IN THE SUPREME COURT OF FLORIDA

CASE NO: SC16-2190

4th District Court Case No: 4D15-1909

Florida Bar No. 137172

DAVID GAL,

Petitioner,

vs.

PREPARED INSURANCE COMPANY,

Respondent.

_____/

BRIEF AND APPENDIX OF PETITIONER ON JURISDICTION (CONFLICT CERTIORARI)

ARNOLD R. GINSBERG, P.A.
9400 South Dadeland Boulevard
Suite 600
Miami, Florida 33156
(305) 670-7999
(305) 670-7004 Fax
aginsberglaw@aol.com
Attorney for Petitioner

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I.

INTRODUCTION

The Petitioner, David Gal ("Gal"), was the Plaintiff in the trial Court and was the Appellee in the Fourth District. The Respondent, Prepared Insurance Company ("Prepared") was the Defendant/Appellant. The symbol "A" will refer to the rule-required Appendix which accompanies this Brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

A.

THE OPINION - - ITS DISCLOSURES AND STATED FACTS

From the subject opinion we learn that the insured, Gal, discovered that water had leaked from his kitchen sink into his custom made kitchen cabinets (A. 2). Having made claim to Prepared, his insuror, Prepared had its adjustor inspect the damage. The adjuster estimated the loss to be $8,653.47 - -which estimate did not include a general contractor's "overhead and profit" (A.2):

* * *

> "The insurer also had a cabinetry expert inspect the cabinets. The insurer's expert claimed he could restore the cabinets for $2,585. Alternatively, he could replace the cabinets for $19,065. However, the expert's calculation

did not include the cost to hire a plumber or electrician who would be necessary to complete the project. The insurer's expert also did not include a general contractor's overhead and profit in his estimate as he admitted he did not know if hiring a general contractor would be necessary..."

* * * (A. 2)

Prepared issued a payment to Gal:

"...for $6,153.47 (the adjuster's original $8,653.47 estimate less the policy's $2,500 deductible). The insured then sued the insurer, claiming that the insurer had undervalued his loss because the insurer failed to pay the full replacement cost of the cabinets and failed to issue payment for a general contractor's overhead and profit."

* * *

As the opinion recognizes:

* * *

"Subsequently, the insured suffered a second loss. This time, an upstairs air conditioner started leaking, causing additional water damage to the kitchen area. The insurer paid the insured $95,000 pursuant to the policy.

After the second leak, the insured had his own expert, a general contractor, inspect the kitchen. The insured's expert claimed that the moisture in the kitchen had warped the kitchen cabinets. However, he admitted that in doing his evaluation he had not distinguished between the damage resulting from the initial sink leak and the subsequent second floor leak. Regardless, he asserted that even if the second leak had not occurred, his opinion would be the same.

The insured's expert claimed repairing the cabinets would

> be impossible due to their unique nature and that they had to be replaced entirely. Additionally, because the cabinets had been integrated in to the kitchen, he needed to replace much of the kitchen as well. In all, the insured's expert opined that replacing the cabinets would cost $107,902.50."
>
> * * *

During the course of the litigation the trial Court:

> * * *
>
> "... granted partial summary judgment in the insured's favor on the issue of liability, finding that the insurer violated the insurance policy by failing to pay a general contractor's overhead and profit."
>
> * * *

On appeal, the District Court reversed the above ruling (as well as reversing several others) holding, as to the above (ruling):

> * * *
>
> "We further write to address the trial court's ruling that payment for a general contractor's overhead and profit was required as a matter of law.
>
> In *Trinidad*, the Florida Supreme Court stated that overhead and profit must be paid under a replacement cost policy when overhead and profit 'are going to be 'reasonable and necessary' to the repair... However, if overhead and profit are not 'reasonable and necessary' to the repair, then the insurer may withhold payment... Thus, an insurer is required to pay overhead and profit only if the insured is 'reasonably likely to need a general contractor.' The issue of whether overhead and profit are 'reasonably necessary' is really 'no different than any other costs of a repair,' *see id.* at 441, and the amount the insured is owed

under an insurance policy will generally be a question of fact for the jury...

In the present case, there remained disputed issues of fact as to whether a general contractor would be necessary. Indeed, neither the insurer's expert nor the insured's expert could say whether a general contractor would be necessary to repair the cabinets. Moreover, the insurer's expert commented that he had had similar projects in the past but had never been hired by a general contractor to work as a subcontractor, indicating a general contractor may not have been necessary. On appeal, the insured makes several arguments for why a general contractor was necessary, but the insured ought to have made these arguments to the jury because '[when material facts are in dispute, then it is the function of the jury to resolve them.' Citation omitted..."

