In the Supreme Court of Florida

CASE NO.: SC16-2190

DAVID GAL,

Petitioner,

v.

PREPARED INSURANCE COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

Respectfully submitted,

DIAZ BRISCOE MEDINA, P.A.
100 S.E. 2nd Street, Suite 3310
Miami, Florida 33131
Telephone: (786) 866-3377
-and-
RUSSO APPELLATE FIRM, P.A.
7300 North Kendall Drive, Suite 600
Miami, Florida 33156
Telephone: (305) 666-4660

Counsel for Respondent

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STATEMENT OF THE CASE AND FACTS[1]

A. Introduction and nature of appeal

This case arises out of a water leak from the kitchen sink in Plaintiff/Petitioner David Gal's ("Plaintiff") house that caused some water damage to the cabinet under the sink. (R 2, pp 253-255, 341-345). Plaintiff submitted a claim under his homeowners policy with Respondent Prepared Insurance Company ("Prepared") asserting that, because he wanted to make sure that all of the cabinets in the kitchen would match, they all needed to be torn out and replaced at a cost $107,902.50. (R 2, pp 341-394; R 4, p 777, R 6, pp 1007-1022). A cabinetry expert consulted by Prepared said that he could completely restore the one water-damaged cabinet to its pre-loss condition at a cost of $2,585.00, and that there was no need to tear out the whole kitchen full of cabinets. (R 2, p 295, R 10, pp 1840, 1848).

It was this fact dispute that was presented in the trial court. (R 6, p 1102). But, instead of proceeding to trial for the parties to present their differing loss amounts to the jury with the respective rationales therefor, the case was completely derailed by a series of errors by the trial court. First, the trial court entered a summary judgment on liability, holding that Prepared breached its contract with the Plaintiff because its

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[1] References to the Record on Appeal appear by volume and page number, as follows: (R __ , p __). References to the trial transcript are also by volume and page: (T__ , p __). Unless otherwise indicated, all emphasis in this brief is supplied by undersigned counsel.

payment on the loss did not include an amount for overhead and profit for a general contractor. (R 5, p 907). Prepared's evidence showed that the loss could be addressed in full by repairing the one cabinet under the sink, and, in moving for summary judgment, Plaintiff had not presented any evidence that a general contractor was required for that repair job. (R 5, pp 839-851) There was thus no basis for the *summary judgment* ruling that Prepared had breached the contract by not paying general contractor overhead and profit. (*Id.*).

The summary judgment then led to a cascade of additional erroneous rulings that eventually culminated in a trial at which Prepared was disallowed from presenting any evidence of its side of the case. The trial court struck all of Prepared's witnesses who would testify about repairing the cabinet, concluding that the homeowners policy was a replacement cost policy, such that any and all losses require replacement; repairs are not allowed. (T 1, pp 129, 142, 162, 164-167, 206). Based on this conclusion, the trial court allowed only the Plaintiff to put on evidence through his expert general contractor as to his estimate for the replacement costs. (*Id.*). The trial court also excluded Prepared's evidence of a subsequent upstairs water loss for which Plaintiff made a claim and for which Prepared had paid him some $95,000.00. (T 1, pp 129, 131-132). Plaintiff's expert had testified that he first inspected the house after the second - and major - upstairs water leak, and that his damage estimates for kitchen repairs did not differentiate between the two separate

water damage events. (R 3, pp 410-414, 422).

Only the Plaintiff was allowed to put on evidence as to what he thought should be paid for the loss. The case was then submitted to the jury, over Defendant's objection, on just two questions asking how much money would be "sufficient/adequate" to pay Plaintiff. (T 2, p 413).

Following the virtually mandated jury verdict in Plaintiff's favor, Prepared appealed, raising four issues. The Fourth District summarized the issues and ruled in Prepared's favor as follows:

> The appellant [Prepared], 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.

Prepared Ins. Co. v. Gal, 209 So. 3d 14, 15 (Fla. 4th DCA 2016).

Plaintiff then sought review by this Court, claiming express and direct conflict

with *Trinidad v. Fla. Peninsula Ins. Co.,* 121 So. 3d 433 (Fla. 2013) and *Colon v. Lara,* 389 So. 2d 1070 (Fla. 3d DCA 1997). The Court accepted jurisdiction, with three Justices dissenting. As discussed below, Prepared believes that the Court should reconsider its acceptance of this case for review as there is no direct and express conflict with either *Trinidad* or *Colon.* Further, this is a very fact specific case involving already established law that does not present any basis or need for more far-reaching legal rulings.

If the Court proceeds with review, the Fourth District's disposition of the case should be affirmed; new trial is warranted on the basis of any of the Fourth District's four independent reasons for ordering new trial.

B. Pertinent facts and proceedings

1. The March 22, 2011 water damage incident and claim under Plaintiff's homeowners policy

After leaving dirty dishes soaking in water overnight, Plaintiff discovered his kitchen sink had a minor leak on March 22, 2011, resulting in some water damage to the underneath cabinet. (R 2, pp 253-255, 341-345; R 8, p 1414). Plaintiff made a claim under his homeowners policy with Prepared. (R 2, pp 346-394).

2. Prepared's investigation and loss payment

Prepared retained independent adjuster Elizabeth Massey to inspect the property and provide a loss estimate. (R 2, pp 264-265; R 8, pp 1515, 1548, 1554). The adjuster's estimate to address the loss was $8,533.68. (R 4, pp 657-660). But,

because it was a kitchen cabinet that had been affected, she recommended that Prepared retain a cabinetry specialist due to her inexperience in dealing with custom cabinetry. (R 8, pp 1519-1520, 1556-1557; R 9, pp 1756-1757).

Prepared hired National Restorations, LLC, which assigned Alan Schmidt, a cabinetry specialist, to inspect and provide estimates both for repair and for replacement. (R 10, pp 1828, 1843; T 1, pp 251-252). Mr. Schmidt inspected the property on May 12, 2011, and found that the water leak had damaged the cabinet under the kitchen sink. (R 10, pp 1827-1828, 1832). He "saw no other damage to any other cabinetry other than the sink base cabinet." (R 10, p 1832).

Mr. Schmidt reported back to the National Restorations representative, who reviewed Mr. Schmidt's photos, pricing, and scope of work, and prepared a cost estimate of $2,585.00 for the work to restore/repair the cabinet. (R 10, pp 1842-1843; R 2, p 295; R 9, p 1757). At National Restoration's request, Mr. Schmidt also prepared a proposal for a full replacement of all cabinets, which he estimated at $19,065.00. (R 10, p 1843). Though he prepared both proposals as requested, Mr. Schmidt guaranteed that he could repair the cabinet under the sink to restore it fully to its pre-loss condition and appearance, matching it exactly with the other cabinetry. (R 10, pp 1840, 1848).

Adjuster Massey's estimate was prepared before Mr. Schmidt had gone out and provided his assessment that only repair of the under-sink cabinet was needed. Ms.

