was damaged by fire in 2008, and Trinidad submitted the claim to Florida Peninsula, which paid part of it, but refused to pay any overhead and profit (R 15).[1]

Section 627.7011(3), Florida Statutes (2008), mandated that for policies issued since October 2005: "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."[2]

Section 627.7011(6) further provided:

> (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:

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[1] As the Third District noted, a general contractor's overhead and profit are elements of repairs, and are included in repair contracts and estimates. *Trinidad v. Florida Peninsula Ins. Co.*, ___ So. 3d ___, 36 Fla. L. Weekly D1081 (Fla. 3d DCA May 18, 2011), Slip Op. p. 2 (citing *Goff v. State Farm Florida Ins. Co.*, 999 So. 2d 684, 689-90 (Fla. 2d DCA 2008), *review denied,* 21 So. 3d 813 (Fla. 2009)). As the opinion explains, overhead includes fixed costs to run the contractor's business, and profit is the amount the contractor expects to earn for his services.

[2] Trinidad cites to the 2008 Florida Statutes, the year his loss occurred.

(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.

Trinidad sued Florida Peninsula based on the insurer's failure to include overhead and profit as part of his claim payment (R 4). Both parties moved for summary judgment (R 11-13, 64-70). Trinidad argued he was entitled to payment of overhead and profit portions of an adjusted loss, whether or not the insured property had yet been repaired or replaced (R 12).

Florida Peninsula contended it did not have to pay overhead and profit until the owner hired a contractor or submitted a contract based on a section of its policy that provided:

SECTION 1 – CONDITIONS

* * *

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 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 67).

The trial court granted summary judgment for Florida Peninsula (R 97). Trinidad appealed to the Third District Court of Appeal (R 71-72).

Florida Peninsula's policy provision differed from the language permitted by § 627.7011(6) for paying replacement cost value. Options (a) and (c) in the statute are reflected, for the most part, in options (a) and (b) in Florida Peninsula's policy. But Florida Peninsula's option (c) – allowing it to pay the necessary amount "actually spent" – is nowhere in § 627.7011(6). The statute permits adjusting the replacement cost payment based on the reasonable and necessary cost to repair (§ 627.7011(6)(b)) or to replace (§ 627.7011(6)(c)) the covered property.

The Third District concluded Florida Peninsula's policy language permitted it to avoid paying overhead and profit until a repair was actually made or the insured entered into a contract, and that this language did not conflict with § 627.7011. *Trinidad*, Slip Op. p. 7.

Trinidad petitioned this Court to accept jurisdiction based on conflict. He argued that because the Third District's opinion permitted the insurer to benefit from a policy provision that conflicted with a Florida Statute, it conflicted with this Court's decision in *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 896 (Fla. 2003). *Kaklamanos* held that even if a court's interpretation is supported by the plain language of a policy provision, a policy provision that is inconsistent with the Florida insurance statutes must be construed and applied to be in full compliance with the insurance code. *Id.*

Trinidad also argued the Third District's opinion conflicted with the Second District's opinion in *Goff, supra*, based on the definition of "replacement cost." *Goff* holds replacement cost value minus depreciation equals actual cash value. *Id.* The Third District, however, held that the insured who paid for what is supposed to be a better replacement cost value policy actually receives less coverage for overhead and profit than an insured who has purchased an actual cash value policy.

The Court accepted jurisdiction on June 8, 2012.

SUMMARY OF ARGUMENT

Section 627.7011(3) requires the insurer pay replacement cost for dwellings insured for replacement cost, whether or not the insured replaces or repairs the property. By permitting Florida Peninsula to apply its replacement cost policy to require that the insured actually replace the damaged property, the Third District's opinion in *Trinidad* sanctioned Florida Peninsula's violation of that statute. *Trinidad* should be reversed based on this Court's decision in *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 896 (Fla. 2003).