* * * (A.4)

B.

CONFLICT

Although this Court did hold in TRINIDAD v. FLORIDA PENINSULA INSURANCE COMPANY, 121 So.3d 433 (Fla. 2013) that "... an insuror is required to pay overhead and profit only if the insured is "reasonably likely" to need a general contractor..." nothing that this Court wrote in TRINIDAD circumscribed, established, identified, mandated or even sought to address what considerations (factors, opinions - - lay or expert - - etc.) would be legally (or factually) relevant in establishing a contested issue on that subject matter: Is it within the knowledge of everyday people; is it solely within the desires of the insured; does it require a minimum of

tradespeople, etc? When the District Court premised its reversal (as to this issue) on TRINIDAD, which itself did not address same, it clearly mis-applied its precedent and/or mis-interpreted its holding, either one presenting a recognized basis for express and direct conflict under Article V, Section 3(b)(3), Fla. Const., *See:* DORSEY v. REIDER, 139 So.3d 860 (Fla. 2014), FIGA v. DEVON NEIGHBORHOOD ASSN., INC., 67 So.3d 187 (Fla. 2011); JAIMES v. STATE, 51 So.3d 445 (Fla. 2010); and, WALLACE v. DEAN, 3 So.3d 1035 (Fla. 2009) and cases cited therein.

III.

SUMMARY OF ARGUMENT

In reversing the summary judgment appealed, and in premising its reversal on this Court's opinion in TRINIDAD, the District Court took TRINIDAD far beyond its expressed holding and gave no guidance as to what is to follow.

Holding that an issue presents a "question of fact" is far from dispositive when the reviewing Court fails to identify the very factual considerations "necessary" (or "lacking") to the end result, the very factual considerations which TRINIDAD did not (need to) address. While it may be assumed the issue of the "reasonable likelihood" (of the need for a general contractor) presents a "question of fact," a more accurate statement is that it presents a matter of "opinion." Hence it must be asked: Whose

opinion? An expert's? The insured's? The adjusters involved? It does not further the jurisprudence of this state for an appellate Court to cite precedent from this Court (as providing authority or support for a reversal) when the cited precedent (here, TRINIDAD) did not address or involve the precise matter now at issue.

TRINIDAD has been mis-applied and mis-interpreted, conflict exists.

IV.

ARGUMENT/JURISDICTIONAL STATEMENT/APPLICABLE (APPELLATE) STANDARD OF REVIEW

THE OPINION RENDERED HEREIN IS IN EXPRESS AND DIRECT CONFLICT WITH TRINIDAD, SUPRA, AND COLON V. LARA, 389 So.2d 1070 (Fla. App. 3rd 1980).

A.

Mis-application and/or mis-interpretation of (Florida Supreme) Court precedent are both recognized basis for express and direct conflict under the Florida Constitution and settled Supreme Court precedent. DORSEY, supra, and JAIMES, supra.

B.

The Fourth District mis-interpreted and mis-applied the holding(s) in TRINIDAD by utilizing same as the basis for its reversal. Putting aside for a moment the opinion established facts of this case, to wit: that Gal hired a general contractor

and then relied upon that expert's opinions in support of his summary judgment motion, Prepared had no general contractor in opposition to Gal's summary judgment motion, opting instead to utilize a (tradesman) "cabinetry expert" whose testimony, [as to the subject issue, to wit: an insuror is required to pay overhead and profit only if the insured is "reasonably likely to need a general contractor",] the Fourth District noted was:

> "The expert's calculation did not include the cost to hire a plumber or electrician who would be necessary to complete the project..." (A. 2).

The Court also stated, as to Prepared's expert, that:

> "... he admitted he did not know if hiring a general contractor would be necessary..." (A. 2).

As to the subject jurisdictional issue, if Prepared's expert did know that a plumber or electrician would be necessary yet "did not know" if hiring a general contractor would be necessary, Gal inquires: Who would know? And so Gal asks [as TRINIDAD did not address]: "reasonably likely" to whom? Upon what factual considerations did the District Court rely in its reversal of the ruling on the issue of entitlement to "overhead and profit?" The Opinion identifies no such considerations merely extends TRINIDAD, a case not addressing the subject issue.

