IN THE SUPREME COURT OF FLORIDA

AMADO TRINIDAD,

Petitioner,

v.

FLORIDA PENINSULA INSURANCE COMPANY,

Respondent.
_____ /

Case No.: SC11-1643
L.T. Case No.: 3D10-1087

FLORIDA PENINSULA'S AMENDED RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Because Trinidad v. Florida Peninsula Ins. Co., 2011 WL 1878115 (Fla. 3d DCA, May 18, 2011) does not conflict on any point with any decision of this Court or of any District Court of Appeal, this Court does not have jurisdiction to review it.

STATEMENT OF FACTS

Petitioner, Amado Trinidad (the "Petitioner"), brought this action 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. (A. 2).[1] After a 2008 fire damaged the Petitioner's home, he submitted a claim for payment to Florida Peninsula under the policy. (A. 2). Florida Peninsula admitted coverage and paid the claim in full, per the terms and conditions of the policy. (A. 2). However, the Petitioner contended that Florida Peninsula's payment was insufficient because it did not include an amount for overhead and profit. (A. 2). Although the Petitioner had not hired a general contractor, or submitted a contract by a contractor estimating the repairs, the

[1] All references to the Appendix shall be made herein as (A. __), followed by the corresponding page number(s).

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Petitioner claimed he was entitled to additional payment for unknown overhead and profit. (A. 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."[2] (A. 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), and Florida Peninsula argued that 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. (A. 3). Because the Petitioner did not incur or contract to incur the cost of contractor's overhead and profit, Florida Peninsula argued that it was not obligated to the Petitioner for such costs. (A. 4).

In granting summary judgment in favor of Florida Peninsula, the trial court found that the loss settlement provision clearly and unambiguously permitted Florida Peninsula to withhold payment of contractor's overhead and profit until such time as those costs are incurred, as it clearly states "the necessary amount

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

actually spent." (A. 4). Since the Petitioner did not present a contract for repairs or actually incur the cost of overhead and profit, the trial court entered summary final judgment in favor of Florida Peninsula. (A. 4). The Petitioner then appealed to the Third District Court of Appeal, which affirmed the rulings of the trial court in an eight-page opinion. (A. 4, 8). The Third District's opinion was issued on May 18, 2011. (A. 1).

SUMMARY OF ARGUMENT

Conflict jurisdiction requires an express and direct conflict between the opinion under review and any opinion of this Court or another District Court of Appeal. Art. V § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Nothing in the Trinidad decision conflicts with any point in any decision of this Court or any other District Court of Appeal. The Petitioner's assertion that Trinidad conflicts with this Court's decision in Allstate v. Kaklamanos, 843 So. 2d 885 (Fla. 2003) and the Second District's decision in Goff v. State Farm Florida Ins. Co., 999 So. 2d 684 (Fla. 2d DCA 2008) is incorrect, since neither case is applicable to the instant matter, nor presents an express and direct conflict necessary invoke the jurisdiction of this Court.

Kaklamanos, in which 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, is inapplicable to the

instant matter since the policy provision at issue does not conflict with section 627.7011, Florida Statutes (2008), as the Petitioner suggests. Section 627.7011 does not preclude the parties to an insurance contract from agreeing to permit the insurer to withhold payment for overhead and profit until such time as those costs are incurred or a signed contract for repairs is presented, when settling a covered loss under a replacement cost policy.

In Trinidad, the Third District held that the policy clearly and unambiguously required the Petitioner to contract to incur or actually incur overhead and profit costs before Florida Peninsula became responsible to the Petitioner for those costs. Because the Petitioner did not contract to incur or actually incur such costs, the Third District affirmed the trial court's grant of summary judgment in favor of Florida Peninsula. (A. 4, 8). The Third District's opinion was based upon its interpretation of the clear and unambiguous policy language, and its reliance on such language is not at odds with this Court's decision in Kaklamanos. The policy provision is not precluded by any of the Florida Statutes, and, therefore, the Kaklamanos decision does not expressly and directly conflict with this case as is necessary to create a basis for the jurisdiction of this Court.

Goff is similarly inapplicable to the instant matter since Goff involved an actual cash value policy. The policy in Trinidad is not an actual cash value policy;

it is a replacement cost policy, which only requires Florida Peninsula to pay costs actually incurred by the Petitioner (money the Petitioner actually spent or became contractually obligated to spend for repair of the damages) when repairing the property. There is no authority for the Petitioner's contention that replacement cost must necessarily include payment for overhead and profit, and Goff certainly does not stand for that proposition. Not all repairs require the services of a general contractor, and the Petitioner did not hire one or become contractually obligated to pay one in this case. (A. 2). If the Petitioner is correct, he would be getting a windfall where neither Florida law nor the policy allows.

Although Goff requires that overhead and profit be included when payment is conditioned on an "actual cash value" basis, loss settlement under the Trinidad policy was made on a replacement cost basis – not actual cash value. As the Third District pointed out in its opinion, the Trinidad 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. Because this case is entirely unlike Goff, and does not in any was conflict with the Second District's decision therein, conflict jurisdiction does not exist on this basis. For these reasons, the Petition should be denied.