Massey's estimate included amounts for clean-up, painting, removing and resetting the kitchen cabinets and appliances, and other items that were not necessary according to Mr. Schmidt. (R 10, pp 1842-1843; R 2, p 295). While Mr. Schmidt's restoration proposal was for considerably less than Ms. Massey's original estimate, Prepared decided just to go ahead and to issue a payment representing Ms. Massey's full estimate amount of $8,653.47 less the policy deductible of $2,500.00, for a figure of $6,153.47. (R 2, pp 266-267).

3. Plaintiff's opinion that the cabinet could not be made to match again

Plaintiff retained public adjuster Martin Rosenberg who would estimate the damages related to the water leak, and receive 20% of the total amount in damages recovered. (R 2, pp 283). Mr. Rosenberg was not a cabinetry specialist, but he nonetheless opined that all of the cabinets in the kitchen should be torn out and replaced because the one water-damaged cabinet could not be restored so as to match the remaining kitchen cabinets. (R 8, pp 1456-1460). He estimated the cost to replace all the kitchen cabinets at $63,999.57, and Plaintiff submitted this estimate to Prepared. (R 2, pp 264-265, 285-294; R 8, p 1513).

4. Plaintiff's lawsuit

Instead of trying Mr. Schmidt's approach to restoring the cabinet in question, Plaintiff filed suit for breach of contract in September of 2011, alleging that Prepared had underestimated the damages and failed to fully pay the loss. (R 2, pp 341-345).

Prepared answered, in pertinent portion denying Plaintiff's allegations. (R 4, pp 662-670).

5. The subsequent - unrelated - water loss in early October of 2012

In early October of 2012, a year and a half after the kitchen sink leak at issue here, Plaintiff's house had a second water-related loss, this time due to an air conditioning leak on the second floor. (R 8, pp 1429-1432). That leak caused water damage to the second floor A/C closet, hallway, and walls, and water also seeped down to the first floor through the first floor ceiling, including the kitchen ceiling. (R 8, pp 1430-1432). To fix the damage, a company made a hole in the first floor ceiling and installed a pump to "suck all the humidity down for two weeks" to dry out the moisture from the A/C leak. (R 8, pp 1431-1432). Plaintiff made a water damage claim to Prepared for this second incident, too, for which Prepared paid Plaintiff $95,000.00. (R 8, pp 1431-1432).

The second water damage claim became significant in this case because the loss estimate prepared by Plaintiff's expert and submitted to the jury included damage from both leak incidents; but Prepared was prohibited from telling the jury that the estimate covered two leak incidents, not just the incident for which they were supposed to award damages. (T 1, pp 129, 131-132).

6. The October 21, 2012 estimate by Plaintiff's expert

A year and a half after the kitchen sink leak in March of 2011 - and a year ***after*** Plaintiff filed suit alleging breach of contract by Prepared - Plaintiff's attorney ***for the first time*** retained a general contractor and asked him to provide an estimate, including for tearing out and replacing all of the kitchen cabinets. (R 3, pp 409-410, 422, 432). The general contractor, Serge Jean-Louis, first inspected the house on October 21, 2012, a year and seven months ***after*** the first water leak from the kitchen sink, and several weeks ***after*** the second water leak from the upstairs A/C closet. (*Id.*). Plaintiff asked only for an estimate for damages resulting from the kitchen sink water leak (*Id.*), but, when Mr. Jean-Louis testified, he said he had not differentiated between the two:

> Q. Tell me, when you went out to Mr. Gal's property the first time, in October of 2012, what was the damage you observed?
>
> A. I could see the dehumidifiers everywhere going off ... * * *
>
> You could see, where the kitchen was, the ripple of the sheetrock. And that's obviously signs of water damage ... But you could see where it went towards the kitchen. And when I went upstairs, that's where most of the water damage was, above where the kitchen area was. So they cut out the ceiling in the -- When you first walk into the foyer, they cut out the ceiling there and they stuck the hose, or whatever they had to do, to dehumidify inside there. ***So that's when I noticed the water damage was to the cabinets, as well. Whatever was above it came either on top of it, behind it, and I guess that humidity warped some of the wood and what have you.***

(R 3, pp 410-411). Mr. Jean-Louis said that he did not distinguish between the first

and second water damage incidents:

> Q. So my question to you is, the kitchen damage that you just described to me on the upper cabinets, ***what is your opinion or understanding as to whether or not that damage was a result of that second floor loss or the previous kitchen loss?***
>
> A. I just went there to see what was happening, period, and I just saw water damage. ***I didn't ask when it happened, how it happened. I saw dehumidifiers there, so my assumption, it was a current, you know, happening, I guess you can say.***
>
> * * *
>
> I mean, it seems like we were just focusing on the ceiling. But this was pretty much, from what I understand from even the pictures and just the damage that I saw on the baseboard, that it was from an under sink leak that happened or occurred in combination, maybe, I don't know - you know, I don't have a crystal ball - in combination maybe with what was going on in the ceiling. But the majority of the actual cause what I was investigating was, you know, the pipe leak.

(R 3, pp 411, 422). Mr. Jean-Louis testified that water damage to the kitchen cabinets, the ceiling, and crown molding was a result of the second floor water loss and required a total removal. (R 3, pp 411, 422-424).

> Q. From here, can you tell me just generally, in addition to the kitchen sink cabinet that you showed me, is there any other location other than the ceiling that you've already pointed out to me --
>
> A. Right. All this crown molding, just to get to repair it -- If you see how it's built in, I can't do it on this; it's right up to the ceiling (indicating). And when the ceiling had somewhat -- It affected a lot of this, which is built into the cabinet (indicating).
>
> Q. So that's the crown molding?
>
> A. Right.

Q. That was from your understanding, the water loss that Mr. Gal had on the second floor?

A. I would think so. 99.9 percent, yes. ***

The water was -- came through the ceiling, down the wall. And this was the end result when they cleaned up. So I couldn't get behind the cabinets to see what happened behind, you know, the actual wood. The only way you're going to do that is remove it completely.

(R 3, pp 412, 414).

Mr. Jean-Louis' estimate for the loss was $107,902.50 for the full replacement of the "whole kitchen" and ceiling. (R 3, pp 416, 423-424, 430, 434).

7. Plaintiff's motion for summary judgment for breach of contract based on failure to pay general contractor overhead and profit

Plaintiff filed a motion for partial summary judgment seeking a ruling that Prepared breached the contract by making a loss payment without including an amount for general contractor overhead and profit. (R 4, pp 671-681). Plaintiff's motion did not include a statement of undisputed material facts. (*Id.*). It did not reference any affidavits. (R 4, pp 671-797). It did not attach any evidence suggesting that the repair proposed by National Restorations and Mr. Schmidt was reasonably likely to require a general contractor. (*Id.*). The motion simply made a conclusory *argument* that no genuine issue of material fact existed as to the reasonable likelihood that a general contractor would be needed. (R 4, pp 671-681).