Trinidad is also wrong because it holds that the insured who paid for what is supposed to be a better replacement cost value policy actually receives less coverage for overhead and profit than an insured who has purchased an actual cash value policy. *Cf. Goff, supra.*

The Third District's opinion is wrong for an independent reason: the policy language did not permit Florida Peninsula to withhold overhead and profit, pending repair. In affirming the trial court's summary judgment, the Third District relied on the loss payment provision of the policy that solely addresses the amount of the payment, not the timing of the payment. The only reasonable interpretation of this provision is that the insurer will make payment based on: (a) the limit of liability; (b) the replacement cost of that part of the building damaged; ***or*** (c) the necessary amount actually spent to repair or replace the damaged building. The

use of the word "or" makes it plain that these are the different options for determining the ***amount*** of the payment. The Third District's interpretation ignores the "or" and reads option (b) out of the policy, thus violating the rule of construction that requires a court to give effect to every part of the contract.

ARGUMENT

I. SECTION 627.7011(3), FLORIDA STATUTES (2008), REQUIRES THE INSURER PAY REPLACEMENT COST FOR DWELLINGS INSURED FOR REPLACEMENT COST, WHETHER OR NOT THE INSURED REPLACES OR REPAIRS THE PROPERTY. FLORIDA PENINSULA'S APPLICATION OF ITS REPLACEMENT COST POLICY VIOLATES THAT STATUTE.

A. Standard of Review.

"The standard for reviewing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001). *See also State v. Presidential Women's Center*, 937 So. 2d 114, 116 (Fla. 2006).

"Interpretation of insurance policy language is a matter of law, subject to *de novo* review." *Graber v. Clarendon Nat'l Ins. Co.,* 819 So. 2d 840, 842 (Fla. 4th DCA 2002), *citing Coleman v. Florida Ins. Guar. Ass'n, Inc.,* 517 So. 2d 686 (Fla. 1988).

"The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review." *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006) (citing *Armstrong v. Harris,* 773 So. 2d 7, 11 (Fla. 2000); *Operation Rescue v. Women's Health Center, Inc.,* 626 So.2d 664, 670 (Fla. 1993), *aff'd in part, rev'd in part on other grounds,* 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994)).

B. By permitting Florida Peninsula to apply its replacement cost policy to require that the insured actually replace the damaged property, the Third District's opinion in *Trinidad* sanctioned Florida Peninsula's violation of § 627.7011.

The Third District's opinion requiring Trinidad to replace the damaged property before being reimbursed for the overhead and profit portion of his claim under his replacement cost value policy should be reversed because it violates § 627.7011, which mandates replacement cost payments "**whether or not the insured replaces or repairs the dwelling or property.**" § 627.7011(3)(emphasis added).

The Legislature amended § 627.7011(3) in 2005, to require that if a dwelling is insured on the basis of replacement cost, "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.**"[3] When the

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[3] This is consistent with opinions from across the country recognizing that an insured entitled to recover "replacement cost" is entitled to recover overhead and profit when it is likely a general contractor will be needed, even though the repairs have not been made. *See, e.g., Mee v. Safeco Ins. Co. of America*, 908 A.2d 344, 350 (Pa.Super. 2006) (because homeowner pays higher premium for replacement cost coverage, he is entitled to overhead and profit where use of general contractor would be reasonably likely, even if no contractor is used or no repairs made); *Mazzocki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9, 13, 766 N.Y.S.2d 719, 723 (2003) ("replacement cost" reasonably interpreted to include overhead and profit whenever it is reasonably likely general contractor will be needed to repair or replace damage; rejecting argument that such expense may not actually be incurred and should not be included in replacement cost).

Legislature eliminated "depreciation," it simultaneously required that the insured receive the full replacement cost ***prior to*** and independent of the expense being "actually incurred."

Thus, § 627.7011 benefitted insureds by mandating a higher payment – replacement cost value – rather than the lower actual cash value number, without requiring repair or replacement of the damaged property. The opinion here, however, sanctions Florida Peninsula's effort to eliminate that legislatively decreed benefit. It results in insureds recovering less than they would have under an actual cash value policy – no overhead and profit payment under a replacement cost policy, compared to payment for overhead and profit under an actual cash value policy. *Trinidad*, Slip Op. pp. 5-6; *Goff*, 999 So. 2d at 689.

