IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMADO TRINIDAD,

Petitioner,

vs. CASE NO.: SC11-1643

FLORIDA PENINSULA
INSURANCE COMPANY,

Respondent.
___________________________/

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Trinidad addresses Florida Peninsula's Issue I on jurisdiction as his Issue III. As the discussion preceding that issue shows, the Third District's opinion approving Florida Peninsula's application of its policy allows Florida Peninsula to violate §627.7011, Florida Statutes (2008). This opinion conflicts with this Court's prior decisions.

Florida Peninsula's claim that its policy permitted it to withhold overhead and profit until those amounts were "actually spent" conflicts with §627.7011(3). The Florida statute applicable to this claim requires replacement cost payment "whether or not the insured replaces or repairs the dwelling or property."

In an effort to preserve the erroneous result it obtained, Florida Peninsula changes its position, and even attempts to change facts. Florida Peninsula now asserts overheard and profit are not likely to be incurred, when it pled below that it "does not deny that it may eventually owe the amount of overhead and profit" (R 67). Without any citation to the record, Florida Peninsula claims Trinidad "does not intend" to enter into a contract for repairs (AB 9, 29). This ignores not only the record, but Florida Peninsula's burden as the movant in obtaining this summary judgment.

Florida Peninsula tacitly complied with §627.7011 when it paid Trinidad for labor and material aspects of the loss, even though Trinidad had not "actually

spent" any money on either of those. Neither Florida Peninsula's policy nor §627.7011 specifically refer to overhead and profit. There was no legitimate basis for Florida Peninsula to refuse to pay overhead and profit when the statute mandated payment "whether or not the insured replaces or repairs."

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.

Section 627.7011(3) required that Florida Peninsula pay on the basis of replacement cost "whether or not the insured replaces or repairs the dwelling or property." Florida Peninsula contends its policy permits it to withhold portions of the replacement cost until the repairs are effected. This would violate §627.7011, Florida Statutes (2008).

The fallacy in Florida Peninsula's position is most evident in its argument based on its loss payment provision, which states it can pay the least of. . . "(c) The necessary amount *actually spent* to repair or replace the damaged building" (AB 4, emphasis added). Florida Peninsula contends this language allows it to withhold payment of overhead and profit. Withholding overhead and profit because those amounts have not been "actually spent to repair or replace" violates §627.7011(3), which requires the replacement cost payment "whether or not the insured replaces or repairs."

If Florida Peninsula truly followed its "actually spent" language, then Florida Peninsula should not have made *any* payments to Trinidad because no repairs had been made. But it did pay for labor and materials (AB 2; Slip Op. 2).

Trinidad's initial brief observed that if actual replacement were required under a replacement cost policy, that would preclude recovery for labor and materials as well as overhead and profit (IB 9, 14). At the time of the summary judgment, it appeared Trinidad had not made any repairs (Slip Op. 2). Thus, under Florida Peninsula's position that it only pays the necessary amount "actually spent" to repair, replace the building, it should have paid Trinidad nothing.

Yet Florida Peninsula admits that it did make payments to Trinidad – even in the absence of any repairs (AB 2; Slip Op. 2). There is nothing in Florida Peninsula's policy, or in §627.7011, that permits Florida Peninsula to distinguish between overhead and profit, and the other aspects of a repair (labor and materials).

Florida Peninsula does not dispute that the words "overhead and profit" are not mentioned in its policy (IB 19). Thus, the underlying premise Florida Peninsula advances to justify withholding overhead and profit both violates the statute, and is refuted by Florida Peninsula's payments of the other aspects of the loss even though no amounts had been "actually spent."[1]

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[1] The *Trinidad* opinion adopted Florida Peninsula's legally incorrect definition of a "replacement cost" policy as one in which payments owed by the carrier are limited to "reimbursement" of those amounts actually incurred by the insured for repairs performed. Section 627.7011, Florida Statutes (2008) requires, however, that replacement cost policies provide the insured with the full cost to "repair or replace" the damaged property in *advance* of the repairs actually being

(....continued)

Much of the rest of Florida Peninsula's argument relies on a new, unsupported, assumption that overhead and profit were "not likely to be incurred" for the repairs (AB 4, 5, 6, 7, 10, 12, 13, 21, 24, 27, 29). Florida Peninsula's cross-motion and amended motion for summary judgment said Trinidad had not signed a contract obligating him to pay a contractor to make repairs, but it never asserted overhead and profit were "not likely to be incurred" (R 52-58, 64-70). To the contrary, Florida Peninsula stated it "does not deny that it may eventually owe the amount of overhead and profit" (R 67).

