Filing # 56924913 E-Filed 05/25/2017 12:19:22 PM

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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 THE MERITS (CONFLICT CERTIORARI)

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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. In this Brief of Petitioner, the parties will be referred to as the Plaintiff and the Defendant and, where necessary for clarification or emphasis, by name (as indicated above). The symbols "R," "T," and "A" will refer to the record on appeal, the trial proceedings, and 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 SUBJECT OF THE DISPUTE

It has been uncontested throughout, and should remain uncontested herein, that on March 22, 2011 Plaintiff's kitchen sink had a leak. Plaintiff timely (and properly) notified his insurance carrier [present Defendant] and coverage for same was approved.

The leak occurred in the kitchen of the Plaintiff's home, which, all agree, was expensive. The cabinetry in the kitchen was custom made. It was built for that exact kitchen (R. 748). The cabinetry went "wall to wall" and the cabinets had inserts designed into them (R. 772, 773). As to the composition of the cabinets themselves, they were solid dark wood, not laminate (R. 1456). The kitchen itself had an island in the middle. Crown molding (all around the kitchen) finished the look (R. 750).

The back splash in the kitchen was marble, the floor in the kitchen (likewise) being (off white) marble. (R. 1410). The counter tops were custom granite, the edges finished by bull nosing (R. 753). Simply stated, what has just been described was "integrated," floor to ceiling, the cabinetry and the molding framing the appliances all being tied into a completely finished look (R. 750).

The kitchen was described by the Plaintiff's witnesses as not being the "average" kitchen that you see in most homes (R. 1456). The kitchen was described by the Defendant's independent field adjuster, Betty Massey:

> "It was a beautiful, beautiful home with a very large gorgeous kitchen..." (R. 1550).

Alan Schmidt was the defendant's expert (cabinet maker) witness (R. 1794-1880) who inspected the Plaintiff's property and noted that the cabinets were "high grade" medium walnut, mahogany tone and relatively new (R. 1440-1443).

B.

THE OPERATIVE FACTS, "POST LEAK."

Post leak, on March 25, 2011, the Plaintiff notified the Defendant of the occurrence. By letter to Plaintiff dated April 5, 2011, the Defendant advised Plaintiff that an adjuster would make contact to set a time and date to inspect the insured premises. (R. 264, 265). Simultaneous with these events, the Plaintiff retained Martin Rosenberg, a Public Adjuster, to handle the Plaintiff's claim (R. 283).

Subsequent to April 5, 2011, the Defendant's adjuster [an independent adjuster from the adjusting firm CatManDo, Inc.] Betty Massey, inspected the Plaintiff's premises and, on April 20, 2011, submitted an itemized estimate summarizing the Plaintiff's loss and quantifying it in an amount of $8,653.47 (R. 744). Applying the Plaintiff's deductible the "net claim" was valued (by the Defendant) at $6,153.47 (R. 744). Massey also recommended that an expert cabinet maker inspect the Plaintiff's kitchen. It eventuated that Massey's April 20, 2011 report was missing its last page [not obtained by the Plaintiff until suit was filed, R. 744; R. 1457]. Be that as it may, the report itself itemized [by line item] the work Massey deemed necessary!

Alan Schmidt was the (Defendant's) expert cabinet maker assigned the task of inspection and, on May 12, 2011, Schmidt inspected the Plaintiff's kitchen. On May 13, 2011, Schmidt issued his report estimating the cost of "repair" (refinishing) to be

$2,585.00 and his estimate for the "replacement" cost to be $19,065.00 (R. 295). As to Schmidt's "repair" estimate, it provided no line item breakdown. As to his estimate for "replacement" costs, his report was quite clear:

> "Replacement cost... does not include removal of any appliances, counter tops, plumbing, electrical work, or other types of restoration. The sink base cabinet is water damaged. The bottom panel is swollen. Support granite top. Replace 3' base cabinet and toe kick and finish to match. Reuse existing wood raised panel doors." (R. 295).

To state the obvious, and to underscore an established fact, Schmidt's estimate (for the "replacement" cost) of $19,065.00 did not include, and was not intended to include, the remaining necessary costs that the insured would have to expend, such as plumbing, electrical work or other types of restoration!

As will be discussed in more detail, infra, and as his deposition revealed, Schmidt's "repair" estimate [as with his "replacement" estimate,] did not take into account the cost of a needed plumber, the cost of a needed electrician, and further did not include any figures for removal of the appliances, the counter tops, or the like! (R. 789, 790, 791). Schmidt, as an expert cabinet maker, readily admitted that in doing the job he would need the assistance of other people (R. 789) and that the costs associated with plumbers and electricians were not part of his estimate (R. 789)! Consequently, it may be stated, that on the facts of this case, it is clear that even in

a "repair" setting, retaining sub-contractors such as plumbers or electricians and arranging all schedules would have to be done either by the homeowner himself or through the services of a general contractor (R. 789) as the hiring of such sub-contractors, as Schmidt admitted:

> "... that's not my business.." (R. 796).

In any event, on June 17, 2011 the Defendant wrote to the Plaintiff:

> * * *
>
> Enclosed please find an undisputed payment draft for the damage associated with the above mentioned loss. The draft in the amount of $6,153.47 is issued to you and Platinum Public Adjusters, Inc. Your Coverage A dwelling payment breakdown is as follows:

Coverage A	**Amount**
Gross Loss	$8,653.47
Less Deductible	$2,500.00
Amount Payable:	$6,153.47

* * * (R. 266-269)

Given that the Plaintiff's Public Adjuster had estimated Plaintiff's loss in an amount of $63,999.57 (R. 1475-1477), and no compromise figure had been reached, by letter dated August 24, 2011, the Defendant advised the Plaintiff:

> "... Chris Berry has been attempting to settle this matter through negotiations with your Public Adjuster, Martin Rosenberg of Platinum Public Adjusters. However, they were unable to reach an agreement. Mr. Rosenberg has stated we should close out our file. If you or Mr.

> Rosenberg wish to re-open negotiations, please contact us and we will re-open this file..." (R. 270).

C.

THE LAWSUIT AND THE DISCOVERY DISCLOSURES

1.

"THE PLEADINGS"

The parties not being able to reach an agreement over the amount needed to put the Plaintiff into a pre-loss status, Plaintiff sued the Defendant. (R. 1-7). When Plaintiff, through discovery, obtained the last page of Adjuster Massey's estimate and learned, from its review, that said estimate did not include an amount for contractor's "overhead and profit," Plaintiff sought, and obtained, leave to amend his Complaint (R. 341, 338-394) which, as amended, alleged in pertinent part:

* * *

COUNT I
BREACH OF CONTRACT

* * *

> 18. The Policy requires the Insurance Company to pay for the replacement cost of the damaged property. The Insurance Company failed to do so, breaching the Policy.
>
> 19. The Policy and Florida law require the Insurance Company under this Policy to pay for overhead and profit as part of the adjustment and payment of the loss of the damaged property. The Insurance Company failed to pay for overhead and profit (on the undisputed amount

> tendered), breaching the Policy, which also was in violation of Florida law.
>
> * * * (R. 343, 344)

The Defendant answered the Amended Complaint (R. 662), denied the material allegations and in so doing highlighted the essence of the dispute:

> * * *
>
> "11. Denied. Defendant issued payment to the Plaintiff for the replacement of the reported damaged property, i.e., the kitchen sink cabinet. The payment exceeded the replacement cost as it allowed for any incidental plumbing and/or electrical cost associated with the replacement cost of the kitchen sink cabinet. Overhead and profit was not due as, at the time of the reported loss and prior to the subsequent water loss at the Plaintiff's property, there was no indication whatsoever that it would be reasonably likely that the sink would need a general contractor for the repair. *See, Trinidad v. Florida Peninsula Co.,* 121 So.3d 433 (Fla. 2013) (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)."
>
> * * * (R. 663)

Of note, and as a matter of undisputed fact, at the time of the Defendant's answer to the Amended Complaint, it should be reminded that Massey's report did note the need for several tradesmen and the Schmidt estimate was exclusive of basically everything, except the cost for the "refinishing" of the cabinet itself!