The trial Court, on the facts before it, facts [established in the opinion] that Gal

had a general contractor who opined as to the scope of the work (A. 2, 3 and 5) granted Gal's summary judgment motion. The insuror's arguments raised purely "paper issues" given the insuror's expert who opined: "He did not know if hiring a general contractor would be necessary..." (as opposed to one would not be necessary). (A. 2). Acknowledging, in the opinion, this testimony yet failing to address its relevance to the dispositive issue, ignores the precedent of cases such as COLON v. LARA, supra, which recognize that a party cannot forestall the granting of relief on motion for summary judgment by raising purely paper issues. However, and of much greater import is the fact that the District Court took TRINIDAD far beyond its expressed holding and gave no guidance as to what is to follow.

Assuming "reasonable likelihood" of the need for a general contractor is "fact based" Prepared presented no facts establishing the "reasonable" unlikelihood that Gal would not need a general contractor. Whatever the Florida criteria as to what is needed to support a factual finding of the "reasonable likelihood" of the need for a general contractor - - and again it is not found in TRINIDAD - - the District Court's reliance on TRINIDAD to reverse the ruling on the subject issue mis-applied and mis-interpreted its precedent.

Holding that an issue presents a "question of fact" is far from dispositive when the reviewing Court fails to identify the very factual considerations "necessary" (or

"lacking") to the end result, the very factual considerations which TRINIDAD did not (need to) address. While it may be assumed the issue of "reasonable likelihood" presents a "question of fact," a more accurate statement is that it presents a matter of "opinion." A broken leg coming through skin is a fact! That the sun is shining is a fact! That the Court wrote an opinion in this case is a fact! Whether an insured is "reasonably likely" to need a general contractor is an opinion! Hence, it must be asked: Whose opinion? An experts? The insureds? The adjusters involved? It does not further the jurisprudence of this state for an appellate Court to cite precedent from this Court [as providing authority or support for a reversal] when the cited precedent (here, TRINIDAD) did not address the precise matter now at issue!

Moreover, sight should not be lost of the fact that the trial Court has already ruled on this issue and found no issue of fact. The District Court's reversal of the summary judgment and then remanding the case to the trial Court for submission to a jury merely "ducks the issue" as opposed to addressing it. What factors does a jury consider? Is an expert's opinion required? Are lay opinions allowed? Is the insured's testimony dispositive? The trial Court was reversed for finding an "absence" of a genuine issue of fact. The subject opinion's reliance on TRINIDAD will not aid the trial Court in that the subject opinion never identified the facts needed to generate an issue of fact.

This Court should exercise its discretion and accept jurisdiction of this case which has mis-interpreted TRINIDAD and/or has mis-applied TRINIDAD to the subject facts. Upon review, this Court should address what type evidence (expert or otherwise) suffices to generate a fact question on the issue of when an insured is "reasonably likely" to need a general contractor for either the "repair" or "replacement" of the insured's (damaged) property. TRINIDAD has been mis-applied and mis-interpreted, conflict exists.

V.

CONCLUSION

Based upon the foregoing reasons and citation of authority, Gal respectfully requests this Honorable Court to exercise its discretion and to review the merits of this controversy.

Respectfully submitted,

ARNOLD R. GINSBERG, P.A.
9400 So. Dadeland Boulevard, Suite 600
Miami, Florida 33156
(305) 670-7999
(305) 670-7004 Fax
aginsberglaw@aol.com
Attorney for Petitioner

By: */s/ Arnold R. Ginsberg*
Arnold R. Ginsberg

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing ***Brief and Appendix of Petitioner on Jurisdiction (Conflict Certiorari)*** was served via e-mail upon the following counsel of record this **21st** day of **December, 2016.**

JUSTIN P. CERNITZ, ESQ.
Cernitz & Shanbron, P.A.
777 Brickell Avenue, Suite 400
Miami, Florida 33131
(305) 370-3255
jcernitz@cernitzlaw.com
glugo@cernitzlaw.com
Attorneys for Petitioner

MARIA MEDINA, ESQ.
Diaz Briscoe Medina, P.A.
100 S.E. 2nd Street, Suite 3310
Miami, Florida 33131
(786) 866-3377
service@dbmlegal.com
mmedina@dbmlegal.com
myepez@dbmlegal.com
Attorneys for Respondent

ELIZABETH K. RUSSO, ESQ.
Russo Appellate Firm, P.A.
7300 No. Kendall Drive, Suite 600
Miami, Florida 33156
(305) 666-4660
e-service@russoappeals.com
Attorneys for Respondent

/s/ Arnold R. Ginsberg
Arnold R. Ginsberg

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief was prepared in accordance with the rule requiring 14 point Times New or 12 point Courier New.

/s/ Arnold R. Ginsberg
Arnold R. Ginsberg

APPENDIX

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PREPARED INSURANCE COMPANY,
Appellant,

v.