Plaintiff makes similarly conclusory statements in his Initial Brief here, saying that it was "obvious" that Mr. Schmidt would need "numerous sub-contractors" and

"several additional tradesman such as a plumber and an electrician" to complete his repair plan, and "clear" that plumbers or electricians would have to been retained through a general contractor. (Initial Brief, pp 5-6, 9-10). In fact, however, there is no affirmative evidence of any of that in the record. The *only* evidence that appears anywhere in the record on this subject was Mr. Schmidt's equivocal answer to one question, which cannot be characterized as affirmative evidence that - without a doubt - a general contractor was needed:

> Q. Can you tell me whether or not you would need the assistance or services of a general contractor?
>
> A. 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. A lot of times, a general contractor would have to go ahead ***if*** permits are needed or things like that. I don't know what - he [Plaintiff] lives in a gated community but I don't know what the restrictions are there, so I - ***I couldn't say.*** [2]

(R 10, pp 1861-1862).

Mr. Schmidt has testified as a cabinetry expert more than 100 times over approximately 38 years, but in that time he rarely worked with general contractors. (R 10, pp 1816-1817, 1821-1822). While Mr. Schmidt testified that he generally coordinates with plumbers, he has never actually been hired by a general contractor,

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[2] Plaintiff quotes *part* of Mr. Schmidt's answer, but conveniently leaves out the portion where Mr. Schmidt qualifies a possible need for assistance *if* permits are required and his conclusion that, in response to the question, "[he] couldn't say." (Initial Brief, p 14).

indicating that a plumber and cabinet maker can coordinate on a cabinet repair job without the need for a general contractor. (R 10, pp 1834-1835, 1847). Furthermore, Mr. Schmidt only affirmatively described the need for a plumber to disconnect the pipes when he was outlining the necessary steps for his plan for replacing the cabinet. (R 10, p 1834). As to any other trades, when asked, he said only that his proposed repair would "possibly" use the services of an electrician. (R 10, p 1861). Plaintiff states that Mr. Schmidt's repair estimate did not take into account "the cost of a ***needed*** electrician." (Initial Brief, p 4). Mr. Schmidt, however, never testified that an electrician *would* be needed, and Plaintiff himself never did anything to show the need for an electrician for Mr. Schmidt's proposed cabinet repair plan. (R *passim*).

In short, there was never any testimony from Mr. Schmidt - or from any other witness for that matter - that it was reasonably likely that a general contractor would be needed for his repairs. (R 9-10, pp 1794-1880). In fact, Mr. Schmidt's testimony described the relative simplicity of the process that is required for replacing a water-damaged kitchen sink cabinet. (R 10, pp 1834-1858). When removing sink cabinets, he testified that generally a plumber will disconnect the pipes leading from the wall to the sink, and then Mr. Schmidt does everything else. (R 10, pp 1834-1842). He takes out the existing cabinet, cuts the drywall, refinishes the cabinet at his shop, and then reinstalls everything when he returns to the house. (*Id.*). He has done these repairs to sink base cabinets 30 or 40 times, without, as he testified, ever being hired

by a general contractor. (R 10, pp 1847, 1857-1858). Based on Mr. Schmidt's description of the steps needed to repair Plaintiff's cabinet, other than his own work, Mr. Schmidt would only have needed to coordinate with a plumber to disconnect and then reconnect the pipes. (R 10, pp 1847, 1857-1858). (The 'possibility' of an electrician appears to refer to the possible need for temporarily disconnecting a garbage disposal, if there was one). In sum, Mr. Schmidt's restoration of the cabinet would not require "removal of any appliances, countertops, plumbing, electrical work or other types of restoration." (R 2, p 295; *see also* R 10, pp 1842-1843).

As movant, Plaintiff had the burden to prove as a matter of undisputed material fact that it was reasonably likely that a general contractor would be needed regardless of whose restoration plan was used. (R 4, pp 671-681). Plaintiff, however, did not provide any evidence establishing that the work covered by Prepared's estimate was reasonably likely to require a general contractor. (R *passim*). In fact, not even Plaintiff's own contractor Jean-Louis was asked to testify that the work proposed by Mr. Schmidt was reasonably likely to require a general contractor. (R *passim*). Mr. Jean-Louis' response, when asked about Mr. Schmidt's proposed work, was that he *could not provide **any** comment on it*; a far cry from affirmatively asserting that the work was likely to require a general contractor:

> Q. Are you able to comment at all as to what they are proposing? Just so you know, this is with regard to the same kitchen cabinets that you and I have discussed today; okay? So, my question is, with the information that you have here, are you able to comment at all as to

whether or not the work that's being proposed here can be done?

A. If somebody had come to me -- No, I can't do it the way that they showed it.

Q. So I'm clear, no, you cannot do the work as its proposed here, or no, you can't comment as to what they are proposing here?

A. ***I can't comment.*** I don't know where it came from; I don't have any idea.

(R 4, pp 768-769). Jean-Louis thus also never provided and evidence or testimony that Mr. Schmidt's plan would require the services of a general contractor.

Plaintiff argues that adjuster Massey's estimate conclusively established the need for a general contractor (Initial Brief, pp 8, 15-16), disregarding the fact that that Prepared appropriately relied during litigation on Mr. Schmidt's evaluation given that adjuster Massey deferred to someone with cabinetry expertise due to her inexperience in that field. (R 8, pp 1519-1520, 1556-1557; R 9, pp 1756-1757).

The trial court granted Plaintiff's motion for partial summary judgment despite Plaintiff's failure to establish at all - much less without dispute - that it was reasonably likely that a general contractor was needed for the work proposed by Prepared's adjuster and National Restorations. (R 5, p 907). With neither supporting undisputed material facts nor legal support, the trial court ruled that Prepared breached the parties' contract by making a payment to Plaintiff for its proposed work without including general contractor overhead and profit. (R 5, pp 907, 975).

8. Plaintiff's second motion for partial summary judgment arguing that a replacement cost policy allows only for replacement and not repairs

Plaintiff thereafter filed additional motions for partial summary judgment in which Plaintiff contended that he was entitled to a ruling that the loss payment made by Prepared constituted a breach of contract.[3] This argument, reduced to its essence, was that the Prepared policy was a replacement cost policy and was required by § 627.7011, Fla. Stat., (2010) to be a replacement cost policy. (R 7, pp 1247-1255). Under Plaintiff's argument, all damage under a replacement cost policy - no matter how slight - requires replacement as a matter of law, such that a scratch on a painted door could not be addressed through sanding and painting, but would always require replacement of the door. (*Id.*). Thus, Plaintiff argued that the water damage to the cabinet under the sink could not be addressed, as Mr. Schmidt proposed, by restoring the cabinet to its pre-loss condition and appearance, but rather required tear out and replacement of all of the cabinets in the kitchen. (*Id.*).

Prepared responded that Plaintiff's argument was counter to both the provisions of the policy and to the replacement cost policy statute. (R 6, pp 1079-1084). The policy expressly allows for repair or replacement: "... we will pay the cost to *repair*

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[3] *See* Plaintiff's Motion and Renewed Motion for Partial Summary Judgment for Breach of Contract for Failing to Pay Replacement Cost (R 6, pp 1007-1022; R 7, pp 1247-1255); Plaintiff's Motion and Renewed Motion for Partial Summary Judgment on the Undisputed Replacement Cost Value of the Damages and for an Order Compelling Payment of Same (R 6, p 1037-1073; R 7, pp 1241-1246).

or replace, after application of deductible and without deduction for depreciation" (R 2, p 365), and the statute requiring homeowners insurers to offer replacement cost coverage expressly provides that the statute does not prohibit an insurer from limiting its liability to the reasonable and necessary cost to repair if that cost is less than the cost to replace. § 627.7011(5), Fla. Stat.