2.

DISCOVERY AND THE FACTS

As heretofore noted, Plaintiff's initial Complaint did not make a claim for contractor "overhead and profit." When Plaintiff, during discovery, received Massey's complete estimate, specifically its summation page, ("Page 4"), Plaintiff discovered Massey had not included in her estimate, and hence payment to the Plaintiff, did not include, contractor "overhead and profit." The Defendant's payment to the Plaintiff did not include "overhead and profit" even though Massey's estimate contemplated (included) line items for matters such as removing (and resetting) electrical appliances, to wit: the refrigerator, the dishwasher and the oven; plumbing tasks such as removing (and resetting) the kitchen sink; removing and replacing the damaged "P-trap;" painting the walls of the kitchen and other (general) construction cleanup (R. 742, 743). While the Massey estimate was made up of an itemized (line by line) cost for such specific services [the "need" for same being recognized even by Massey] the estimate itself was silent as to who, what, or how the tasks themselves could be coordinated! Consequently, the last page of the Massey estimate became relevant to the Plaintiff's claim - - as the total of its line items did not take into account the (additional) amount that the Plaintiff would need to compensate a

general contractor for coordinating all of the various tasks and for its "overhead and profit."

Alan Schmidt, the Defendant's "expert" cabinet maker was retained by National Restoration [itself retained by the Defendant] to review the Plaintiff's loss (R. 1794-1880). Schmidt has no general contractor's license. (R. 782). By his own admission he is an expert on cabinetry (and wood) and was sent when Massey's recommendation to have a cabinet maker review Plaintiff's loss was approved by the Defendant. Schmidt made one visit and spent some 20 minutes at the Plaintiff's home (R. 788). It was his opinion that there existed no water damage to any other cabinetry other than the sink (base) cabinet (R. 788). He further opined that the cabinets could be repaired (refinished) without a total kitchen replacement. In explaining his opinion, at his deposition, he listed all the steps needed to be done (in the "repair" process) to put the Plaintiff's kitchen (back) into a pre-loss condition. At this point in time it is sufficient to remind that Schmidt admitted he was not a general contractor, he would need several additional tradesmen such as a plumber and an electrician in order to perform his "repair" (refinish) services, candidly conceding that he would need outside services in order to perform any electrical or plumbing work associated with the repair (R. 789, 790). That Massey delineated all of the numerous required tradesmen in her estimate cannot be disputed. Schmidt further admitted that

he would not hire such tradesmen as "that's not my business." (R. 796). Consequently, it may be stated without equivocation, that neither the estimate of Massey nor the "repair" or "replacement" estimate of Schmidt included the cost of a general contractor although Massey's report and Schmidt's deposition acknowledged the need for numerous sub-contractor services, even when only "repairing" (refinishing) the cabinets [in order to put the Plaintiff's kitchen (back) into its pre-loss condition.] More specifically, given the obvious need for numerous sub-contractors, it was more than "reasonably likely" - - indeed, it was almost a certainty - - that unless the insured was himself going to coordinate all the sub-contractors, a decision he rejected when he hired his general contractor, a general contractor would be required, no matter whether "repair" or "replacement" would be the final decision. Given the obvious need for numerous sub-contractors, "overhead and profit" should have been, but was not, included in the Defendant's "undisputed payment draft for the damages associated with the above mentioned loss..." (R. 266-268, 741-744).

As heretofore discussed, the Plaintiff retained the services of Martin Rosenberg, a Public Adjuster. His estimate of the amount needed to put Plaintiff's kitchen back into a pre-loss condition was $63,999.57 (R. 1455). His estimate included the costs of detaching and resetting various appliances, included the services

of a general contractor and included as well the "overhead and profit" to which a general contractor would be entitled. (R. 1455).

As the subject record further shows, the Plaintiff obtained a bid/proposal from a licensed general contractor [Nikon Contracting and Engineering, Inc.], which bid itemized the scope of work that needed to be done in order to place Plaintiff's kitchen (back) into a "pre-loss condition." Said estimate included "overhead and profit" for the service to be provided, as well as including and itemizing the costs for all necessary sub-contractors, to wit: the costs for an electrician, a plumber and the miscellaneous sub-contractors to complete the job - - in addition to the costs of the expert cabinet maker (R. 775-778). All costs were quantified.

Plaintiff's general contractor was Mr. Jean-Louis. His inspection of the Plaintiff's premise did not take place until October 21, 2012, one year and seven months after the water leak from the kitchen sink and several weeks after a water leak from the upstairs air conditioning closet (R. 409, 422, 432).

While the direct subject matter of this case remains the March 22, 2011 leak in the Plaintiff's kitchen, it must also be explained that in early October of 2012 Plaintiff's house had a second water related loss, this time due to an air conditioning leak on the second floor (R. 1429-1432). That leak caused water damage to the second floor air conditioning closet, hallway and walls. Water from that leak also

seeped down to the first floor through the first floor ceiling (R. 1430-1432). To fix the damage, a company made a hole in the first floor ceiling and installed a pump to dry out the moisture from the leak (R. 1431, 32). Plaintiff made a water damage claim to this Defendant for which claim the Defendant paid the Plaintiff $95,000.00 (R. 1431, 1432). As will be discussed, infra, this event (the "second leak") became an issue in the trial of this case as it related to the damages Plaintiff claimed from the initial (March 22, 2011) "leak" [as testified to by Plaintiff's expert witness, General Contractor, Mr. Jean-Louis,] as well as to the Defendant's argued defenses.

The above provides the background for Jean-Louis' visit in October of 2012. At that time he observed that the Plaintiff's home was under repair for the upstairs water leak. However, at all times, his opinion established a clear line of demarcation between the damage from the later, upstairs leak, and the damage caused by the subject (earlier) kitchen floor leak. His estimate included <u>only</u> the damages which he, in his expertise, assessed for the kitchen sink leak. At trial, the witness did not attempt to "break out" the "perceived" damage to the "upper cabinets" which may, or may not, have been caused by the second leak. However, he explained that it made <u>no difference</u> to him (given the integrated nature of the kitchen) in that <u>since the lower cabinets were damaged</u> (as a consequence of the leak from the kitchen sink,) <u>the entire kitchen had to be replaced</u> (T. 334, 344, 345; *See also:* R. 747, 748, 751).

Jean-Louis further opined that he could not repair the kitchen, as all the cabinets, molding, and the like had to be replaced given the kitchen's design! As he further explained, it was "all tied in." (R. 748, 750, 753). The witness was told to confine his inspection (and his ultimate estimate) to the kitchen sink leak, and so, as he stated, "I stayed with that." (R. 751, 761). Consequently, from the subject record, it may be stated that, in the opinion of the expert witness, given the kitchen's design, the entire kitchen would have had to have been replaced irrespective of the extent of the damage resulting from the subsequent upstairs leak (R. 761).