Section 627.7011(3) does not permit distinguishing overhead and profit from other damages such as labor and materials. If the insured does not make repairs, he will not incur any of the other elements, including the labor or materials. If actual replacement were required under a replacement cost policy, that would preclude recovery for labor and materials, as well as overhead and profit. *Trinidad*'s holding – which permits the insurer to distinguish overhead and profit from all other elements of property damage – violates § 627.7011's mandate that the insured receive the full replacement cost payment, whether or not he repairs or replaces the dwelling.

Trinidad permitted Florida Peninsula to evade its clear responsibility to pay the full replacement cost, as mandated in § 627.0711(3), by relying on subpart (c) of Florida Peninsula's payment provision. *Trinidad*, Slip Op. p. 4. Indeed, as the comparison above shows, subpart (c) – stating it can limit the replacement cost payment to the amount "actually spent to repair or replace" – is not permitted by § 627.7011(6). And the "actually spent" limitation directly conflicts with § 627.7011(3)'s requirement that replacement cost be paid "whether or not the insured replaces or repairs."

When the *Trinidad* opinion permitted Florida Peninsula to benefit from its application of a policy provision that it did not comply with Florida insurance statutes, that holding conflicted with this Court's holding in *Kaklamanos, supra.* *Kaklamanos* held that even if a court's interpretation is supported by the plain language of a policy provision, a policy provision that is inconsistent with the Florida insurance statutes must be construed and applied to be in full compliance with the insurance code. 843 So. 2d at 896. *See also Salas v. Liberty Mut. Fire Ins. Co.*, 272 So. 2d 1, 5 (Fla. 1972)(automobile policy provision that attempted to narrow or limit uninsured motorist coverage contrary to purpose and intent of uninsured motorist statute was invalid).

The Third District's decision seems to stem from an erroneous assumption that a policy promising to pay "replacement cost" requires that the insured actually

replace the damaged property. However, replacement cost is merely a term that describes a ***measure of damages***: the amount that it would take to replace the damaged property in like new condition (namely, with no depreciation). *See, e.g., Goff*, 999 So. 2d at 689-90. Using "replacement cost" to describe an amount does not require the insured make the repair to obtain replacement cost value.

In purporting to distinguish *Goff*, *Trinidad* stated: "Trinidad's policy is **not** an actual cash value policy, it is a replacement cost policy, which only requires Florida Peninsula to pay costs incurred by Trinidad (money Trinidad actually spent or which he became contractually obligated to spend for repair of the damages) when repairing the property." *Trinidad*, Slip Op. p. 6 (emphasis in original). As other Florida courts recognize, however, replacement cost value is never less than actual cash value because replacement cost minus depreciation equals actual cash value. For example, *Goff* refers to "the calculation of actual cash value by use of replacement cost less physical depreciation," and says the difference between actual cash value and full replacement cost is the amount withheld as depreciation. 999 So. 2d at 689, 690.[4]

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[4] *See also, e.g., Citizens Property Ins. Corp. v. Ashe,* 50 So. 3d 645, 647 (Fla. 1st DCA 2010) (adjuster deducted depreciation from replacement cost to determine actual cash value). The Florida Department of Financial Services web page states, "'Replacement Cost' coverage means the policy will pay up to the limits for the replacement of a damaged or destroyed home, or personal property,

(....continued)

Goff holds "actual cash value includes overhead and profit where the insured is reasonably likely to need a general contractor for repairs." 999 So. 2d at 689. Because actual cash value equals replacement cost minus depreciation, an actual cash value payment should never be more than a replacement cost payment. Under *Goff*, the insured gets a depreciated overhead and profit payment as part of actual cash value, even though the property has not been repaired or replaced. But under *Trinidad,* the insured, under the same circumstances, gets no overhead and profit at all – as part of what should be a higher replacement cost value payment. [5]

Thus, Florida Peninsula received a premium for this policy based on its promise to pay the higher replacement cost value for losses under the policy. *Trinidad* sanctions Florida Peninsula using a construction of a policy provision to violate § 627.7011 and avoid paying Trinidad – and likely other insureds – the