The trial court took up this motion at the beginning of trial, along with numerous other motions discussed herein. (T 1-2, pp 1-221). The trial court effectively granted the Plaintiff's motion for partial summary judgment on the meaning of replacement cost policy, ruling that as a matter of law, the policy and statute only allowed replacement and did not allow for repairs, and that therefore Prepared had breached the policy by paying the Plaintiff a loss amount for the cost of repairs instead of paying to tear out and replace all of the kitchen cabinets. (T 1, p 129, 162, 166-167).

Plaintiff now attempts to characterize this "replace" versus "repair" dispute as a "paper issue" with the off-point comment (and emphasis) that "Defendant failed to establish the total cost of the (repair) job!" (Initial Brief, p 18). But, this just ignores Plaintiff's successful (but entirely incorrect) argument to the trial court that only replacement is warranted under a replacement cost policy. It also ignores the testimony of Mr. Schmidt and the written estimate which identified the total cost of the cabinet repair job as $2,585.00. (R 10, pp 1842-1843; R 2, p 295; R 9, p 1757).

9. Further pre-trial motions and rulings that ultimately prevented the defense from presenting a case to the jury

Just prior to the trial, Plaintiff told the trial judge that by granting the initial partial summary judgment, the court had effectively ruled (a) that a general contractor *was* needed to replace all the cabinets, and that (b) Prepared's payment based on its $8,533.68 estimate was insufficient because it did not include general contractor overhead and profit. (R 7, pp 1373-1378; T 1, pp 32-33, 119-120). So, Plaintiff argued, because the trial court had ruled as a matter of law that a general contractor was required for the job, then only a general contractor could testify to Plaintiff's damages. (T 1, pp 36-37, 73-77). Therefore, Plaintiff argued, no testimony from non-general contractors on scope of damages, cost of damages, and method of repair should be admitted at trial. (R 6, pp 1187-1192, 1199-1201; T 1, pp 36-38, 70-71, 149-152). Plaintiff concluded his argument by saying that accordingly none of Prepared's witnesses could testify because they were not general contractors, and that Prepared could not introduce evidence of its adjuster's estimate of $8,533.68, of National Restorations' estimate of $2,585.00 as the cost to repair the cabinet based on Mr. Schmidt's report, or of Prepared's loss payment of $6,153.47. (R 6, pp 1187-1192; 1199-1201; R 7, pp 1217-1219; T 1, pp 9, 36-38, 80-81, 153-154).[4]

[4] Plaintiff made these arguments repeatedly in a series of overlapping motions. See Plaintiff's Motion and Renewed Motion for Partial Summary Judgment for Breach of Contract for Failing to Pay Replacement Cost (R 6, pp 1007-1022; R 7, pp 1247-1255); Plaintiff's Motion and Renewed Motion for Partial Summary

Prepared opposed Plaintiff's motions arguing that they were improperly seeking to prevent the jury from deciding the central disputed fact question in the case, to wit, whether the jury agreed with Plaintiff's or Prepared's assessment of the loss amount generated by the March 2011 kitchen leak. (R 6, p 1102; T 1, pp 157-158). As defense counsel summed up Plaintiff's arguments:

> The Plaintiff is inappropriately attempting to circumvent a factual finding by the trier of fact in this matter regarding the amount of damage at issue. In doing so, the Plaintiff is attempting to obtain a summary disposition of the central disputed issue in this case, i.e., whether the damage at issue will require a complete replacement of the entire kitchen cabinetry. It is Plaintiff's position that it does, and it is Prepared's position that it does not.

(R 6, p 1102). (*See also* T 1, pp 157-158).

Prepared also pointed out that general contractors were not the only witnesses qualified to testify in the trial. (R 8, pp 1583-1588). Experts can always testify within their own fields of expertise, such that cabinetry specialist Mr. Schmidt was certainly

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Judgment on the Undisputed Replacement Cost Value of the Damages and for an Order Compelling Payment of Same (R 6, p 1037-1073; R 7, pp 1241-1246); Plaintiff's Motion *in Limine* to Preclude Full Replacement Cost Value Damage Evidence and or Reference to Expert Testimony on Full Replacement Cost Value Damages (R 6, pp 1187-1192); Plaintiff's Amended Motion (R 7, pp 1373-1386); Plaintiff's Motion *in Limine* to Preclude Full Replacement Cost Value Damage Evidence and or Reference to Expert Testimony on Full Replacement Cost Value Damages (R 6, pp 1187-1192); Plaintiff's Motion and Amended Motion *in Limine* and/or Motion to Strike Lay Witnesses from Giving Expert Opinions (R 6, pp 1199-1201; R 8, pp 1589-1591); and Plaintiff's Motion *in Limine* to Exclude Testimony of Individuals or Adjusters with no Personal Knowledge of the Facts at Issue. (R 7, pp 1217-1219).

entitled to testify, based on his background and experience, as to the extent to which the one water-damaged cabinet could be restored to its pre-loss appearance and condition. (R 8, pp 1583-1588). Prepared further noted that *fact* witnesses did not require any expertise, let alone expertise in general contracting, to testify about the results of their inspections and observations as to the physical conditions in Plaintiff's house after the leak incidents. (R 8, pp 1583-1588; R 7, pp 1333-1336; T 1, pp 78-80).

The judge accepted Plaintiff's arguments. He ruled that liability had already been established; that a breach of contract had occurred based on the Plaintiff's replacement cost argument; that full replacement of the kitchen cabinets was required; that the only issue for trial was the cost for full replacement of the cabinets; that only general contractors could testify; and that any estimates not prepared by a general contractor would be excluded from evidence. (T 1, pp 129, 142, 162, 164-167, 206).

10. Plaintiff's motion *in limine* to exclude reference to the second leak

A final motion *in limine* filed by the Plaintiff sought to exclude evidence of the October 2012 subsequent water leak loss. (R 7, pp 1370-1372). Plaintiff argued that evidence about the subsequent loss was irrelevant to the damages sought for the March 2011 loss, and would be prejudicial to the Plaintiff. (*Id.*; T 1, pp 63-71). Prepared responded that, based on the testimony of Jean-Louis, his damage estimate

was based on losses caused by *both* leak events. (R 8, pp 1401-1406). His proposal to replace the entire kitchen for $107,903.50 included his assessment for items of damage that *could not* have been caused by the kitchen sink leak, like ceiling damage and moisture behind cabinets near the ceiling. (R 8, pp 1401-1406).

The trial court inexplicably 'interpreted' Jean-Louis' testimony to mean that the entirety of the water-related damage was solely related to the initial kitchen sink leak incident, not the subsequent incident. (T 1, p 132). The trial court thus granted Plaintiff's motion *in limine*, ruling that the jury would only be allowed to hear evidence about the initial March 2011 leak. (T 1, pp 129, 131-132).

