In the Supreme Court of Florida

CASE NO.: SC16-2190

DAVID GAL,

Petitioner,

v.

PREPARED INSURANCE COMPANY,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

This case arises out of a water leak from Petitioner's kitchen sink that caused damage to kitchen cabinets. (Op. 2).[1] Petitioner made a claim to his homeowner's insurer, Respondent Prepared Insurance Company. (Op. 2). Respondent had a cabinetry expert inspect the cabinets. (Op. 2). In pertinent portion, "[t]he insurer's expert claimed that he could restore the cabinets for $2,585." (Op. 2). On the other hand: "The insured's expert claimed repairing the cabinets would be impossible due to their unique nature and that they had to be replaced entirely." (Op. 3). "In all, the insured's expert opined that replacing the cabinets would cost $107,902.50." (Op. 3).

The parties' experts thus posited two different methods for addressing the damage to the cabinets - the insurer's cabinetry expert said that the cabinets could be repaired, and the insured's expert said that they needed to be replaced. (Op. 2, 3). As to the repair option, "neither the insurer's expert nor the insured's expert could say whether a general contractor would be necessary to *repair* the cabinets. (Op. 4). "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

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[1] All facts recited herein are taken directly from the Fourth District's Opinion, and are referenced by Opinion page number, as follows: (Op. __). For ease of reference, a copy of the Opinion is attached as an Appendix. Unless otherwise indicated, all emphasis herein is supplied by undersigned counsel.

subcontractor, indicating a general contractor may not have been necessary." (Op. 4).

In *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013), this Court held that, under a replacement cost policy - like the Petitioner's policy with Respondent here - general contractor overhead and profit must be paid when a general contractor's services "are going to be 'reasonable and necessary' to the repair." 121 So. 3d at 441. Although, as the Fourth District's Opinion noted, the Petitioner insured did not have any evidence that a general contractor would be reasonable and necessary for the *repair* option that the insurer's expert said would restore the cabinets to their pre-loss condition, the Petitioner nonetheless filed a motion for summary judgment on liability, contending that the Respondent breached the replacement cost insurance contract by not including general contractor overhead and profit in its payment on the loss. (Op. 3). The trial court "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[.]" (Op. 2).

On appeal, the Fourth District reversed the judgment eventually entered in favor of the Petitioner for four separate erroneous rulings, any one of which "would have required reversal for a new trial[.]"(Op. 2). One of the four rulings the Fourth District reversed was the entry of the summary judgment on liability based on the

trial court's conclusion that Respondent owed overhead and profit for a general contractor as a matter of law. (Op. 4). The Fourth District's reversal as to that ruling was based on the conflicting evidence, and the dearth of any affirmative evidence that a general contractor would be reasonably necessary whether the cabinets were repaired or whether they were replaced. (Op. 4).

The Fourth District's Opinion first set out the controlling law set by this Court in *Trinidad*, and then pointed out the fact issues in this case that precluded disposition by summary judgment. (Op. 4). The following is the entirety of the Fourth District's discussion on this point:

> 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).

(Op. 4).

Petitioner initiated these discretionary review proceedings claiming express and direct conflict with two cases: *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013) and *Colon v. Lara*, 389 So. 2d 1070 (Fla. 3d DCA 1980). As set forth next, the Fourth District's decision conflicts with neither of the cited cases, and no basis exists for exercise of this Court's discretionary conflict review.

SUMMARY OF ARGUMENT

The Fourth District's Opinion expressly follows the *Trinidad* conclusion "that overhead and profit are included in the replacement cost of a covered loss when the insured is reasonably likely to need a general contractor for the repairs," 121 So. 3d at 439, and reversed the summary judgment in Petitioner's favor to have the fact issues on that point resolved by a jury. (Op. 4). No conflict of any kind has been shown between the Fourth District's Opinion and *Trinidad*.