DAVID GAL,
Appellee.

No. 4D15-1909

[October 13, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael L. Gates, Judge; L.T. Case No. 11-22825 (12).

Elizabeth K. Russo and Kevin D. Franz of Russo Appellate Firm, P.A., Miami, and Diaz Briscoe Medina, P.A., Miami, for appellant.

Arnold R. Ginsberg of Arnold R. Ginsberg, P.A., Miami, and Justin P. Cernitz and Candise Shanbron of Cernitz & Shanbron, P.A., Miami, for appellee.

LEVINE, J.

The appellant, an insurance company, raises four issues for our review: (1) whether a replacement cost homeowners' policy requires an insurer to replace damaged property, as a matter of law, or whether the insurer may limit its liability and repair the property; (2) whether the trial court correctly determined the insured was entitled to judgment as a matter of law on the issue of liability because the insurer failed to pay a general contractor's overhead and profit; (3) whether the trial court abused its discretion in striking all of the insurer's witnesses because they were not general contractors; and finally, (4) whether the trial court abused its discretion when the court prohibited the insurer from cross-examining the insured's expert as to matters that may have affected the witness's opinion.

We agree with the insurer on all four issues. The insurer should have had an opportunity to argue that it could repair the damaged property and that hiring a general contractor was unnecessary. Furthermore, the insurer's witnesses should not have been stricken, nor should the insurer

have been prohibited from cross-examining the insured's expert as to facts weighing on the credibility of his opinion. Any one of the above errors would have required reversal for a new trial though we write to address all four.

The insured, David Gal, discovered water had leaked from his kitchen sink into his custom-made kitchen cabinets. The insurer, Prepared Insurance Company, had its adjuster inspect the damage. The adjuster estimated the loss to be $8,653.47. The adjuster's estimate did not include a general contractor's "overhead and profit."

The insurer also had a cabinetry expert inspect the cabinets. The insurer's expert claimed he could restore the cabinets for $2,585. Alternatively, he could replace the cabinets for $19,065. However, the expert's calculation did not include the cost to hire a plumber or electrician who would be necessary to complete the project. The insurer's expert also did not include a general contractor's overhead and profit in his estimate as he admitted he did not know if hiring a general contractor would be necessary. Nevertheless, the insurer's expert also commented that he had worked on similar projects with plumbers and electricians, but had never been hired as a subcontractor by a general contractor.

The insurer issued a payment to the insured for $6,153.47 (the adjuster's original $8,653.47 estimate less the policy's $2,500 deductible). The insured then sued the insurer, claiming that the insurer had undervalued his loss because the insurer failed to pay the full replacement cost of the cabinets and failed to issue payment for a general contractor's overhead and profit.

Subsequently, the insured suffered a second loss. This time, an upstairs air conditioner started leaking, causing additional water damage to the kitchen area. The insurer paid the insured $95,000 pursuant to the policy.

After the second leak, the insured had his own expert, a general contractor, inspect the kitchen. The insured's expert claimed that the moisture in the kitchen had warped the kitchen cabinets. However, he admitted that in doing his evaluation he had not distinguished between the damage resulting from the initial sink leak and the subsequent second floor leak. Regardless, he asserted that even if the second leak had not occurred, his opinion would be the same.

The insured's expert claimed repairing the cabinets would be impossible due to their unique nature and that they had to be replaced

entirely. Additionally, because the cabinets had been integrated into the kitchen, he needed to replace much of the kitchen as well. In all, the insured's expert opined that replacing the cabinets would cost $107,902.50.

The trial court made several pre-trial rulings that impacted the outcome of this case. The trial court granted partial summary judgment in the insured's favor on the issue of liability, finding that the insurer violated the insurance policy by failing to pay a general contractor's overhead and profit. The trial court also found that, because the insurance policy was a "replacement cost policy," the insurer was required to *replace* the cabinets, not *repair* them. Next, on the day of trial, the trial court determined that because a general contractor was necessary, the only witnesses qualified to testify were general contractors. Because neither of the insurer's witnesses—its adjuster and the insurer's cabinetry expert—were licensed general contractors, they were stricken. Finally, the trial court determined that the insurer could not cross-examine the insured's expert about the second water damage incident, finding it to be irrelevant.

Following a jury trial, the jury awarded the insured $44,304.85 in damages. This appeal followed.

We review the trial court ruling on a motion for summary judgment de novo. *Eco-Tradition, LLC v. Pennzoil-Quaker State Co.*, 137 So. 3d 495, 496 (Fla. 4th DCA 2014). "The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985).