11. Trial, verdict, and final judgment

Based on the trial court's exclusion of Prepared's witnesses and evidence, Prepared proffered the testimony of Alan Schmidt and Ron Jacobson of National Restorations outside the presence of the jury. (T 2, pp 216, 222-246; 246-261). Mr. Schmidt's proffer detailed the proper method of repair for the kitchen cabinet damaged by water, and the manner in which the cabinet could be restored to match the existing kitchen cabinets. (*Id.*). Mr. Jacobson's proffered testimony established that he agreed with Mr. Schmidt's estimate, and with his assessment that the damage only warranted fixing one cabinet, not replacing the whole kitchen. (T 2, p 258).

Plaintiff was allowed to put on his own testimony and that of his public adjuster (though neither were general contractors), as well as the testimony of Jean-Louis. (T

2, 288-353). Prepared's entire defense was limited to cross-examination, and even that was further limited by the trial court as described below. (T 2, pp 288-387).

At trial, in contrast with his deposition testimony, Jean-Louis testified that a total replacement of the kitchen was required due to the extent of 2011 water damage. (T 2, pp 334-335). On direct, he testified that ***the*** reason for total replacement was because the cabinetry, crown molding, and ceiling were all integrated. (T 2, pp 334-335). Prepared sought to impeach Jean-Louis on cross-examination with an additional reason for total replacement he suggested in his deposition testimony, which was that the water flowing down from the upstairs A/C unit caused the damage to the kitchen ceiling and crown molding. (T 2, pp 370-375; R 3, pp 410-414, 422). Prepared pointed out that Mr. Jean-Louis' trial testimony opened the door to questioning about ***all*** of his reasons for recommending a total kitchen replacement. (T 2, pp 370-375; R 8, pp 1572-1575). The trial court disallowed Prepared's requested line of cross-examination. (T 2, p 376).

The jury then received an instruction that Prepared had breached the contract and that the jury's role was to determine the amount of money necessary to place Plaintiff in a pre-loss condition, bearing in mind that the jury had been given only Plaintiff's evidence on the issues. (T 2, pp 394-395). The jury clearly was disturbed by the one-sidedness of the trial evidence, and asked the following questions during their deliberations: (1) "We would like clarification on the amount offered to the

plaintiff from the defendant;" and (2) "Was there an estimate done by the insurance company, if so, amount?" (T 2, pp 418-419). The trial court declined to answer the jury's questions. (*Id.*).

The verdict form - over Prepared's objection - gave the jury just two questions to answer:

(1) Is $107,902.50 a sufficient/adequate amount to pay Mr. Gal for his damages in the March 22nd, 2011 kitchen plumbing loss in order to put him back in a pre-loss condition?

(2) If not, what is the dollar amount?

(T 2, p 413). The jury answered NO to Question 1, and $55,000 to Question 2. (T 2, pp 421-422). The trial court set off Prepared's prior payment to Plaintiff from the verdict amount, and entered final judgment in Plaintiff's favor in the amount of $44,304.85. (R 9, pp 1644, 1718). Prepared timely appealed the final judgment, and appellate proceedings ensued in the Fourth District. (R 9, pp 1719-1720).

12. Disposition in the Fourth District Court of Appeal

The Fourth District agreed with all of Prepared's arguments on appeal in reversing the judgment and remanding for a new trial. *Gal,* 209 So. 3d at 15, 18. More specifically, where the trial court had granted Plaintiff a partial summary judgment, ruling that a "replacement cost policy" mandates that the damaged property be replaced, not repaired, the Fourth District reversed, holding that, as a matter of law, a "replacement cost policy" does not require that the damaged

property be "replaced," and, similarly, does not prohibit the damaged property from simply being "repaired." *Id.* (*quoting Trinidad,* 121 So. 3d at 438). Thus, on remand, the jury cannot be told, as it was the first time, that Prepared *ipso facto* breached the policy by making a payment to repair rather than replace the damaged property.

In keeping with that entirely sound holding, the Fourth District also ruled that it was an abuse of discretion to prevent Prepared from putting on its witnesses to testify that the damages could be remedied by repair, rather than replacement. 209 So. 3d at 17-18. And, the Fourth District noted, there remains a disputed issue of fact as to whether a general contractor would be necessary to repair the cabinet under Mr. Schmidt's plan. 209 So. 3d at 17. Accordingly, the Fourth District reversed, and remanded for a new trial where Prepared would be allowed to present its evidence as to the issues of (1) whether the damages could be remedied by repair of the one water-damaged cabinet, by a simple repair, and (2) whether a general contractor was not reasonably likely to be needed for that repair. 209 So. 3d at 18.

Finally, the Fourth District held that the trial court abused its discretion by prohibiting Prepared from cross-examining Jean-Louis on whether damage caused by the second leak was included in his damages estimate. 209 So. 3d at p 18. It concluded that Prepared must be given the opportunity to challenge the reliability and credibility of Plaintiff's expert's opinion. *Id.*

Importantly, the Fourth District reversed and remanded for a new trial, noting

that "*[A]ny one of the above errors would have required reversal for a new trial ...*" 209 So. 3d at p 15.

13. Plaintiff's invocation of express and direct conflict review

Plaintiff petitioned this Court asserting that the Fourth District's opinion expressly and directly conflicted with *Trinidad* and *Colon, supra*. Prepared argued in response there is no conflict because the Fourth District's opinion (1) expressly followed *Trinidad's* holding "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" and (2) did not cite to or say anything about the passing statement in *Colon* that "a party cannot forestall the granting of relief on a motion for summary judgment by raising purely paper issues." This Court accepted jurisdiction, with three Justices dissenting.

STATEMENT OF THE ISSUES

Whether the Court lacks a basis for exercise of jurisdiction.

Whether the Fourth District correctly ruled that the trial court erred in entering a partial summary judgment for the Plaintiff determining that Prepared breached the insurance contract by making a loss payment to the Plaintiff without including an amount for general contractor overhead and profit when the Plaintiff, as movant, provided no evidence that it was reasonably likely that a general contractor would be needed to perform the repairs recommended by Prepared.

Whether the Fourth District correctly ruled that the trial court erred in granting a second motion for partial summary judgment ruling that Prepared had to replace all kitchen cabinets even though the policy and § 627.7011, Fla. Stat. allow damage from a loss to be addressed through repair *or* replacement.

Whether the Fourth District correctly ruled that the trial court improperly (1) struck all of Prepared's fact and expert witnesses because they were not general contractors, and because they addressed repairs rather than replacement; (2) excluded Prepared's repair estimates because they were not prepared by a general contractor; (3) precluded Prepared from cross-examining Plaintiff's contractor with his deposition testimony that was in conflict with his trial testimony; and (4) excluded all evidence of the subsequent water leak event despite Plaintiff's contractor's testimony that his loss amount covered damage from both leak events.