3.

"OVERHEAD AND PROFIT" AND THE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT'S BREACH OF CONTRACT FOR FAILING TO PAY GENERAL CONTRACTOR'S OVERHEAD AND PROFIT AND TO COMPEL PAYMENT OF SAME.

On January 21, 2014 Plaintiff moved for a "PARTIAL SUMMARY JUDGMENT ON DEFENDANT'S BREACH OF CONTRACT FOR FAILING TO PAY GENERAL CONTRACTOR'S OVERHEAD AND PROFIT..." (R. 671). Therein Plaintiff argued:

> "22. Plaintiff obtained a bid/proposal from a licensed general contractor (Nikon Contracting and Engineering, Inc.), which provided for the scope of work that needed to be done in order to place Plaintiff back in a pre-loss condition, as a result of the subject loss and damages he sustained..." (R. 678).

In addition to referencing Plaintiff's own expert on the subject issue, Plaintiff also called to the Court's attention that even expert cabinet repairer Schmidt, [the Defendant's expert witness,] when asked about his need for the assistance or services of sub-contractors affirmatively stated:

> "Generally, that would have to go through a GC. I personally can't assign, you know, a plumber even though he's a plumber, you know, contractor, whatever..." (R. 679).

Schmidt also testified that the repair job (according to his estimate) required/involved, at a minimum, woodwork, cutting of drywall, plumbing work, and electrical work. *See:* R. 679, at footnote 2 thereat.

On March 3, 2014, the Defendant filed its response to the Plaintiff's Motion arguing, in essence, that it had the right to repair the cabinets (not necessarily to replace the kitchen) and that the Plaintiff's reliance on the deposition testimony of the Defendant's expert witness Schmidt, as to the need for a "general contractor" [and hence that "overhead and profit" was owed:]

> "... is taken completely out of context and that further ignores the amount of the payment issued was more than enough to cover any overhead and profit that could have been incurred..." (R. 844).

Yet the amount submitted to the Plaintiff by the Defendant was based on Massey's estimate for a complete "repair" and clearly demonstrated, as a line by line

examination reflects, that numerous sub-contractors were necessary and that the estimate, hence the Defendant's payment, did not include any amount for "overhead and profit." The Defendant could not, and cannot, have it both ways! It paid the Plaintiff the total of what Massey estimated. That amount did not include "overhead and profit!" The Schmidt "estimates" not only contained no overhead and profit but they did not take into account, nor did the Schmidt deposition provide, the actual cost for any of the sub-contractor's, yet all estimates reflected the need for several of them. (R. 791). Simply stated, Massey's estimate, although recognizing the need for numerous sub-contractors, did not include overhead and profit! The Schmidt estimate, was woefully incomplete [as his deposition established. (R. 789-791, 796).]

As the issues were framed, Plaintiff's expert witness, General Contractor, Jean-Louis, established by competent, substantial evidence, what Massey knew all along, that there existed an absolute need for (numerous) sub-contractors such as a painter, an electrician, a plumber, a cabinet maker and various and sundry other minor sub-contractors. Massey's estimate recognized [as did the estimate of Plaintiff's expert] the need for the services of several sub-contractors and included payment for them. However, Massey's estimate did not include either the cost of a general contractor or factor into her estimate, a general contractor's "overhead and profit." Neither one of Schmidt's estimates, whether for "repair" or "replacement" included "overhead and

profit" although he admitted that sub-contractors would be needed on the job but that he would not hire a plumber or an electrician:

> "I'm not involved in that at all. That's not my - - that's not my business..." (R. 796).

Consequently, it may be stated, that at the time of the Plaintiff's Motion for Partial Summary Judgment the evidence was without conflict: whether the ultimate decision was to "repair" (refinish) the cabinets or "replace" (the entire kitchen), the Defendant never generated a fact question as to the "lack of" need for a general contractor, as both of its witnesses, Massey (in her paid estimate) and Schmidt (in both his estimates and in his deposition), underscored the need for several sub-contractors (tradesmen, if you will) to perform the necessary tasks! (R. 791). No witness testified in support of the Defendant's position, that there was no "reasonable likelihood" that a general contractor was not needed and no witness for the Defendant testified that putting the Plaintiff's kitchen (back) into a pre-loss condition would not require numerous sub-contractors! The one "undisputed" fact is that while the Massey "estimate" [and the payment tendered to the insured on such estimate] recognized the need for many separate and distinct tradesmen (obviously more than three) the estimate did not include contemplation of a general contractor or inclusion of a general contractor's overhead and profit! Hence, at the time of the hearing on the

summary judgment motion Massey, Jean-Louis, and even Schmidt recognized the need for numerous sub-contractors to bring the insured's premise back into a pre-loss condition. Moreover, as a matter of undisputed fact, the insured, Mr. Gal, had made the decision that he was not going to "coordinate" all of the necessary sub-contractors and so it became a given fact that not only was it "reasonably likely" that the insured would need a general contractor, it was an established fact that he did hire a general contractor and there existed no evidence presented by the Defendant to establish why it was "unreasonable" for the insured to have hired a general contractor!

The parties argued their respective positions at a hearing held on March 19, 2014 (R. 1724-1793). By order dated March 24, 2014 the trial Court granted Plaintiff's Motion (R. 907), essentially establishing that the Defendant breached the subject contract in failing to pay Plaintiff pursuant to the insurance policy's terms and conditions.

4.

TRIAL AND THE DEFENDANT'S LACK OF EVIDENCE

While the trial court's ruling on the Plaintiff's Motion for Partial Summary Judgment [as to the issue of "overhead and profit"] established a contract breach and therefore resolved one of the two claims advanced by the Plaintiff - - still remaining was the underlying issue of what was the cost to place Plaintiff's kitchen (back) into

a pre-loss status. Plaintiff maintained (through its general contractor) that the kitchen, given its integrated status, needed to be replaced (in its entirety) while the Defendant, through Schmidt, admittedly not a general contractor, asserted he could repair the cabinets without replacing the entire kitchen. As the trial on the issue of "repair" versus "replacement" approached, the parties filed numerous motions which were heard on the morning of trial (T. 3-183).

On the morning of trial the Court heard argument on these numerous motions. (T. 1-221). The trial Court granted the Plaintiff's Motion for Partial Summary Judgment as to "replacement" versus "repair." The record before this Court reflects much colloquy and argument. There exists no doubt that the trial Court stated (on the record) that there existed "only" one issue to be tried, to wit: "... the cost of the full replacement of the kitchen cabinets..." (T. 166, 167). That ruling was squarely based upon the Defendant's failure to present competent, substantial evidence which would have quantified (in its entirety) the cost of the "repair" (refinishing) of the cabinets! Because of the Defendant's failure to produce evidence quantifying the "total cost" of repair, the issue of "repair" versus "replacement" remained a paper issue. The trial Court ruled for the Plaintiff on this issue because, as the record reflects and, as a matter of fact, the Defendant failed to establish the total cost of the (repair) job! The Defendant tendered no expert witness (general contractor or not) to quantify the

amount of money it would have taken for Schmidt to complete the entire repair job. While it is true that Schmidt could have testified that $2,585.00 was the cost to "repair" (refinish) the cabinets, said figure was limited, by his own deposition testimony, solely to what the actual cost of refinishing was (R. 791). Neither Schmidt nor any other defense witness tendered any evidence to quantify how much money it would have taken to complete the entire repair job, that is, to remove the cabinets, disconnect all electrical appliances, remove the plumbing, so as to be able to "refinish the cabinets," and then reverse the process (to then re-install). From a factual standpoint, the above comprised the entire evidence presented by the Defendant to generate a fact question in support of its position that it was entitled to go to the jury on the matter of "repair."