We write first to address the trial court's interpretation of "replacement cost policy." The trial court concluded that "replacement cost" meant that the insurer had to *replace*, rather than *repair*, the cabinets. We reverse as the trial court incorrectly interpreted what a "replacement cost policy" is.

"Replacement 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." *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013) (emphasis added) (citation omitted). A "replacement cost policy" is a policy where the insurer agrees to compensate for a loss without taking into account depreciation. *See id.* Such a policy does not prohibit *repairing* the damaged property. *See id.* In fact, both the governing statute as well as the parties' insurance policy expressly provide that an insurer may limit its liability to the "reasonable and necessary cost

to repair the damaged, destroyed, or stolen covered property." *See* § 627.7011(6)(b), Fla. Stat. (2010) (amended 2011) (emphasis added). Thus, we conclude that a replacement cost policy does not mandate that the insurer replace the damaged property.[1]

We further write to address the trial court's ruling that payment for a general contractor's overhead and profit was required as a matter of law.

In *Trinidad*, the Florida Supreme Court stated that overhead and profit must be paid under a replacement cost policy when overhead and profit "are going to be 'reasonable and necessary' to the repair." 121 So. 3d at 441. However, if overhead and profit are not "reasonable and necessary" to the repair, then the insurer may withhold payment. *See id.* (citing § 627.7011(6), Fla. Stat. (2008)). Thus, an insurer is required to pay overhead and profit only if the insured is "reasonably likely to need a general contractor." *Id.* at 440. The issue of whether overhead and profit are "reasonably necessary" is really "no different than any other costs of a repair," *see id.* at 441, and the amount the insured is owed under an insurance policy will generally be a question of fact for the jury, *see Citizens Prop. Ins. Corp. v. Mallett*, 7 So. 3d 552, 556 (Fla. 1st DCA 2009); *see also Mee v. Safeco Ins. Co. of Am.*, 908 A.2d 344, 348 (Penn. Super. Ct. 2006) ("Whether use of a general contractor was reasonably likely is a question of fact for the jury.").

In the present case, there remained disputed issues of fact as to whether a general contractor would be necessary. Indeed, neither the insurer's expert nor the insured's expert could say whether a general contractor would be necessary to repair the cabinets. Moreover, the insurer's expert commented that he had had similar projects in the past but had never been hired by a general contractor to work as a subcontractor, indicating a general contractor may not have been necessary. On appeal, the insured makes several arguments for why a general contractor was necessary, but the insured ought to have made these arguments to the jury because "[w]hen material facts are in dispute, then it is the function of the jury to resolve them." *Decarlo v. Griffin*, 827 So. 2d 348, 350 (Fla. 4th DCA 2002).

Next, the trial court abused its discretion when it struck all of the insurer's witnesses because they were not general contractors. As discussed, there remained disputed issues of fact as to whether cabinets could be repaired and whether a general contractor was reasonably

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[1] We express no opinion as to whether repairing the cabinets was factually possible in this case.

necessary. The insurer should have been permitted to present relevant testimony directed at these issues and others. *See* § 90.401, Fla. Stat.; *Watkins v. State*, 163 So. 292, 293 (Fla. 1935) ("In civil as well as in criminal cases, facts which on principles of sound logic tend to sustain or impeach a pertinent hypothesis of an issue are to be deemed relevant and admitted in evidence, unless proscribed by some positive prohibition of law."). Striking these witnesses effectively prevented the insurer from litigating relevant issues in this case.

Finally, prohibiting inquiry into the second leak was also an abuse of discretion. Although the insured's expert claimed the second leak did not impact his opinion, the jury, not the trial court, should have had the opportunity to decide whether the insured's expert was to be believed. *See Berry v. CSX Transp., Inc.*, 709 So. 2d 552, 571 (Fla. 1st DCA 1998) ("Trial courts should not arrogate the jury's role in 'evaluating the evidence and the credibility of expert witnesses' by 'simply cho[o]s[ing] sides in [the] battle of the experts.'") (quoting *Christophersen v. Allied-Signal Corp.*, 902 F.2d 362, 366 (5th Cir. 1990)). Thus, the insurer should have been given the opportunity to present facts that may weigh on the reliability and credibility the opinion of the insured's expert. *See Dep't of Agric. & Consumer Servs. v. Bogorff*, 35 So. 3d 84, 88 (Fla. 4th DCA 2010).

In conclusion, we reverse and remand for a new trial and for proceedings consistent with this opinion.

Reversed and remanded.

FORST, J., and COLBATH, JEFFREY, Associate Judge, concur.

* * *

Not final until disposition of timely filed motion for rehearing.

A.5.