SUMMARY OF ARGUMENT

Prepared respectfully submits that the decision to accept jurisdiction should be revisited. The two cited conflict cases - *Trinidad v. Fla. Peninsula Ins. Co.,* 121 So. 3d 433 (Fla. 2013) and *Colon v. Lara,* 389 So. 2d 1070 (Fla. 3d DCA 1997) - do not show any conflict. The Fourth District expressly followed *Trinidad.* The claimed *Colon* conflict with was with its statement that "a party cannot forestall the granting of relief on a motion for summary judgment by raising purely paper issues." 389 So. 2d at 1071. The Fourth District certainly did not hold to the contrary, nor were there

any 'purely paper' issues here. Plaintiff just argued that there were paper issues by disregarding Prepared's evidence.

Absent conflict, the Court has no basis for exercising jurisdiction. But, neither does the case present any issues that require new principles of law. *Trinidad* held "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. Plaintiff seems to be asking the Court to set up some rule that if a certain number of trades may be involved in repairs, then general contractor overhead and profit must be paid as a matter of law. But, this case is a virtual poster child for not creating any such set rule. There was evidence here that the cabinet specialist had done kitchen cabinet restorations like the one he proposed here for almost 40 years without ever having a general contractor involved. He said that a plumber would be needed to disconnect and reconnect the pipes, but there is no need for a general contractor to call a plumber. Similarly, if an electrician was needed at all - and that was never established in the entire length and breadth of this incredibly vast record, although Plaintiff had years to obtain evidence to that effect - the job would be only to disconnect and reconnect the garbage disposal (if there was one - also not established). No general contractor is needed to make that phone call either.

For all the journeying it has done through the court system, this is really a simple case with a fact issue that should have been decided in a simple - and fair -

jury trial. There was a water leak in Plaintiff's kitchen in March of 2011 that resulted in water damage to the cabinet under the kitchen sink. The only dispute was over which party's loss assessment should be accepted. The jury had only to decide whether the damage could be taken care of by repairing the one cabinet that was water-damaged, or whether all of the kitchen cabinets had to be torn out and replaced because Plaintiff did not think the cabinetry expert could match the other cabinets. And Plaintiff's lay opinion about inability to match was in direct contrast to the cabinetry expert's testimony not only that he *could* restore the cabinet to an exact match, but that he already *had* accomplished such matches in scores of prior jobs with water damage to cabinets from similar kitchen sink leaks.

Instead, at Plaintiff's urging, the trial court issued a series of erroneous and improper rulings that resulted in a trial in which Prepared was not allowed to present any witnesses or evidence as to its side of the case; in which the jury was told that the judge had already decided that Prepared had breached the contract; in which the jury was told that Prepared was required to replace all of the kitchen cabinets, and also the ceiling and crown moldings; and in which the jury was told that the only question for them was how much it would take to replace Plaintiff's entire kitchen.

The trial court first erred by ruling that Prepared breached the policy by paying for Plaintiff's kitchen sink leak loss without including an amount for general contractor's overhead and profit. Plaintiff presented no evidence that *Prepared's*

proposal was reasonably likely to require the need for a general contractor. The cabinet expert never testified a general contractor was needed for his proposal; on the contrary, he testified that he has *never* been hired by a general contractor over 38 years in performing his cabinetry work. Plaintiff's expert said that he could not comment at all on the cabinet expert's proposal. Notwithstanding Plaintiff's failure to come forward with proof to support its summary judgment contention that a general contractor was needed, the trial court granted Plaintiff's motion. The summary judgment ruling also erroneously preempted the jury from determining the critical fact issue presented by the lawsuit, i.e., the amount of loss. If the amount arrived at by the jury was equal to or less than the loss amount Prepared paid to the Plaintiff, then there was no breach of contract by Prepared.

Plaintiff's current suggestion that the jury must be told how to decide when it is reasonably likely to need a general contractor, under a 'three tradesman' or other bright-line rule, should be rejected. This Court already established in *Trinidad* that there is no one rule for when a general contractor is needed; on the contrary, *Trinidad* held that overhead and profit must be paid when it is "reasonably likely" that a general contractor will be needed for repairs. Reasonableness under any given circumstances is a question for juries.

The trial court then ruled that the policy and § 627.7011, Fla. Stat. did not allow Prepared to address the water damage to the cabinet by repairing the cabinet,

erroneously holding that the policy and statute *require* replacement and *disallow* repairs. In fact, both the statute and the policy expressly allow damage from losses to be replaced *or* repaired.

The trial court also made a series of unwarranted evidentiary rulings in Plaintiff's favor. The trial court precluded Prepared from putting on its witnesses at trial because they were not general contractors. The trial court precluded Prepared from submitting the repair estimates received from its adjuster and cabinet specialist as evidence because they were for repairs and not replacement. The trial court instructed the jury that Prepared had breached its contract with the Plaintiff. The trial court instructed the jury that the only question they were to answer was how much in damages would be "sufficient/adequate" to compensate Plaintiff. The trial court excluded evidence about a subsequent leak on the second story in 2012 even though, by his own testimony (which the jury was not allowed to hear), Plaintiff's contractor's estimate to replace the "whole kitchen" for $107,902.50 was based, in significant part, on damage from the subsequent leak event.

For all intents and purposes, this was a bench trial in a case where a jury trial had been demanded. The trial court adjudicated all of the genuinely disputed material facts adversely to Prepared, and then precluded Prepared from defending the claim at trial with any witnesses or evidence. The resulting trial was entirely and unjustifiably unfair. The Fourth District correctly reversed for a new trial.

STANDARD OF REVIEW

Summary judgment rulings are reviewed de novo. *Chirillo v. Granicz,* 199 So. 3d 246, 249 (Fla. 2016). Evidentiary rulings are subject to an abuse of discretion standard of review. *See, e.g., Rimmer v. State,* 59 So. 3d 763, 774 (Fla. 2010).

ARGUMENT

A. There is no basis for exercise of conflict jurisdiction

This Court has discretionary jurisdiction over decisions of district courts of appeal that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law[.]" Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court lacks jurisdiction because the Fourth District's decision does not conflict with the cited conflict cases.

The Fourth District's Opinion expressly followed 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 Plaintiff's favor to have the fact issue on that point resolved by a jury.

Plaintiff's other conflict argument cites *Colon* (a 1980 case later abrogated on the merits) for the proposition that a party cannot prevent the granting of relief on a motion for summary judgment by raising purely paper issues. The Fourth District's opinion does not say that purely paper issues defeat a summary judgment. Instead,

it recites the record *evidence* reflecting actual fact issues in this case, not purely paper issues.

There is no conflict with either *Trinidad* or *Colon*. This Court should revisit its jurisdictional decision, and decline to exercise jurisdiction over this heavily fact-specific case that does not create any conflict in Florida decisional law and does not present any need for issuance of broader legal rulings.