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(continued....)
without deducting for depreciation. This is different from Actual Cash Value (ACV), which pays for the value of the damaged item, less depreciation." http://www.myfloridacfo.com/consumers/insurancelibrary/insurance/p_and_c/residential/coverages/type/residential_coverage_type_-_replacement_cost.htm

[5] *Goff* also says it is proper to depreciate the overhead and profit elements of the claim when the policy calls for an actual cash value payment. That part of *Goff* is incorrect, as a simple example shows. Consider a kitchen cabinet that has been damaged and needs to be replaced. If the insured could find the same used cabinet so its value was already depreciated, the same amount of labor would be required to install that used cabinet as it would to install a new one. Therefore, the labor aspects of an actual cash value payment (including overhead and profit, which is merely a species of labor) should not be depreciated.

higher replacement cost value coverage for which they paid, and for which it received a premium. Trinidad urges this Court to reverse the Third District opinion so this Florida statute is not violated, and Florida homeowners are protected from Florida Peninsula's effort to deny them their statutorily mandated benefits.

II. FLORIDA PENINSULA'S POLICY LANGUAGE DOES NOT PERMIT THE INSURER TO WITHHOLD OVERHEAD AND PROFIT, PENDING ACTUAL REPAIR.

A. Standard of Review.

Trinidad adopts the standard of review set forth in Issue I.

B. The policy language does not permit Florida Peninsula to withhold overhead and profit until repairs are made.

As shown above, the Third District's opinion permitted Florida Peninsula to benefit from a policy provision that violates § 627.7011. But even if that statute did not exist, the Third District's opinion should still be reversed for an independent reason: the policy language did not permit Florida Peninsula to withhold overhead and profit, pending actual repair.

In its answer brief in the Third District, Florida Peninsula admitted it has paid Trinidad the replacement cost less any amount for overhead and profit (pp. 3,

6). If the Third District's interpretation of this insurance policy were correct, however, Florida Peninsula should not have paid *anything* on a replacement cost policy unless and until the costs to repair or replace the damaged building were actually incurred - because there is nothing in the policy that differentiates overhead and profit from any other component of replacement cost. As Florida Peninsula's own conduct demonstrates, that is not the correct interpretation. Florida Peninsula owed replacement cost for the damaged building - including the overhead and profit portion of replacement cost – if the services of a general contractor are reasonably likely to be required, even if those expenses have not actually been incurred.[6]

The value of the damaged property includes the overhead and profit that were originally incurred to build that property, if the damage is significant enough to warrant the services of a general contractor. Overhead and profit are as much a part of the amount of the loss as the wood or other construction materials burned in the fire. *See Mazzocki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9, 13, 766 N.Y.S.2d 719, 723 (2003)("replacement cost" reasonably interpreted to include overhead and profit whenever it is reasonably likely general contractor will be

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[6] Because Florida Peninsula does not define the term "replacement cost," the term must be construed in the light most favorable to Trinidad. *See Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1304 (11th Cir. 2008).

needed to repair or replace damage; rejecting argument that such expense may not actually be incurred and should not be included in replacement cost); *Mee v. Safeco Ins. Co. of America*, 908 A.2d 344, 350 (Pa.Super. 2006)(because homeowner pays higher premium for replacement cost coverage, he is entitled to overhead and profit where use of general contractor would be reasonably likely, even if no contractor is used or no repairs made). *See also Goff, supra*; *Gilderman v. State Farm Ins. Co.*, 437 Pa.Super. 217, 225, 649 A.2d 941, 945 (1994) (generally accepted in building trade that if more than three trade categories of subcontractors involved in repairs, owner is entitled to services of general contractor).

In its opinion, the Third District correctly stated that "Florida law mandates that we construe insurance contracts in accordance with their plain meaning," and that an unambiguous insurance policy "must be construed to mean what it says and nothing more." *Trinidad*, Slip Op. p. 3 (citations omitted). However, when the Third District interpreted the loss settlement provision of Florida Peninsula's policy as permitting the insurer to withhold payment for overhead and profit until the repairs are actually made, the court read into this provision a timing element that did not appear in the plain language. *Id.*, Slip Op. p. 4. In fact, nothing in the Florida Peninsula policy, including the loss settlement provision, permits the insurer to withhold overhead and profit until repairs are made.