Florida Peninsula's new premise has no record support – much less a showing that, as movant, it met what would have been its burden when seeking summary judgment to establish overhead and profit would never be incurred. Indeed, its failure to specify this as a ground when moving for summary judgment would have precluded judgment on that ground. Fla. R. Civ. P. 1.510(c). Florida Peninsula points to nothing in the record on the scope of needed repairs. For the

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(continued....)
performed. Adopting Florida Peninsula's legally incorrect definition led the court to erroneously conclude that insureds are afforded greater policy benefits when coverage is afforded by a less expensive actual cash value policy (see AB 12 and below).

purpose of the legal issue this appeal presents, Trinidad is entitled to the inference that the repairs warrant the services of a contractor.[2]

Florida Peninsula's claim that Trinidad did not plead a contractor would be necessary both ignores Florida Peninsula's burden on summary judgment, and ignores that Trinidad pled Florida Peninsula was refusing to pay overhead and profit in his original complaint and his amended complaint (AB 27; R 4, 15). Trinidad's amended complaint went on to seek a declaratory judgment as to whether the insurer was entitled to withhold overhead and profit until the insured actually expended the money (R 17).[3]

Florida Peninsula attempts to set up a straw man by asserting Trinidad claimed overhead and profit is part of the replacement cost payment in every case (AB 21). Trinidad did not, and does not, argue this. There are some losses for which the services of a general contractor are not required. Appellate decisions

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[2] Florida Peninsula's error in insisting on its "actually spent" standard may suggest that it neither investigated nor determined whether the insured was likely to incur a general contractor's overhead and profit expense. In any event, it certainly failed to meet its burden on summary judgment.

[3] Florida Peninsula notes there was some discussion of actual cash value below (AB 2). This included Florida Peninsula, which in its answer sought a declaration on overhead and profit expenses "when payment is made on an actual cash basis." (R 9).

have referred to an owner being entitled to the use of a general contractor when the repairs will involve three or more trade categories of subcontractors.[4]

So the issue presented in this appeal is not whether every loss requires a contractor to oversee the repairs, or Florida Peninsula's failure to meet its burden on summary judgment to show the repairs in this case did not warrant a general contractor. Rather, this case presents a legal issue: does §627.7011, Florida Statutes (2008), allow insurers to hold back any portion of the full cost to repair or replace (namely, replacement cost) until after repairs are performed and the cost actually incurred. The answer is no. And as part of that full replacement cost payment, the statute requires the insurer pay the amount for overhead and profit when the services of a contractor are warranted.

Section 627.7011(3) mandates the payment of replacement cost "without reservation or holdback of any depreciation in value, *whether or not the insured replaces or repairs the dwelling or property*" (emphasis added). Section 627.7011(6) permits the insurer to pay the lesser of the limit of liability or the reasonable and necessary cost to repair or to replace. The statute does not provide the option Florida Peninsula placed in its policy: that it could pay only the amount

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[4] *See, e.g., Press v. Louisiana Citizens Fair Plan Prop. Ins. Corp.*, 12 So. 3d 392, 393, 396 (La. App. 4th Cir. 2009), *review denied*, 17 So. 3d 967 (La. 2009); *Burgess v. Farmers Ins. Co., Inc.*, 151 P. 3d 92, 2006 Ok. 66 (2006). The initial brief referred to more than three trades, a reference the cited case had made to the brief of a party (IB 15).

"actually spent to repair or replace" (R 67). The statute eliminated the ability to limit payments to those amounts "actually spent to repair or replace.

With this backdrop, it is apparent that Florida Peninsula's arguments cannot justify its illegal contractual provision. Florida Peninsula's Argument II B begins with its blending of two distinct concepts – whether overhead and profit are unlikely to be incurred because a contractor is not necessary for a particular loss – with whether the insurer can refuse to pay for overhead and profit because repairs have not yet been made.

When a contractor is warranted (three or more trades), §627.7011 requires that all aspects of replacement cost – including overhead and profit – be paid without regard to whether the repairs have been made. Florida Peninsula's language by which it claims it could withhold until monies were "actually spent" violates §627.7011(3) and §627.7011(6).

Florida Peninsula is wrong when it asserts that nothing in §627.7011(6) prevents the parties from contracting to withhold payment for overhead and profit until such a time as those costs are incurred (AB 23). The manner in which Florida Peninsula and the Third District read and applied subsection (c) violates the permissible list of provisions included in §627.7011(6).

By the Legislature specifying the loss can be adjusted "to the lesser of" the three listed options, the Legislature excluded the fourth "actually spent" option

Florida Peninsula inserted. *See Young v. Progressive Southeastern Ins. Co.,* 753 So. 2d 80, 85 (Fla. 2000)(discussing the principle of statutory construction that the mention of one thing implies the exclusion of another, and that by failing to permit self-insured motorist policy exclusions in the list of authorized exclusions, the Legislature indicated its intent not to permit such exclusions).