B. The trial court erred in granting Plaintiff's first motion for partial summary judgment and ruling that failure to pay general contractor overhead and profit was a breach of contract

1. There is a genuine dispute whether a general contractor is reasonably likely to be needed for Mr. Schmidt's repair plan

Plaintiff obtained summary judgment after arguing that Prepared breached the policy by making a payment for Plaintiff's kitchen sink leak loss without including an amount for general contractor's overhead and profit. The applicable law on overhead and profit - as recognized and followed by *Gal, supra* - is as follows:

> [I]f the insured is unlikely to incur overhead and profit, section 627.7011(6) would allow the insurer to withhold payment of those costs consistent with section 627.7011(3) because they are not 'reasonable and necessary' to the repair. *See* § 627.7011(6), Fla. Stat. (2008). This logically follows because, if the insured is not reasonably likely to incur overhead and profit in repairing the damaged property, then overhead and profit are not replacement costs of the insured's covered loss. On the other hand, if overhead and profit are going to be 'reasonable and necessary' to the repair, section 627.7011(3) would mandate their payment as replacement costs.

Trinidad, 121 So. 3d at 441. But, Plaintiff failed to meet his summary judgment

burden of proving that, as a matter of undisputed fact, Prepared's proposed repairs were reasonably likely to require a general contractor.

The core fact issue for the jury to decide was whether the damage to the kitchen cabinet from the sink leak should be addressed (a) through Prepared's proposed repair of the cabinet, which Prepared contended would fully restore the cabinet to its pre-loss appearance and condition, or (b) through Plaintiff's contractor's proposal, which called for tearing out and replacing the whole kitchen. The trial court was required, on Plaintiff's summary judgment motion, to view the facts in the light most favorable to non-movant Prepared (*i.e.*, to accept that addressing the loss required only fixing one cabinet, not replacing the whole kitchen). This means Plaintiff had to establish as undisputed fact that Prepared's proposed repair was reasonably likely to require a general contractor. Plaintiff presented no evidence to that effect.

Plaintiff's motion did not attach or reference any evidence establishing conclusively that Prepared's proposed repair required the use of a general contractor. The motion did not include a statement of undisputed facts or attach any supporting affidavits and/or authenticated evidence. Instead, Plaintiff argued that ***his expert's proposal*** required a general contractor. But, his expert, Jean-Louis, did not say the same for Prepared's proposed repairs. He said only, ***"I can't comment"*** on Prepared's proposed repairs. (R 4, pp 768-769). He did not testify that the limited repair of one cabinet was reasonably likely to require a general contractor. Plaintiff

offered no other evidence on this front, and summary judgment was unwarranted on the record before the trial court. The Fourth District correctly so held.

Plaintiff also did not obtain testimony from Prepared's witnesses that it was reasonably likely that the repairs to the one cabinet would require a general contractor. Mr. Schmidt was expressly asked whether he would require the use of a general contractor for this job, but his bottom line response was: "***I couldn't say.***" (R 10, p 1862). This vague and uncertain answer can hardly be characterized as undisputed affirmative evidence that a general contractor was needed. *See Fellowship Foundation v. Paul,* 86 So. 2d 808, 810 (Fla. 1956) ("vague and uncertain" testimony is insufficient to support entry of a summary judgment).

Plaintiff also argued to the trial court that Mr. Schmidt would normally coordinate with a plumber, but Plaintiff did not offer any evidence or provide any legal authority that a general contractor is likely to be needed when a cabinet maker coordinates with a plumber. In fact, Mr. Schmidt's testimony actually showed otherwise; he testified that, while he has worked with plumbers, he has never been hired by a general contractor. (R 10, p 1847). The record can hardly be said to establish undisputedly that Mr. Schmidt's work in refinishing Plaintiff's cabinet would require a general contractor given his testimony that in his 38 years of cabinet work he has never been hired by a general contractor. At the very least, the testimony establishes a reasonable inference that his work would not require a general

contractor.

It will also be recalled that the Prepared's actual payment of $6,153.47 to Plaintiff was not based just on Mr. Schmidt's proposal, but on independent adjuster Massey's estimate, which included work and items that Mr. Schmidt did not consider necessary. (R 2, pp 266-267; R 4 pp 739-740). Plaintiff argues - at pages 14-16 of its statement of the case and *facts* - that adjuster Massey's estimate reflects that she "knew all along, that there existed an absolute need for (numerous) sub-contractors," and therefore, that a general contractor was needed. (Initial Brief, p 15-16). But, Mr. Schmidt testified that he did not believe that the work adjuster Massey included was necessary to put Plaintiff's kitchen back to its original state. Plaintiff's statement of 'fact' on this issue is nothing more than argument. Any such argument by Plaintiff as to what weight should be given to adjuster Massey's estimate proposal or as to what she "knew all along" is for a jury.

Plaintiff improperly seeks to place the burden on Prepared at the summary judgment stage by arguing: "[T]he undisputed evidence of record establishes that Defendant never created a fact question as to the 'lack of' the need for a general contractor" and that "Defendant presented no testimony to establish that it was not reasonable for the insured to hired a general contractor ..." (Initial Brief, pp 28, 40). In fact, it was Plaintiff's burden as movant to establish that, without genuine dispute, a general contractor was reasonably likely to be needed in connection with a job that

consisted only of repairing one cabinet under the kitchen sink. *See Dade County School Bd. v. Radio Station WQBA,* 731 So. 2d 638, 643 (Fla. 1999) ("It is the burden of the moving party to conclusively prove that no genuine issue of material fact exists."). Prepared was not required to show the "lack of" need for a general contractor when Plaintiff had not first presented evidence that Mr. Schmidt's proposed repair *was* reasonably likely to need a general contractor.

Furthermore, the trial court's summary judgment ruling impermissibly invaded the province of the jury on ***the*** pivotal fact question in the case. Plaintiff's suit asserted a claim for breach of contract by Prepared, and the alleged breach was in underpayment of the water leak loss. (R 2, pp 341-345). The question of breach could only be decided by obtaining the jury's finding as to the amount of loss after hearing both sides' evidence and witnesses. If the jury determined an amount of loss that was equal to or less than the loss payment Prepared made to the Plaintiff, there was no breach of contract for underpayment of the loss.

2. A bright-line "three tradesman threshold" is unnecessary, impractical, and conflicts with *Trinidad*

Plaintiff questions how a jury can determine when it is reasonably likely that an insured would need a general contractor without being given specific instructions by the court. (Initial Brief, pp 26-27). Plaintiff argues that the Fourth District's opinion is deficient in failing to provide strict parameters and instructions for the jury on how to make a finding of 'reasonable likelihood.' (*Id.*) Plaintiff wants this Court to

establish instructions for advising a jury precisely when a repair job is reasonably likely to need a general contractor. Plaintiff appears to recommend a "three tradesman threshold" (i.e., a bright-line rule that a general contractor is required as a matter of law any time three trades are used for a project). (*Id.*).

Plaintiff's argument is based on one out-of-state case - *Mee v. Safeco Ins. Co. of America,* 908 A. 2d 344 (Pa. 2006) - which, in actuality, supports Prepared's position that no such bright-line rule is necessary or even helpful. In *Mee*, an insured homeowner filed suit claiming that his insurer Safeco breached the parties' insurance contract by failing to pay general contractor overhead and profit in connection with his claim. Safeco obtained summary judgment despite the insured's expert providing "***evidence*** that whenever more than one trade is reasonably required to make repairs, a general contractor's services are reasonably required[.]" *Mee*, 908 A. 2d at 346. The appellate court held that summary judgment was improper and "[w]hether use of a general contractor was reasonably likely is a question of fact for the jury." *Mee*, 908 A. 2d at 348.