While the above fully addresses the Defendant's evidentiary deficiencies in attempting to generate a fact question in support of its "repair" theory, the matter of "replacement" likewise needs to be addressed.

In addressing that issue, one again turns to the Defendant's reliance upon Alan Schmidt, the expert cabinetmaker [assigned the task of inspection of the Plaintiff's kitchen and for estimating the cost of "repair" and "replacement." (R. 295).] As noted, supra, Schmidt's estimate for "replacement" costs:

> "... does not include removal of any appliances, counter tops, plumbing, electrical work, or other types of restoration..." (R. 295).

Since Schmidt's "replacement cost" estimate did, on its face, exclude the cost of all other tradesmen, Schmidt admitting that his work could not be accomplished without the aid of others (R. 789-796), Schmidt's opinion was factually and hence, legally, deficient (R. 791). Consequently, whether one turns to the correctness vel non of the trial court's ruling on the Plaintiff's Second Motion for Summary Judgment [or to the trial court's ruling in excluding Schmidt,] the trial Court was correct because Schmidt was neither a general contractor nor did his "replacement" estimate include the cost of other workers which he himself admitted he would need to complete his job (R. 791).

As to the other motions argued that morning and, more specifically, to the trial court's rulings, the trial Court did not directly rule that a "general contractor" was required, the trial Court reviewed the evidence and concluded that none of the witnesses tendered (by the defense) could, or did, quantify what the (total) cost was to "repair" or to "replace!" In his deposition, Schmidt admitted he would need the services of other contractors to complete the job. He could not quantify the amount of money needed to accomplish that task. His handwritten estimate as to "replacement" specifically excluded all of the costs associated with the necessary sub-

contractors. His deposition did not "fill in the blanks" as to what those costs would be. Whether required or not, the Defendant had no general contractor. A review of the remaining witnesses tendered by the defense as to these pertinent issues reflects the following.

As heretofore discussed, Betty Massey was an independent adjuster from the adjusting firm of CatManDo, Inc. However, and as the record reflects, she was not offered as a witness for any purpose! The proffered testimonies of Schmidt and Ron Jacobson, of the National Insurance Claims Service for Furniture Restoration and Cabinet Restoration never quantified anything as to the amounts at issue. If the issue was, from inception, what was the cost to place Plaintiff's kitchen into a pre-loss condition, the trial Court ruled, as the record reflects, that the Defendant failed to generate a fact question, as no defense witness explained what the total cost would be for either "repair" (refinishing) of the cabinets or for "replacement" (of the entire kitchen). The trial court's rulings were based upon the Defendant's failure to present evidence and not on the trial Court's failure to appreciate "the meaning of replacement cost policy." As will be argued, infra, the District Court's conclusions in these regards are not supported by the appellate record. What the record does reflect is that the Plaintiff's expert witness / general contractor was the only witness who not only qualified to address the issue, but the only one who did provide a

(legally) cognizable figure! Consequently, after all the colloquy, argument and rulings were concluded, it was established that there existed no genuine issues of disputed fact, save for the jury to consider the cost to bring Plaintiff's kitchen back into its pre-loss condition

As to the testimony of Jean-Louis, the Plaintiff's general contractor, it was clear from inception, from his deposition, that because the kitchen was integrated, he was going to have to "tear out" and replace the entire kitchen irrespective of whether the "upper cabinets" were damaged by water (from the upstairs leak) or were not damäged at all! (R.748, 751, 761; T.334, 344, 345). At all times pertinent, the issue was not, and never was, "damage" from the second floor (second) leak but, rather, whether he could bring the Plaintiff's kitchen (back) to the pre-loss condition or not! If he could not match the wood, the stains and the like, as he said he could not do, (T.343-345) then it was for the jury to pass upon his credibility and to determine whether he could, or could not, and consequently, whether his costs were reasonable. The matter of damage to the kitchen from the upstairs leak was irrelevant and immaterial to his opinion. The Defendant presented no counter-evidence. As an aside, merely as a matter of fact, perhaps without any legal significance, the jury returned a verdict for an amount of money considerably less than the amount testified

to by Jean-Louis, who was cross-examined (on such costs) by Defendant's counsel (T.359-367; 421, 422).

D.

THE DISTRICT COURT OPINION

1.
"THE REVERSAL"

In reversing the trial Court, the District Court, in its opinion, identified four issues raised (on appeal) by the Defendant:

* * *

> "(1) Whether a replacement cost Homeowners' policy requires an insuror to replace damaged property, as a matter of law, or whether the insuror 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 insuror failed to pay a general contractor's overhead and profit; (3) whether the trial Court abused its discretion in striking all of the insuror's witnesses because they were not general contractors; and finally, (4) whether the trial Court abused its discretion when the Court prohibited the insuror from cross-examining the insured's expert as to matters that may have affected the witnesses' opinion..." (A. 1).

The Court agreed with the insuror on all four of the issues raised stating:

> "... the insuror should have had an opportunity to argue that it could repair the damaged property and that hiring a general contractor was unnecessary. Further, the insuror's witnesses should not have been stricken, nor should the insuror 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..." (A. 1 and 2).

It is not the intention of this Plaintiff to inject into this portion of the brief any argument. Suffice it to say at this juncture, as the record before this Court clearly demonstrates, the insuror had every "opportunity" to "argue" that it could repair the damaged property (and that hiring a general contractor was unnecessary) but never took advantage of that "opportunity" given that none of the witnesses presented in support of that "opportunity" was able to quantify the total cost of the "repair." Moreover, and, again, as the record before this Court clearly demonstrates, not one of the Defendant's witnesses testified that a "general contractor" would not be necessary. In the subject opinion the Court makes no mention of the fact that while Schmidt would have testified that $2,585.00 was the cost to "repair" (refinish) the cabinets, that figure was limited, by his own deposition testimony, solely to what the actual cost of the wood refinishing was (R. 791). Neither Schmidt nor any other defense witness tendered any evidence to quantify how much money it would have taken to complete the entire repair job, that is, to remove the cabinets, disconnect all electrical appliances, and remove the plumbing, so as to be able to "refinish the cabinets," and then reverse the process (to then re-install). From the face of the

subject record it is clear that the Defendant had every "opportunity" to "argue" that it <u>could</u> repair the damaged property and more than ample opportunity "to argue" that the hiring of a "general contractor" was "unnecessary" but took no advantage of that opportunity! In point of fact, the Defendant failed to take "advantage of that opportunity" on at least two separate occasions. The District Court's opinion is simply not well reasoned, indeed, there exists no reasoning in the opinion, no stated facts, no context, merely conclusions!