The loss settlement provision on which Florida Peninsula and *Trinidad* relied says:

> SECTION 1 – CONDITIONS
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> * * *
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> 3. Loss Settlement. Covered property losses are settled as follows:
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> * * *
>
> b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of 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 31-33; policy pp. 9-11).

All of these provisions address the *amount* of the payment, *not the timing* of the payment.[7] It is also significant that both (b) and (c) would include amounts for overhead and profit. The only difference is that under (c), the actual amount is known after the repairs are completed, whereas the amount under (b) is an estimate, just as the other anticipated costs are.

The only reasonable interpretation of subsection 3.b.(1)(a)-(c), is that the insurer will make payment, up to the limit of liability, based on "(b) . . . the replacement cost of that part of the building damaged for like construction and use on the same premises; ***or*** (c) [t]he necessary amount actually spent to repair or replace the damaged building" (R 32, policy page 10, emphasis added). The "or" makes it plain these are the different options for determining the amount Florida Peninsula will pay, and that Florida Peninsula will pay the least amount of these amounts. They are not criteria used to determine when different amounts will be paid.

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[7] Florida Peninsula deleted the only policy language that had addressed the timing of payment issue – subsection 3.b.(4) at R 32, policy page 10. Florida Peninsula replaced it with a timing provision limited to sinkhole claims – subsection 3.b.(4) at R 49, Policy Endorsement, Special Provisions - Florida, p. 6 of 12. This loss involves a fire (R 4). How much Florida Peninsula must pay is a separate issue from when it must pay. And it deleted the "when" provision for losses other than sinkholes.

As discussed above, the Third District rests its holding that Florida Peninsula is not required to pay overhead and profit until these amounts are actually incurred entirely on subpart (c). This holding treats subpart (c) as if it were the only provision governing the settlement of covered losses at replacement cost, rather than merely one of three provisions governing the amount Florida Peninsula will pay.

Trinidad ignores subpart (b), which says the insurer pays "[t]he replacement cost of that part of the building damaged for like construction and use on the same premises." First, if the cost to repair or replace has to be incurred before Florida Peninsula is required to pay, there would be no need for subpart (b), because the actual cost would always be known (namely, subpart (c) would always control). Second, nothing is mentioned in subpart (b) about the insured first having to incur the cost to repair or replace.

Interpreting subsection 3.b.(1) as the Third District and Florida Peninsula did would read subpart (b) out of the policy, which would violate the principle that courts give effect to every provision of the contract, if possible. *See Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla. 2000)(interpretation of insurance policy which gives reasonable meaning to all provisions preferred to one which leaves a part useless or inexplicable).

Another error in the Third District's interpretation is that the words "overhead and profit" are nowhere to be found in subsection 3.b.(1)(c), or any other provision in the policy. There is certainly no policy language indicating overhead and profit are to be treated differently than other components of replacement cost value - which Florida Peninsula has paid without requiring actual repair or replacement.

Thus, the Third District's holding – that Florida Peninsula may withhold overhead and profit until those costs are actually incurred – is unsupported by any policy language.

The Third District cited *State Farm Florida Ins. Co. v. Lorenzo*, 969 So. 2d 393 (Fla. 5th DCA 2007), to support its holding that because the policy is a replacement cost policy, and the damage has not been repaired or replaced (or a contract signed), Florida Peninsula can withhold *all* overhead and profit payment, pending repair. *Trinidad*, at 7. A careful reading of *Lorenzo* shows the court's reliance was misplaced (IB 20).