Petitioner's other conflict argument, based on *Colon v. Lara*, 389 So. 2d 1070 (Fla. 3d DCA 1980) and made in passing in one sentence on page 8 of Petitioner's Brief on Jurisdiction, cites *Colon* for the proposition that "a party cannot forestall

the granting of relief on a motion for summary judgment by raising purely paper issues." (Petitioner's Brief on Jurisdiction, p 8). The Fourth District's Opinion here certainly says nothing that conflicts with that statement from *Colon*. What the Opinion does do is recite the state of the record *evidence* that raised actual fact issues in this case, not purely paper issues.

ARGUMENT

Neither of Petitioner's cited 'conflict' cases in fact conflicts with the Fourth District's decision, and this case accordingly presents no basis for the review Petitioner is seeking. Respondent respectfully submits that review should be declined.

Because Petitioner has not been able to point to any actual express or direct conflict with the two cases he references, Petitioner instead cites *Dorsey v. Reider*, 139 So. 3d 860 (Fla. 2014) and *Jaimes v. State,* 51 So. 3d 445 (Fla. 2010) for the proposition that "[m]is-application and/or mis-interpretation of (Florida) Supreme Court precedent are both recognized bases for express and direct conflict under the Florida Constitution and settled Supreme Court precedent." (Petitioner's Brief on Jurisdiction, p 6). But, that proposition does not help Petitioner at all because: (a) he has not shown how the Fourth District Opinion in anyway misapplies or misinterprets *Trinidad*; and (b) *Colon* is a Third District case to which the proposition would not apply in any event.

As to *Trinidad*, the Fourth District Opinion merely follows the *Trinidad* ruling that "overhead and profit are included in the replacement cost of a covered loss when the insured is reasonably likely to need a general contractor for the repairs[.]" 121 So. 3d at 439. The 'misapplication' that Petitioner argues is that the Fourth District did not, preemptively and in a vacuum, tell the trial court *what evidentiary means* may be used to establish that an insured is - or is not - "reasonably likely to need a general contractor for the repairs." 121 So. 3d at 439. Notably, neither did this Court do so in *Trinidad* itself. Petitioner's argument on this point makes no sense. Neither the Fourth District nor this Court in *Trinidad* had any call to tell the parties what evidence would be admissible on the subject or to tell the trial courts how to rule on the admissibility of whatever evidence the parties might present. What evidence may be admissible on "reasonable likelihood" presents questions for resolution by the trial court under the Florida Evidence Code and Florida decisional law, subject to appellate review after the actual evidence has been presented and either admitted or excluded.

Petitioner's series of rhetorical questions about what evidence may be used to show reasonable likelihood is ironic at best in the context of this case given that Petitioner successfully persuaded the trial court to preclude the Respondent from offering *any* evidence on the subject. The trial court's resulting ruling striking of

all of Respondent's witnesses was reversed by the Fourth District as an abuse of discretion:

> [T]he 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 the cabinets could be repaired and whether a general contractor was reasonably necessary. The insurer should have been permitted to present relevant testimony directed at these issues and others.

Gal, 2016 WL 5939749 at *3. The Fourth District was correct in ruling that, on conflicting evidence, it is for the jury to decide whether a general contractor is reasonably likely, and that, on remand, jury must hear from *both* parties' witnesses on the subject. The jury is fully capable of weighing the evidence and the credibility of the witnesses, and reaching a conclusion on the general contractor issue. As discussed above, this Court already announced in *Trinidad* that the standard is when "the insured is ***reasonably*** likely to need a general contractor for the repairs." 121 So. 3d at 439. What is reasonable under given circumstances is the quintessential jury question. The Fourth District's Opinion is entirely in line with *Trinidad* in seeing no need to describe what evidence may be pertinent or admissible on the subject of reasonable likelihood.

In sum, when, as here, an appellate court determines that a summary judgment should be reversed because the record shows that there is evidence that creates fact issues, or because the movant did not meet the burden of proof on entitlement to

summary judgment, the appellate court quite properly does not go beyond the issue before it to provide an outline of what evidence may or may not be admissible for the jury's resolution of the fact issue on remand. *Trinidad* in no way suggests otherwise. Petitioner has shown no conflict with *Trinidad*, and no misapplication of *Trinidad*.