Plaintiff filed its "breach of contract" partial summary judgment motion on January 21, 2014 (R. 681). By the time the motion was filed the parties had already deposed both Schmidt and Jean-Louis. The Defendant already knew the arguable deficiencies in Schmidt's deposition. The Defendant already knew the opinions of Jean-Louis and the substance of his testimony. Schmidt was deposed on November 15, 2013 (R. 779). Jean-Louis was deposed on September 27, 2013 (R. 745). The hearing on the Plaintiff's motion was held on March 19, 2014 (R. 1724). At no time did the Defendant obtain a general contractor (or any other witness, expert or not) to tender an opinion why it was reasonably "unlikely" that Gal would need a general contractor. Moreover, the Defendant never obtained any expert witness (general contractor or not) to quantify that which Schmidt did not! At the hearing on Plaintiff's motion the Defendant argued (for reasons not herein pertinent) that Jean-

Louis be stricken as an expert witness and if not, although discovery was closed, that the Defendant be given leave to obtain its own general contractor (R 1738-1741). Two things should be noted. First, there does not seem to be any ruling (or order) obtained on the Defendant's *ore tenus* request. Second, assuming same has been overlooked in this record, there has never been any contention that the trial Court abused its discretion in denying the Defendant's request.

2.

"REMAND" AND THE NON-ADDRESSED ISSUES

At page 4 of the slip opinion the Court wrote:

> "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!"

As the record before this Court clearly demonstrates, the testimony of the Defendant's expert witness cabinet maker (Schmidt) established that he would need "outside services" in order to perform any electrical or plumbing work associated with the repair and further testified that he would not hire "them" as "that's not my business." (R. 796). Putting aside for a moment the obvious question, "whose business is it?" the Fourth District's opinion ignores the inherent deficiencies in the result reached. Upon "remand" if the opinion is allowed to survive, there will still exist a void as to what evidence a jury is to be presented (by the litigants) either in support of, or in

opposition to, the issue of "whether it is reasonably likely" that an insured would need a general contractor. Assuming such evidence could be provided, the next issue would have to address: What is the jury to be instructed regarding the "reasonable likelihood" that an insured would need a general contractor? The "void" in the opinion as it relates to the jury's instructions underscores a more pressing deficiency in the Fourth District's opinion, as this Plaintiff has just noted. Before one can formulate a jury instruction, one must need "evidence" in support of that instruction. The question which circumscribes the issues implicated herein may be asked as follows: Although an insuror is required to pay overhead and profit when the insured is "reasonably likely" to need a general contractor, what fact or facts prima facie establish such a "likelihood?" Asked in a more general way, the question becomes: What considerations (factual, legal or otherwise) are to be weighed by the jury in its determination of when an insured is "reasonably likely" to need the services of a general contractor for either the "repair" or "replacement" of property after the happening of an occurrence [under a homeowners' policy of insurance] such that it may be determined whether (or not) the insuror owes to the insured "overhead and profit." Case law suggests a "three tradesmen threshold." *See:* GOFF v. STATE FARM FLORIDA INSURANCE CO., 999 So.2d 684 (Fla. App. 2d 2008) and MEE v. SAFECO INSURANCE CO. OF AM., 908 A.2d 344 (Pa. 2006). If that is to be the

test, the subject record, properly viewed, more than adequately meets that test.

If the test is to contemplate nothing more, and nothing less, then the insured choosing not to serve as his own "general contractor" then the subject record, properly viewed, more than adequately (again) meets that test. If the answer to the heretofore posed question takes us into the realm of "expert testimony" then it is clear that the Plaintiff's expert witness, [hired by the Plaintiff who did not want to "serve" as his own general contractor,] met the test which then required the Defendant to generate a fact question on the issue. Where, as here, the Defendant presented no testimony to establish that it was <u>not reasonable</u> for the insured to hire a general contractor and where, as here, Massey's estimate <u>contemplated</u> the need for numerous sub-contractors (tradesmen) there existed no "genuine" issue of material fact and the trial Court quite properly granted summary judgment in the Plaintiff's favor. By no means does the Plaintiff suggest that the Fourth District's opinion was correct. For the reasons heretofore advanced, and which reasons will be fully argued, infra, the opinion should be quashed. However, even assuming it could be found to be "record supported" (which it is not) it is still deficient as it sends the case back to the trial Court without attempting, or seeking to attempt, to provide the answer to that which was not needed (to be answered) in TRINIDAD v. FLORIDA PENINSULA INSURANCE COMPANY, 121 So.3d 433 (Fla. 2013).

Lastly, the Court, at page 4 of the slip opinion, stated:

> "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' (internal citation omitted)..."

The record before this Court reflects that the insured initially moved for a partial summary judgment and made "these arguments" to the Court! Not one of the witnesses presented by the Defendant testified that there was "no need" for a general contractor. The "material facts" were not "in dispute." Consequently, the trial Court granted the Plaintiff's Motion for Partial Summary Judgment on the issue of entitlement to "overhead and profit." As will be argued, infra, the trial Court was correct in granting the Plaintiff's Motion for Partial Summary judgment on the issue of "overhead and profit."

III.

SUMMARY OF THE ARGUMENT

The Plaintiff would respectfully suggest to this Court that the trial Court neither erred in its summary judgment rulings nor abused its discretion in the several evidentiary rulings made. Consequently, the opinion of the Fourth District should be quashed and the trial court's rulings should, in all respects, be affirmed.

A.

The trial Court was correct in granting Plaintiff's first Motion for Partial Summary Judgment and ruling that the failure of the insuror to pay general contractor overhead and profit constituted a breach of contract.

The undisputed evidence of record establishes that the Defendant never created a fact question as to the "lack of" the need for a general contractor. No witness testified in support of the Defendant's position that there was no "reasonable likelihood" that a general contractor was not needed and, no witness for the Defendant testified that putting the Plaintiff's kitchen (back) into a pre-loss condition would <u>not require</u> numerous sub-contractors. One need look no further than the deposition of Schmidt to learn that, in this particular case, in order to obtain the necessary sub-contractors, Schmidt would have had to have the services of a general contractor, as he would not hire them. In contrast, Plaintiff's expert witness, general contractor, Jean-Louis, established by competent, substantial evidence, what the Defendant knew all along, to wit: that there existed an absolute need for (numerous) sub-contractors such as a painter, an electrician, a plumber, a cabinet maker, and various and sundry other minor sub-contractors. Indeed, Massey's estimate recognized the need for the services of several sub-contractors and Massey included payment for them!

Given the undisputed record facts of this case, it may be concluded that the Defendant never generated a fact question as to the "lack of" the need for a general contractor - -as both Massey and Schmidt recognized that numerous sub-contractors would be needed, whether one considered the job to be a "repair" or a "replacement." The trial court's ruling in this regard should be affirmed.

B.

The Plaintiff would respectfully suggest to this Court that the trial Court was correct in finding that the Defendant presented no competent, substantial evidence to generate a fact question as to the amount of money it would take <u>either</u> to "repair" or to "replace" the damaged property. The Plaintiff reaches this conclusion because none of the witnesses tendered by the Defendant could, or did, quantify what the total cost was to "repair" or to "replace" the Plaintiff's kitchen. The trial court's ruling was based upon the Defendant's failure to present evidence. That ruling should be affirmed in all respects.

C.