In *Lorenzo*, the insureds' house was damaged by fire in October, 2000, which was covered by a State Farm homeowner's insurance policy. *Id.*, at 395. State Farm adjusted its estimate of the loss to reflect an actual cash value of $93,167.82, and paid the insureds this amount. State Farm withheld $6,346.29 pending completion of the repairs or the signing of a contract with a general

contractor. *Id.*, at 396. The insureds subsequently concealed from State Farm their signing of a contract with a general contractor and, instead, sued State Farm on the basis that the insurer had withheld payment for contractor overhead and profit. *Id.* Upon learning of the signed contract, State Farm paid the remaining $6,346.29. *Id.* The Lorenzos took the position that State Farm's payment of the remaining amount constituted a confession of judgment. The county court agreed and granted summary judgment for the Lorenzos on this basis; the circuit court affirmed. *Id.*

The Fifth District quashed the summary judgment, holding that State Farm had "abided by its obligations under the loss settlement provision, and did not withhold benefits or compel the Lorenzos to sue." *Id.*, at 398. It seems clear the *Lorenzo* court was irritated by the insureds' attempt to create a breach of contract situation, thereby entitling it to attorney's fees. *Id.*, at 398. Having said that, however, careful reading of the case reveals the court's analysis of the insurer's obligations does not support the Third District's holding that Florida Peninsula can withhold *all* overhead and profit payment, pending repair.

If, in *Lorenzo*, State Farm had withheld the *entire* payment for overhead and profit – as Florida Peninsula did here – it would have withheld 20% of the actual

cash value estimate of $93,167.82, or $18,633.56.[8] Instead, it withheld only $6,346.29 – a figure that appears to represent depreciation. In fact, this is precisely the practice State Farm followed in *Goff*. *Goff*, 999 So. 2d at 690.[9] Thus, *Lorenzo* is entirely consistent with *Goff*.

In addition, *Lorenzo* contained a provision similar to Florida Peninsula's former provision 3.b.(4), which Florida Peninsula deleted. *Id.*, at 395. Unlike State Farm in *Lorenzo*, Florida Peninsula has deleted the only provision relating to the timing of payment (except as to sinkhole claims), and no longer has the contractual authority to withhold even a depreciated amount of overhead and profit, because its policy paid solely on the basis of replacement costs (and any withholding now would violate § 627.7011).

In its answer brief below, Florida Peninsula argued for the first time that the record is devoid of evidence demonstrating Trinidad needed the services of a general contractor or entered into a contract with a general contractor (p. 14; R 52-58, 64-70). However, Florida Peninsula moved for summary judgment and bore the burden to disprove any material factual issues. It made no factual showing of

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[8] The common allowance is 10% for profit and another 10% for overhead (*i.e.*, "ten and ten"). *See Bankers Security Ins. Co. v. Brady*, 765 So. 2d 870, 872 (Fla. 5th DCA 2000).

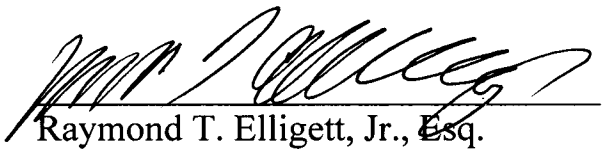
[9] As in *Goff*, the *Lorenzo* policy was issued and the loss occurred prior to the effective date of § 627.7011(3).

any kind and did not argue to the trial court that repairing the fire damage to Trinidad's house would not require the services of a general contractor (R 52-58, 64-70). For purposes of Florida Peninsula's summary judgment motion, therefore, the services of a general contractor were required. Summary judgment for Florida Peninsula was erroneous because these material factual issues are still in dispute.

CONCLUSION

Trinidad respectfully requests this Court quash the Third District's opinion, with directions to reverse the summary judgment, and remand the case for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: SCOTT A. COLE and KRISTEN A. TAJAK, ESQ., Cole, Scott & Kissane, P.A., 9150 S. Dadeland Boulevard, Suite 1400, Miami, Florida 33143, Attorneys for Respondent; and ADRIAN NEIMAN ARKIN, ESQ. and TIMOTHY H. CRUTCHFIELD, ESQ., 1700 Sans Souci Boulevard, North Miami, Florida 33181, Attorneys for Amicus Curiae, on July 3, 2012.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using 14-point Times New Roman type, a font that is proportionately spaced.

Attorney