

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMADO TRINIDAD,

Petitioner,

CASE NO.: SC11-1643

vs.

L.T. CASE NO.: 3D10-1087

FLORIDA PENINSULA
INSURANCE COMPANY,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Trinidad's home was insured by Florida Peninsula Insurance Company under a policy that required Florida Peninsula to pay covered losses at "replacement cost" (A 2, 4). 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."¹

Trinidad's home was damaged by fire in 2008, and he submitted the claim to Florida Peninsula, which paid part of it, but refused to pay any overhead and profit (A 2). As *Trinidad* noted, a contractor's overhead and profit are elements of repairs, and are included in repair contracts and estimates (A 2).²

Section 627.7011(6) states:

(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;

¹ Trinidad cites to the 2008 Florida Statutes, the year his loss occurred.

² Citing *Goff v. State Farm Florida Ins. Co.*, 999 So. 2d 684, 689-90 (Fla. 2d DCA 2008).

- (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.

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:

- 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.

(A 4).

Florida Peninsula's policy provision differed from the language permitted by § 627.7011(6) for paying replacement cost. 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 (subpart (b)) or to replace (subpart (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 (A 4-5, 7).

SUMMARY OF ARGUMENT

The Third District’s opinion permitted the insurer to benefit from a policy provision that conflicted with a Florida Statute. *Trinidad* thus conflicts with this Court’s decision in *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 896 (Fla. 2003).

Trinidad also conflicts with *Goff*, on the definition of “replacement cost,” and because *Trinidad* 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.

ARGUMENT

Trinidad v. Florida Peninsula conflicts with *Kaklamanos* and *Goff*.

A. Standard of Review.

Because this Court makes the initial decision on whether it will accept this case based on conflict jurisdiction, it is not reviewing the decision of an underlying court on the merits. This Court determines as a matter of law if there is conflict between the decisions.

The district court opinion need not identify the conflict to create jurisdiction based on express and direct conflict. *Ford Motor Co. v. Kikas*, 401 So. 2d 1341, 1342 (Fla. 1981).

B. *Trinidad* conflicts with this Court’s opinion in *Kaklamanos* by enforcing a policy provision that violates a Florida statute.

Perhaps led into error by Florida Peninsula’s policy language, the *Trinidad* panel seemed to assume a policy that promises to pay replacement cost value requires the insured actually replace the damaged property. Replacement cost is 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.

Indeed, § 627.7011(3) mandates replacement cost payments “whether or not the insured replaces or repairs the dwelling or property.” 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. Yet, Florida Peninsula paid those portions of the replacement cost estimate (A 2). *Trinidad* holds the insured cannot receive the mandated full replacement cost payment unless he replaces or repairs the dwelling. This conflicts with § 627.7011.

Trinidad permitted Florida Peninsula to evade its clear responsibility to pay the full replacement cost § 627.0711(3) mandates by relying on Florida Peninsula’s payment provision (A 4). But as the comparison above shows, Florida Peninsula’s payment provision conflicted with the language § 627.7011(6) permits an insurer to include in its policy on adjusting the losses. Indeed, it is subpart (c) of Florida Peninsula’s policy – stating it can limit the replacement cost payment to the amount “actually spent to repair or replace” – that is not permitted by § 627.7011 (6). And the “actually spent” limitation directly conflicts with the requirement replacement cost be paid “whether or not the insured replaces or repairs” mandated by § 627.7011(3).

When the *Trinidad* opinion permitted Florida Peninsula to benefit from its policy provision that 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.

C. *Trinidad* conflicts with the Second District's opinion in *Goff*.

Because it relied on Florida Peninsula's policy provision, *Trinidad* also conflicted with *Goff*. In purporting to distinguish *Goff*, the *Trinidad* opinion 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." (A 6, original emphasis).

As numerous Florida cases recognize: replacement cost value 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, 690.³

Thus, *Trinidad* defining replacement cost as costs incurred/money spent conflicts with the way *Goff* defined replacement cost – actual cash value plus depreciation, with no mention of costs incurred or money spent.

Trinidad conflicts further with *Goff* in another way. *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. *Goff* says it is proper to depreciate the overhead and profit elements of the claim when the policy calls for an actual cash value payment.

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. But under *Trinidad*, the insured gets no overhead and profit at all – as part of what should be a higher replacement cost value payment.

³ 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, 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

Thus, *Trinidad* conflicts with this Court's holding in *Kaklamanos* on requiring that insurance policy provisions conform to the Florida Statutes, and with the Second District's holding in *Goff*.

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 policy provision that conflicts with § 627.7011 to avoid paying Trinidad – and likely hundreds of other insureds – the higher replacement cost value coverage for which they paid, and for which it received a premium. Trinidad urges this Court to accept this case and reverse the Third District opinion so that thousands of other Florida homeowners insured by Florida Peninsula, or other insurance companies who would seek to deny them their statutorily mandated benefits, are protected.

CONCLUSION

Trinidad respectfully requests this Court accept jurisdiction in this case on the basis of conflict with *Kaklamanos* and *Goff*.

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, on August 25, 2011.

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

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