The trial Court acted well within its considerable discretion (1) in precluding the Defendant's proffered damage witnesses where their opinions were legally incomplete; and, (2) in precluding evidence of the October 2012 (subsequent) water loss where same was irrelevant to the opinions rendered. The record before this Court

reflects that neither Schmidt nor any other defense witness tendered any evidence to quantify how much it would have cost to complete the entire repair, that is, to remove the cabinets, disconnect all electrical appliances and remove the plumbing, so as to be able to "refinish the cabinets" and then reverse the process (to then re-install). Moreover, since Schmidt's "replacement cost" estimate did, on its face, exclude the cost of all other tradesmen, Schmidt admitting that his work could not be accomplished without the aid of others, Schmidt provided no testimony as to the total cost of the kitchen replacement. Consequently, it should be found that the trial Court was correct in excluding Schmidt because he was neither a general contractor nor did his "replacement" estimate include the cost of other workers, which he himself admitted he would need to complete the job. An examination of the proffered testimony of Jacobson leads to the same result. The opinions of both witnesses were legally irrelevant under settled Florida law, therefore, the trial Court did not abuse its discretion in precluding their testimony.

The trial Court did not abuse its discretion in excluding evidence of the existence of the "second" water leak. The testimony of Jean-Louis was consistent. He believed it was necessary to replace the entire kitchen, therefore he did not concern himself with what caused the ceiling, upper cabinets and the molding to be damaged. As the entire thrust of Jean-Louis' opinion was that he would have to

replace the entire kitchen, as all was integrated, because he believed he could not match paint, color, hue, etc., and his credibility as to these matters was assessed by the jury, it should not be found on these facts that the trial Court abused its discretion in excluding evidence surrounding the "second" (upstairs) leak.

The opinion of the Fourth District should be quashed and the trial court's rulings should be affirmed in all respects.

IV.

ARGUMENT, INCLUDING STANDARDS OF REVIEW

The Plaintiff would respectfully suggest to this Court that the trial Court neither erred in its summary judgment rulings nor abused its discretion in the several evidentiary rulings made. Consequently, the opinion of the District Court of Appeal, Fourth District, should be quashed and the final judgment appealed should, in all respects, be approved by this Court.

A.

STANDARDS OF REVIEW

In passing on a motion for summary judgment, the function of the trial Court is to determine whether there is a genuine issue of any material fact and not to determine any issues of fact. *See, generally:* Florida Rule of Civil Procedure 1.510 and HOLL v. TALCOTT, 191 So.2d 40 (Fla. 1966). Moreover, as this Court stated

in TRINIDAD v. FLORIDA PENINSULA INSURANCE COMPANY, 121 So.3d 433 (Fla. 2013) *de novo* review is the appropriate standard of review of an order (or orders) granting summary judgment.

Equally well settled, a party cannot forestall the granting of relief on a motion for summary judgment by raising purely paper issues. *See:* COLON v. LARA, 389 So.2d 1070 (Fla. App. 3rd 1980) and authorities cited therein. Summary judgment is proper when a movant sustains the burden of proving the non-existence of a genuine issue of material fact. *See:* HOLL v. TALCOTT, supra. *See also:* KROUSE v. AVIS RENT A CAR SYSTEM, INC., 459 So.2d 1132 (Fla. App. 3rd 1984) and COLON, supra.

A trial Court has broad discretion in determining the scope of an expert witness testimony and its determination will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. *See:* WARNING SAFETY LIGHTS, INC. v. GALLOR, 346 So.2d 92 (Fla. App. 3rd 1977). In this regard, the trial Court's ruling must be viewed in the context of the trial as a whole. *See:* SIDRAN v. DUPONT, 925 So.2d 1040 (Fla. App. 3rd 2003).

B.

THE TRIAL COURT WAS CORRECT IN GRANTING PLAINTIFF'S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT AND RULING THAT THE FAILURE (OF THE INSUROR) TO PAY GENERAL CONTRACTOR OVERHEAD AND PROFIT CONSTITUTED A BREACH OF CONTRACT.

In reversing the final judgment appealed, and in determining that the trial Court committed reversible error, the Court stated as follows:

> "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 insuror 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 insuror was required to replace the cabinets, not repair them..." *See:* Slip Opinion, at page 3.

First, and foremost, in order to determine whether the trial Court erred in its ruling on the Plaintiff's Motion for Partial Summary Judgment it becomes necessary to briefly review Florida law on the subject matter of "overhead and profit."

In TRINIDAD v. FLORIDA PENINSULA INSURANCE COMPANY, 121 So.3d 433 (Fla. 2013) this Court addressed an issue regarding the scope of replacement cost insurance coverage under the applicable provisions of the Florida Statutes in effect in 2008, as is applicable herein. This Court sought to resolve the conflict between the Third District's opinion in TRINIDAD and the opinion of the

Second District Court of Appeal in GOFF v. STATE FARM FLORIDA INSURANCE CO., 999 So.2d 684 (Fla. App. 2d 2008). This Court resolved the conflict by holding (that):

> "... an insuror's required payment under a replacement cost policy includes overhead and profit, where the insured is reasonably likely to need a general contractor for the repairs, because the insured would be required to pay costs for a general contractor's overhead and profit for the completion of repairs in the same way the insured would have to pay other replacements costs he or she is reasonably likely to incur in repairing the property. Because Section 627.701, Fla. Stat. (2008), and the replacement cost policy in this case, did not require the insured to actually repair the property as a condition precedent to the insuror's obligation to make payment, the insuror was not authorized to withhold, pending actual repair, its payment for replacement costs, which is measured by what it would cost the insured to repair or replace the damaged structure on the same premises if the insured were to do so. Accordingly, we quash the Third District's decision ... and direct that this case be remanded to the trial Court to determine whether Trinidad is reasonably likely to need a general contractor for the repairs that encompass his covered loss..." 121 So.3d, at page 436.

The question of "when" an insured is "reasonably likely" to need a contractor for the repairs was addressed in GOFF, supra, which, as heretofore stated, was approved in TRINIDAD.

Although GOFF addressed the subject issue in the context of discussing "actual cash value" the analysis, since TRINIDAD, must be the same. "Overhead and profit" is due:

> "... where the insured is reasonably likely to need a general contractor for repairs..." GOFF, 999 So.2d, at page 689.

In stating the above, the Court in GOFF cited with approval to several out of state cases including MEE v. SAFECO INSURANCE CO. OF AM., 908 A.2d 344 (Pa. 2006). In that case, Mee, the insured, purchased a homeowner's insurance policy from Safeco covering his home. Mee suffered direct physical loss to his home as the result of an overflowing toilet. When Mee reported the loss to Safeco it sent a general contractor to inspect the damage to Mee's home and to provide Safeco with a repair and replacement cost estimate. The estimates did not include a line-item cost for general contractor's overhead and profit. Mee hired a Public Adjuster to inspect the damage and to provide a repair and replacement cost estimate. Suffice it to say at this juncture the parties there disagreed over what was an appropriate amount. Ultimately, the reviewing Court discussed the issue which is at the center of the controversy here. Noting that "repair and replacement costs logically and necessarily include any costs that an insured reasonably would be expected to incur in repairing

or replacing the covered loss" the MEE Court, citing to prior Pennsylvania law on the subject matter stated:

> "... there clearly are certain types of property damage claims which will not require the services of a general contractor. An example is where the loss involves only a damaged pipe, and a plumber alone normally would be called to perform all necessary repairs. In this respect, we therefore agree with State Farm's position that there are some types of covered losses where the services of a general contractor normally would not be utilized. Thus, in some cases, contractor expenses would not have to be included in repair or replacement cost estimates. Indeed (citation omitted) ['Insureds'] implicitly concede that general contractors are not always needed, noting that 'it is generally accepted in the building trade that if more than three trade categories of sub-contractors are involved in the repairs, the owner is entitled to the services of a general contractor to obtain bids, hire the sub-contractors and coordinate/supervise the work. ..." 908 A.2d, at pages 348 and 349.