As to *Colon*, Petitioner makes nothing more than a throwaway argument that the *Colon* opinion's remark that purely paper issues cannot defeat summary judgment conflicts with the Fourth District's Opinion. The Fourth District did not say that purely paper issues can defeat summary judgment, and its Opinion does not reflect any purely paper issues in reversing the summary judgment here. *Colon* is not a basis for exercise of conflict review.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that review should be declined in this case for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Respondent's Brief on Jurisdiction was sent by electronic mail this 11th day of January, 2017 to:

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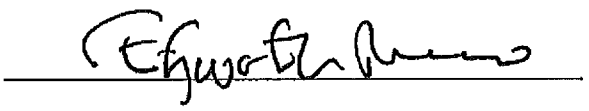
Undersigned counsel hereby respectfully certifies that the foregoing Brief on Jurisdiction complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.



2016 WL 5939749

District Court of Appeal of Florida,
Fourth District.

PREPARED INSURANCE COMPANY, Appellant,
v.
David GAL, Appellee.

No. 4D15–1909.
|
Oct. 13, 2016.

Synopsis

Background: Insured brought action against homeowners insurer to recover full replacement cost of cabinets damaged by sink leak and to recover general contractor's overhead and profit. The Seventeenth Judicial Circuit Court, Broward County, Michael L. Gates, J., granted partial summary judgment for insured on liability, struck insurer's witnesses, precluded cross-examination of insured's expert, and entered judgment on jury verdict for insured. Insurer appealed.

Holdings: The District Court of Appeal, Levine, J., held that:

[1] policy did not mandate replacement of damaged property, but permitted insurer to repair kitchen cabinets;

[2] factual issues precluded summary judgment on liability for overhead and profit;

[3] striking insurer's witnesses because they were not general contractors was improper; and

[4] prohibiting insurer from cross-examining insured's expert about leak from upstairs air conditioner was abuse of discretion.

Reversed and remanded.

West Headnotes (6)

[1] **Insurance**
Election to restore, repair or take property

Replacement cost homeowners policy did not mandate replacement of damaged property, but permitted insurer to repair kitchen cabinets damaged by sink leak; insurer could limit liability to reasonable and necessary cost to repair damaged property. West's F.S.A. § 627.7011(6)(b).

Cases that cite this headnote

[2] **Insurance**
Replacement

Insurance
Election to restore, repair or take property

A "replacement cost policy" is a policy where the insurer agrees to compensate for a loss without taking into account depreciation; such a policy does not prohibit repairing the damaged property. West's F.S.A. § 627.7011(6)(b).

Cases that cite this headnote

[3] **Insurance**
Repair or Replacement

Property insurer is required to pay general contractor's overhead and profit only if the insured is reasonably likely to need a general contractor. West's F.S.A. § 627.7011(6).

Cases that cite this headnote

[4] **Judgment**
Insurance cases

Genuine issues of material fact as to need for general contractor to repair or replace custom kitchen cabinets damaged by water leak precluded summary judgment for insured on claim that homeowners insurer would

be liable for overhead and profit of general contractor. West's F.S.A. § 627.7011(6).

Cases that cite this headnote

[5] **Insurance**
⇦ Admissibility

Striking homeowners insurer's witnesses because they were not general contractors effectively prevented insurer from litigating relevant issues of need for general contractor to repair or replace custom kitchen cabinets damaged by water leak and was improper in insured's suit alleging insurer's liability for overhead and profit of a general contractor. West's F.S.A. § 90.401.

Cases that cite this headnote

[6] **Evidence**
⇦ Control and discretion of court

Prohibiting homeowners insurer from cross-examining insured's expert about leak from upstairs air conditioner was abuse of discretion in insured's suit to recover for damage to custom kitchen cabinets from prior sink leak; jury should have had opportunity to decide whether insured's expert was to be believed.

Cases that cite this headnote

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

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Opinion

LEVINE, J.

*1 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.

***2** 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).

[1] 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.

[2] "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]

***3** 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.

[3] 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.").

[4] 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).

[5] 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 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,* 121 Fla. 58, 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.

[6] 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).

*4 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.

All Citations

--- So.3d ----, 2016 WL 5939749, 41 Fla. L. Weekly D2322

Footnotes

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

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