Florida Peninsula confirms the error of its analysis by its attempted reliance on *State Farm Fire and Cas. Co. v. Patrick,* 647 So. 2d 983 (Fla. 3d DCA 1994). First, the most telling aspect of *Patrick* is that it comes from 1994, before the 2005 adoption of §627.7011(3) – which mandated the payment of replacement cost value without any depreciation holdback, and whether or not the repairs are made. Second, the *Patrick* case does not mention, much less address, the components of overhead and profit. Thus, *Patrick* does not in any way support Florida Peninsula's attempt to treat overhead and profit as somehow different in a replacement cost context from the other aspects of the loss, which it admits it has to pay before the money is "actually spent."

II. Florida Peninsula's Policy Does Not Permit The Insurer To Withhold Overhead And Profit, Pending Actual Repair.

Florida Peninsula offers no response to Trinidad's argument that its loss payment provision does not address *when* Florida Peninsula must make the payments mandated under Florida law, and that it deleted its timing of payment provision for all but sinkhole losses (IB 17). As shown, §627.7011 mandates payment whether or not the repairs have been made.

Florida Peninsula argues that it can use the words "replacement cost" in its policy in a way that conflicts with the Florida statute and that is just fine (AB 28). Of course, as this Court holds, that is not fine. Even if Florida Peninsula's policy could be read the way it wants to, the policy language must be conformed to the statute.[5]

Even absent §627.7011, because Trinidad had not repaired the property at the time of the judgment, Florida Peninsula's subsection (3)(b)(1)(c) had not been triggered and did not apply. Florida Peninsula's actions in paying the other components of the loss – other than overhead and profit – show that it realized subsection (c) was not properly in play.

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[5] *See Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003); *Salas v. Liberty Mut. Fire Ins. Co.*, 272 So. 2d 1 (Fla. 1972).

III. Review Is Proper Because The Third District's Decision Conflicts With *Kaklamanos* And *Goff.*

This Court holds that even if a court's interpretation of an insurance policy provision is supported by the plain language of the provision, if the provision is inconsistent with Florida insurance statutes, it must be construed and applied to be in full compliance with the insurance code. *Kaklamanos,* 843 So. 2d at 896. Thus, if Florida Peninsula's desired construction of its policy to permit it to withhold part of the replacement cost until repairs are made were given effect, that would violate §627.7011(3). By so construing Florida Peninsula's policy, the Third District opinion conflicted with *Kaklamanos* (and *Salas*).

Florida Peninsula's argument that its policy does not conflict with §627.7011(3) is based on the same erroneous argument it makes on the merits. Florida Peninsula contends it can carve out overhead and profit and refuse to pay them as part of replacement cost, (1) even though it admits it must pay other aspects of the damages as replacement cost before repairs are made, and (2) even though nothing in that Florida Statute (or in its policy) permitted it to distinguish overhead and profit from other elements of the loss.

The district court opinion in *Trinidad*[6] also conflicts with the Second District's opinion in *Goff v. State Farm Florida Ins. Co.,* 999 So. 2d 684 (Fla. 2d DCA 2008), *review denied,* 21 So. 3d 813 (Fla. 2009). As even Florida Peninsula appears to recognize, the amounts paid for replacement cost value can never be less than actual cash value, because actual cash value typically equals replacement cost minus depreciation (IB 11; AB 14, 15-16, n. 3).

Goff recognizes and holds the insured in a repair situation warranting a general contractor will be entitled to overhead and profit as part of an actual cash value policy. 999 So. 2d at 689. *Trinidad's* holding means insureds are entitled to less in contractual benefits under a replacement cost policy, which by definition (and the statute) should provide insureds with greater insurance coverage and protection. Thus, *Trinidad* conflicts with *Goff*. Trinidad and other insureds paid more for what should have been greater replacement cost coverage; Florida Peninsula seeks to collect that larger premium, and deny the benefits the insureds paid for (IB 12).

Florida Peninsula notes §627.7011(3) was amended in 2011 (AB 19). The amended statute does not apply to this loss, and as amended, merely restored the ability of Florida insurers to withhold depreciation. The amended statute does not

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[6] *Trinidad v. Florida Peninsula Ins. Co.*, ___So. 3d ___, 36 Fla. L. Weekly D1081 (Fla. 3d DCA May 18, 2011).

alter Florida law that overhead and profit must be included in the actual cash value payment to the insured, owed prior to repairs being performed or expenses "actually spent." *E.g., Goff.*

The Department of Financial Services explanation of the statute confirms Florida Peninsula's error in denying insureds their rights under §627.7011:

> **History:** From October 1, 2005 to May 17, 2011: New or renewal personal lines residential policies, which contained replacement cost coverage, must state that full replacement cost is paid for the dwelling and personal contents without a deduction for depreciation. **In other words, there was no "holdback" of funds until repairs were made on property or it was replaced."** (emphasis added)

My Florida CFO Website (2012) available at:

http://www.myfloridacfo.com/consumers/insurancelibrary/Insurance/P_and_C/Residential/Claim/Residential_Claim_-_Replacement_Cost_Settlement.htm

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 33156, 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 August 30, 2012.

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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.

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