In concluding its opinion in MEE, the Court reaffirmed the following settled legal principles of Pennsylvania law which clearly are directly applicable to the subject cause:

> "... repair and replacement costs include O and P where use of a general contractor would be reasonably likely... because the homeowner pays higher premiums for repair and replacement coverage, he is entitled to O and P where use of a general contractor would be reasonably likely, even if no contractor is used or no repairs are made... Expert testimony about industry standards may be used to answer whether use of a general contractor is reasonably

> likely... and, whether use of a general contractor is reasonably likely depends on the nature and extent of the damage and the number of trades needed to make repairs. This last principle necessarily requires consideration of the degree of coordination or supervision of trades required to make the repairs..." 908 A.2d, at page 350.

Apparently, given TRINIDAD, its approval of GOFF, and the reliance by GOFF upon MEE, it can (and should) be comfortably stated that the question of whether a "general contractor would be reasonably likely" presents a question of fact for the trier of fact and, while "expert testimony" about industry standards "may be used to answer that question," same is not mandatory. Whether the use of a general contractor is "reasonably likely" depends on the nature and extent of the damage and the number of trades needed to make repairs. As to the latter, same requires a consideration:

> "... of the degree of coordination or supervision of trades required to make the repairs..." MEE, supra, 908 A.2d, at page 350.

Given the above stated settled principles of law, the question of whether the trial Court was correct in granting Plaintiff's first Motion for Partial Summary Judgment and ruling that the failure to pay general contractor overhead and profit constituted a breach of contract, may now be addressed.

The undisputed evidence of record establishes that the Defendant never created a fact question as to the "lack of" the need for a general contractor. Both Massey (in her estimate) and Schmidt (in both his estimates and in his deposition), underscored the need for several sub-contractors (tradesmen, if you will) to perform the necessary tasks! No witness testified in support of the Defendant's position that there was no "reasonable likelihood" that a general contractor was not needed, and no witness for the Defendant testified that putting the Plaintiff's kitchen (back) into a pre-loss condition would not require numerous sub-contractors. One need look no further than the deposition of Schmidt to learn that, in this particular case, in order to obtain the necessary sub-contractors Schmidt would have had to have the services of a general contractor, as he would not hire them (R. 789, 790, 791).

Lastly, and as the issues were framed, Plaintiff's expert witness, general contractor, Jean-Louis, established by competent, substantial evidence, what the Defendants's Independent Adjuster, Massey, knew all along, to wit: that there existed an absolute need for (numerous) sub-contractors such as a painter, an electrician, a plumber, a cabinet maker and various and sundry other minor sub-contractors. Massey's estimate recognized [as did the estimate of Plaintiff's expert] the need for the services of several sub-contractors and Massey included payment for them! However, Massey's estimate did not include either the cost of a general contractor or

factor into her estimate, a general contractor's "overhead and profit." Neither one of Schmidt's estimates, whether for "repair" or "replacement" included the costs of sub-contractors, although he admitted that sub-contractors would be needed on the job (R. 796). Not one defense witness established the "reasonable likelihood" that Plaintiff would not need a general contractor!

Given the law on the subject matter, and the undisputed record facts of this case, it may be concluded that the Defendant never generated a fact question as to the "lack of" the need for a general contractor - - as both Massey and Schmidt recognized that numerous sub-contractors would be needed, whether one considered the job to be a "repair" or a "replacement."

The Plaintiff would respectfully suggest to this Court that TRINIDAD (and its progeny) acknowledge that overhead and profit must be included in the replacement cost of a covered loss when the insured is reasonably likely to need a general contractor for the repairs. The Plaintiff finds it somewhat ironic that the District Court reversed the partial summary judgment entered in favor of the Plaintiff on the issue of "overhead and profit" given the Plaintiff's decision to hire a general contractor as well as both Massey's estimate, which included the cost of numerous tradesmen and the opinion of the Defendant's expert witness whose opinion, while it did not quantify the cost to hire a plumber or an electrician, established that

numerous tradesmen would be necessary to complete the project. The "project" in this case, from the Defendant's standpoint, was merely "a repair." Assuming that the "reasonable likelihood" of the need for a general contractor is "fact based" the Defendant presented no facts establishing the "reasonable" likelihood that Gal would not need a general contractor. Where, as here, it is undisputed that it would take at least three "tradesmen" to accomplish the task either of "repair" or "replacement" and no expert testimony was produced by the Defendant that a general contractor would not be needed, that portion of the District Court's opinion which reversed the trial court's order granting the Plaintiff's motion for partial summary judgment on the issue of overhead and profit should be quashed.

C.

THE TRIAL COURT WAS CORRECT IN FINDING THAT THE DEFENDANT PRESENTED NO COMPETENT, SUBSTANTIAL EVIDENCE TO GENERATE A FACT QUESTION AS TO THE "COST" OF "REPAIR" AND/OR "REPLACEMENT."

The Plaintiff would respectfully suggest to this Court that the trial Court was correct in finding that the Defendant presented no competent, substantial evidence to generate a fact question as to the amount of money it would take either to "repair" or to "replace" the damaged property. The Plaintiff reaches this conclusion because none of the witnesses tendered by the Defendant could, or did, quantify what the total

cost was to "repair" or to "replace" the Plaintiff's kitchen. As heretofore discussed, in his deposition, Schmidt admitted he would need the services of other contractors to complete the job. He did not, and could not, quantify the amount of money necessary. His written estimate as to "replacement" specifically excluded all of the costs associated with the necessary sub-contractors. His deposition did not "fill in the blanks" as to what those costs would be. Moreover, Massey was not a contractor and was not tendered as a witness. When the time came to proffer the testimonies of Schmidt and Ron Jacobson, it was clear the opinions tendered were deficient. If, as it was argued below, that the issue that the jury had to decide was what the "total cost" was to place Plaintiff's kitchen into a pre-loss condition, then it must be acknowledged that the Defendant failed to generate a fact question because no defense witnesses explained what the total cost would be for either "repair" (refurbishing) or for "replacement" (of the entire kitchen). The trial court's ruling was based upon the Defendant's failure to present evidence. *See:* COLON, supra.

At page 1 of the Slip Opinion, the Court identifies four issues raised on appeal. The Court identified the first issue as:

> "(1) Whether a replacement cost Homeowners' Policy requires an insuror to replace damaged property, as a matter of law, or whether the insuror may limit its liability and repair the property..."

Having stated the above, the Court , at page 3 of the Slip Opinion, stated:

> "The trial Court also found that, because the insurance policy was a 'replacement cost policy,' the insuror was required to replace the cabinets, not repair them..."

At page 3 of the Slip Opinion, as to this issue, the Court further wrote:

> "The trial Court concluded that 'replacement cost" meant that the insuror had to replace, rather than repair, the cabinets. We reverse as the trial Court incorrectly interpreted what a 'replacement cost policy" is..."