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JURISDICTIONAL STATEMENT

The Florida Supreme Court is authorized to exercise its discretionary jurisdiction to review decisions issued by District Courts of Appeal that expressly and directly conflict with decision of the Supreme Court or other District Courts of Appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict must be "express and direct" and must appear within the four corners of the majority opinion. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, *i.e.*, it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."). Nothing within the four corners of the Trinidad opinion expressly and directly conflicts with the cases cited by the Petitioner and, thus, jurisdiction does not lie in this Court.

ARGUMENT

I. NOTHING IN THE THIRD DISTRICT'S OPINION IN TRINIDAD EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN KAKLAMANOS.

The Petitioner contends that the Third District's decision in Trinidad creates a conflict with this Court's decision in Allstate v. Kaklamanos, 843 So. 2d 885 (Fla. 2003), which requires a District Court of Appeal to construe and apply any policy provision that is in conflict with the Florida Statutes in full compliance with

the insurance code. See Petitioner's Brief, pp. 4-6. As a basis for his contention, the Petitioner asserts that section 627.7011(3), Fla. Stat. (2008), precludes an insurer from withholding overhead and profit when settling a loss on a replacement cost basis. See Petitioner's Brief, p. 5. In addition, the Petitioner contends that the loss settlement provision in the policy conflicted with the language an insurer was permitted to include in its policy, as prescribed by section 627.7011(6), Fla. Stat. (2008).[3] Neither assertion is correct.

As the Third District pointed out in its opinion, payment of overhead and profit is *not* mentioned in section 627.7011, and section 627.7011(3) does not require payment for profit and overhead which have not been incurred nor are likely to be incurred. (A. 7). Rather, the statute's plain language only requires that replacement costs be paid without a holdback for depreciation, which is not at issue in this case. (A. 7). There is nothing in section 627.7011 which requires payment for profit and overhead which have not been incurred nor are likely to be incurred, and Florida Peninsula's policy provision did, in fact, comply with Florida's insurance statutes.

Furthermore, as this Court has recognized, "courts have almost uniformly held that an insurance company's liability for replacement cost does not arise until

[3] Notably, the Petitioner did not raise this argument in either of the lower courts, and therefore, waived same. Nonetheless, Florida Peninsula has addressed this argument herein – in Issue II.

the repair or replacement has been completed." Ceballo v. Citizens Property Ins. Corp., 967 So. 2d 811, 815 (Fla. 2007). Nothing in sections 627.7011(3) or 627.7011(6) prevents the parties to an insurance policy from contracting to terms which 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 covered loss under a replacement cost policy. In fact, section 627.7011(6) (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).

In Trinidad, the Third District held that the policy clearly and unambiguously required the Petitioner to contract to incur or actually incur overhead and profit costs before Florida Peninsula became responsible to the Petitioner for those costs. The Third District's opinion was based upon its interpretation of the clear and unambiguous policy language, which did not in any way conflict with section 627.7011, and its reliance on such language is not at odds

with this Court's decision in Kaklamanos. As such, Kaklamanos does not create a basis for the jurisdiction of this Court, and the Petition should be denied.

II. NOTHING IN THE THIRD DISTRICT'S OPINION IN TRINIDAD EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT'S DECISION IN GOFF.

The Trinidad opinion likewise does not expressly and directly conflict with the Second District's decision in Goff v. State Farm Ins. Co., 999 So. 2d 684 (Fla. 2d DCA 2008). Unlike Goff, this case does not involve an actual cash value payment, and for this reason alone Goff is inapplicable. Under the policy in Goff, State Farm was contractually obligated to pay *actual cash value at the time of loss*, and would pay additional amounts for repair or replacement after the work was completed. Id. at 685. Similar language was deleted from the Petitioner's policy by way of endorsement and statute. (A. 5).

Furthermore, the claim at issue in Goff occurred in 2004, and was governed by the statutes in effect at that time. Subsequent to the Goffs' 2004 claim, the Florida legislature amended section 627.7011, Florida Statutes. Following the 2005 amendment, all homeowners' policies were required to be adjusted on the basis of replacement costs, as opposed to actual cash value, and language to that effect was either written into policies or amended by endorsement. In this case, the actual cash value language was deleted by endorsement. (A. 5). Therefore, all

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claims under the Trinidad policy were adjusted on a replacement cost basis according to the terms of the policy.

There is no authority for the Petitioner's contention that replacement cost must necessarily include payment for overhead and profit, and Goff certainly does not stand for that proposition. Not all repairs require the services of a general contractor, and the Petitioner did not hire one or become contractually obligated to pay one in this case. Although Goff requires that overhead and profit be included when payment is conditioned on an "actual cash value" basis, loss settlement under the Trinidad policy was made on a replacement cost basis – not actual cash value. As the Third District pointed out in its opinion, the Trinidad 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. Because this case is entirely unlike Goff, and does not in any was conflict with the Second District's holding therein, conflict jurisdiction does not exist on this basis.

CONCLUSION

For the foregoing reasons, there is no jurisdictional basis for review by this Court because neither of the cases relied upon by the Petitioner support a claim of express and direct conflict. The Petition should therefore be denied and dismissed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and accurate copy of the foregoing was served via U.S. Mail and Facsimile on this 16th day of September, 2011, 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.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a), Fla. R. App. P., undersigned counsel hereby certifies that this brief is submitted in Times New Roman 14-point font.

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