Putting aside for a moment the fact that the subject opinion does not identify the specific ruling of the trial Court nor the context of the trial court's ruling, which, is found in the record at (T. 130-134; 153-156; 164-168; 170-175) the following should be noted. Whether, during the colloquy between the Court and all counsel, the Court may have given Defendant's counsel the impression that he did not fully understand "the meaning of replacement cost policy" such impression - even if true - is irrelevant. The trial court's ruling was correct. Absent evidence, the Defendant did not generate a fact question as to either the "cost" of the repair or the "cost" of the replacement. *See:* HOLL v. TALCOTT, supra, and KRAUSE v. AVIS RENT A CAR SYSTEM, INC., supra. Consequently, it should be found that the trial Court was correct in finding that the Defendant presented no competent, substantial evidence to generate a fact question as to the total "cost" of either "repair" or "replacement." *See:*

ROBERTSON v. STATE, 829 So.2d 901 (Fla. 2002) and DADE COUNTY SCHOOL BOARD v. RADIO STATION WQBA, 731 So.2d 638 (Fla. 1999). *See also:* JOHNSON v. CHRISTIANA TRUST, 166 So.3d 940 (Fla. App. 4th 2015) - - "If a trial Court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."

D.

THE TRIAL COURT ACTED WELL WITHIN ITS CONSIDERABLE DISCRETION (1) IN PRECLUDING THE DEFENDANT'S PROFFERED DAMAGE WITNESSES WHERE THEIR OPINIONS WERE LEGALLY INCOMPLETE; AND (2) IN PRECLUDING EVIDENCE OF THE OCTOBER 2012 (SUBSEQUENT) WATER LOSS WHERE SAME WAS IRRELEVANT TO THE OPINIONS RENDERED.

In reversing the trial Court the District Court further addressed the following issues:

* * *

> "(3) Whether the trial Court abused its discretion in striking <u>all of the insuror's witnesses</u> because they were not general contractors; and finally, (4) whether the trial Court abused its discretion when the Court prohibited the insuror from cross-examining the insured's expert as to matters that may have affected the witnesses' opinion..."

The District Court agreed with the Defendant as to the above.

As to the District Court's finding that the trial Court abused its discretion by striking "all" of the Defendant's witnesses, the Plaintiff would respectfully suggest to this Court no abuse of discretion occurred.

First, and foremost, it should be noted that "all" included only "Schmidt" and "Jacobson."

Second, the record before this Court reflects that Schmidt was not a general contractor. While Schmidt's deposition established his opinion that the water damaged lower cabinets could be "repaired" his opinion was incomplete. It was incomplete because the Defendant tendered no other (expert) witness (general contractor or not) to quantify the amount of money it would have taken for Schmidt to complete the entire repair job given his own admissions that he could not, as a cabinetmaker, hire a plumber, electrician, etc. While Schmidt could have testified that $2,585.00 was the cost to "repair" (refinish) the cabinets, that figure would have been misleading, at best, legally insufficient at worst. Schmidt's own deposition reflected that said number was limited solely to the cabinets. Neither Schmidt nor any other defense witness tendered any evidence to quantify how much it would have cost to complete the entire repair, that is, to remove the cabinets, disconnect all electrical appliances, and remove the plumbing, so as to be able to "refinish the cabinets" and then reverse the process (to then re-install).

The conclusions reached by the District Court fair no better when one turns to the evidence regarding "total replacement of the kitchen." Since Schmidt's "replacement cost" estimate did, on its face, exclude the cost of all other tradesmen, Schmidt admitting that his work could not be accomplished without the aide of others, Schmidt provided no testimony as to the total cost of the kitchen replacement. The trial Court was correct in excluding Schmidt because he was neither a general contractor nor did his "replacement" estimate include the cost of other workers, which he himself admitted he would need to complete the job.

A review of the proffered testimony of Jacobson leads to the same result. As none of the witnesses tendered could, or did, quantify what the total cost was to "repair" or to "replace," their opinions were legally irrelevant under Section 90.401, Fla. Stat. - -"relevant evidence is evidence tending to prove or disprove a material fact." Neither witness supplied any evidence as to what was the most "material" of the disputed facts, and that was: what the "total" cost of "repair" or "replacement" would have been! Since the Defendant presented no competent, substantial evidence to generate a fact question, the trial court's ruling was correct. Consequently, the trial Court did not abuse its discretion in precluding their testimony. *See:* GALLOR, supra, and SIDRAN, supra.

As to the District Court's reversal of the trial court's ruling concerning the excluding of evidence of the "subsequent incident" no abuse of discretion occurred.

Jean-Louis readily admitted that some of the ceiling damage and damage to the upper crown molding was caused by the second water leak. However, what the District Court did not address is that Jean-Louis testified that <u>he did not consider the upstairs leak in his estimate</u> (R. 761). As his deposition testimony established, because the kitchen was integrated, he was going to have to "tear out" and replace the entire kitchen <u>irrespective</u> of <u>whether</u> the "upper cabinets" were damaged by water (from the upstairs leak) or were not damaged at all (R. 761). As to his testimony, the issue is not, and never was, "damage" from the second floor, [the second leak,] but rather, <u>whether</u> he could bring the Plaintiff's kitchen (back) to the pre-loss condition or not and, if so, what was the cost?. If he could not match the wood, the stains and the like, <u>as he stated he could not do,</u> (T. 344, 345) then he was going to tear out everything in the kitchen for a total replacement (T. 334, 340, 345). Consequently, evidence as to <u>whether</u> the ceiling, upper crown molding, or upper cabinets were damaged <u>as a consequence</u> of the second floor leak, was irrelevant. Jean-Louis was consistent in his testimony. As he believed it was necessary to replace the entire kitchen, he did not concern himself with what <u>caused</u> the upper cabinets and molding to be damaged.

First, and foremost, the testimony given by Jean-Louis in his deposition was consistent with his trial testimony. Consequently, there was nothing for the Defendant to impeach him with. *(See:* T. 216, 217)

At page 5 of the Slip Opinion, the District Court stated:

> "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 (internal citations omitted)... Thus, the insuror should have been given the opportunity to present facts that may weigh on the reliability and credibility (of) the opinion of the insured's expert (internal citations omitted)..."

However, a trial Court has broad discretion in determining the scope of an expert witness testimony and the trial court's ruling in this regard will not be disturbed (on appeal) in the absence of a clear showing of an abuse of discretion. In the instant cause, the entire thrust of Jean-Louis' opinion was that he would have to replace the entire kitchen, walls, ceiling, molding, etc., because <u>he believed</u> he could not match paint, color, hue, etc. <u>His credibility as to these matters was assessed by the jury.</u> <u>The jury</u>, in the exercise of its discretion, returned a verdict less than Jean-Louis established. Whether the ceiling, the walls, the molding at the top of the kitchen were water damaged (from the upstairs leak) or were in perfect shape made not a bit of difference to Jean-Louis. It was his belief that he needed to replace the entire kitchen

because he could not "match" the rest of the kitchen to the damaged area and the insured did not want a "patchwork quilt" for a kitchen. (T. 334-336). It should not be found on these facts that the trial Court abused its discretion in excluding evidence surrounding the "second" (upstairs) leak. *See:* GALLOR, supra, and CANAKARIS v. CANAKARIS, 382 So.2d 1197 (Fla. 1980).

V.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Plaintiff respectfully urges this Honorable Court to quash the decision of the District Court of Appeal, Fourth District, and to affirm, in all respects, the final judgment entered in favor of the Plaintiff, David Gal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing ***Brief and Appendix of Petitioner on the Merits (Conflict Certiorari)*** was served via e-mail upon the following counsel of record this **25th** day of **May, 2017**.

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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
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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

[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.