The *Mee* court said that there is no "bright line rule" for determining when a general contractor will be needed; instead, it must be determined on a "case-by-case basis." 908 A. 2d at 350. One of many factors in the analysis is whether the record includes evidence of "expert testimony about industry standards[.]" *Id.* Critically, in *Mee*, the insured provided the trial court with expert testimony that (in Pennsylvania

anyway) a general contractor's services were reasonably required when multiple trades were used. Here, Plaintiff did not provide any evidence (through expert testimony or otherwise) that a general contractor is required if there are "x" amount of trades involved. *Mee* says that the issue of whether a general contractor is reasonably likely to be needed is a jury question. Here, the jury was not given the opportunity to answer that fact question.

One Florida Circuit Court delved into this issue in depth in *Juvonen v. United Property and Casualty Ins. Co.*, 2015 WL 3514865 (Fla. 15th Cir. Ct. 2015). In *Juvonen*, the trial court was presented with a proposed class of insureds claiming breach of contract by their insurer for failing to pay an amount for general contractor overhead and profit. That Court rejected the insureds' argument that their class could be defined as claimants whose property loss repairs required more than one trade. The court examined out-of-state case law addressing the "multiple trades" approach for determining whether a general contractor is needed, and rejected that approach as inconsistent with Florida's "reasonable likelihood" test as announced in *Trinidad*, which "involves a consideration of multiple factors." *Juvonen*, 2015 WL 351486 at *13. The *Juvonen* court stated:

The Court declines to apply Plaintiffs' multi-trade approach. Cases such

> as *Dewitt*[5] and *John*[6] are persuasive, as use of a multi-trade rule would not answer whether use of a general contractor was reasonably likely to be necessary for each claim. A standard evoking reasonableness involves a consideration of multiple factors. *See, e.g., Rawls v. Leon Cnty.*, 974 So. 2d 543, 547 (Fla. 1st DCA 2008) (considering multiple factors when considering whether there was a "reasonable necessity" for taking property); *Collins v. Wilkins*, 664 So. 2d 14, 14 (Fla. 4th DCA 1995) (considering multiple factors when determining whether attorney's fee was "reasonable"). Number of trades is but one such factor. Individualized inquiries are required to answer the standard posed by *Trinidad* [] and therefore use of a multi-trade rule is inappropriate.
>
> [***]
>
> A multi-trade rule is inappropriate here, as a general contractor may not be reasonably likely to be needed despite use of two or more trades.

2015 WL 3514865 at *13.

Prepared submits that *Juvonen* is correct insofar as there is no need for this Court to provide any bright-line upon which the jury can premise a finding that a general contractor would or would not be needed. This Court has already announced the standard as when "the insured is ***reasonably*** likely to need a general contractor for the repairs." *Trinidad,* 121 So. 3d at 439. Creating a bright-line rule would effectively recede from *Trinidad*'s perfectly workable standard, and take the reasonableness determination out of the jury's hands. This would be as unnecessary

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[5] *Nat'l Security Fire & Casualty Co. v. Dewitt,* 85 So. 3d 355 (Ala. 2011).

[6] *John v. Nat'l Security Fire & Casualty Co.,* No. 06-1407, 2006 WL 3228409 (W.D. La. Nov. 3, 2006).

as creating a bright-line rule for when one acts or fails to act with the care that a ***reasonably*** careful person would use under like circumstances. *See* Fla. Std. Jury Instr. (Civ.) 401.4, Negligence. What is reasonable under given circumstances is the quintessential jury question - involving "consideration of multiple factors" - with no call for hard-and-fast rules from the courts pre-determining what is reasonable without the benefit of any evidence. *Juvonen*, 2015 WL 3514865 at *13. A jury is fully capable of making the reasonableness determination by weighing the evidence presented by the parties.

As it relates to the facts of this case, Plaintiff tries to argue that Mr. Schmidt required multiple tradesmen for his plan, and that - as a matter of law and regardless of an absence of evidentiary support - a general contractor is needed when multiple trades are involved. As to the need for multiple tradesmen, Mr. Schmidt only affirmatively described the need for a plumber to disconnect the pipes when he was outlining the necessary steps for his plan for restoring the cabinet. As to any other trades, when asked, he said only that his proposed repair would "possibly" use the services of an electrician. (R 10, p 1861). He never testified that an electrician *would* be needed, and Plaintiff did nothing otherwise to show the need for an electrician. When viewed in the light most favorable to Prepared, the record evidence does not show that Mr. Schmidt's plan would require multiple trades - or that the mere fact of multiple trades perforce requires a general contractor. *Pep Boys-Manny, Moe &*

Jack, Inc. v. Four Seasons Commercial Maintenance, Inc., 891 So. 2d 1160, 1161 (Fla. 4th DCA 2005) ("Where the record demonstrates the ***possibility*** of a disputed fact, summary judgment is improper.").

C. The trial court erred by adjudicating liability against Prepared based on Plaintiff's incorrect notion of what "replacement cost policy" means

The trial court also erred in its ruling issued at the beginning of trial, which effectively granted the Plaintiff's second motion for partial summary judgment based on Plaintiff's legally unsupported idea of what 'replacement cost policy' means. This ruling incorrectly determined, as a matter of law, that Prepared breached the contract by failing to pay to rip out and replace all of the kitchen cabinets because replacement is required, and repair is not permitted. (T 1, pp 129, 162, 166-167).

A replacement cost policy only requires the insurer to make loss payments with no deduction for depreciation; it does not mean that replacement is always required to the exclusion of repair. *Trinidad*, 121 So. 3d at 438; § 627.7011(3), Fla. Stat. (2010). The Fourth District correctly held that the trial court erred as a matter of law in this regard, stating:

> "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.[]

Gal, 209 So. 3d at 17.

Plaintiff all but conceded the trial court's error below, and does not appear to argue to this Court that all property damage losses covered by the policy must be addressed with replacement - and not repair - of the damaged property. Plaintiff merely argues that insufficient evidence was presented as to the amount of money it would take "*either* to 'repair' or 'replace' the damaged property." (Initial Brief, p 31). As discussed above, Prepared did present evidence through Mr. Schmidt as to the cost for repairing the kitchen cabinet. Prepared was ready and willing to present evidence at trial as to the amount of money it would take to repair the damaged property, but the trial court prevented it from doing so by striking all of Prepared's witnesses and excluding its estimates from evidence. The jury was thus not allowed to resolve the fact question as to what amount it would take to restore Plaintiff's property to substantially its pre-loss condition - whether through the repairs proposed by Prepared or the full replacement of all of the kitchen cabinetry proposed by Plaintiff. If the amount of loss determined by the jury was equal to or less than the amount that Prepared paid on the loss, there was no breach of contract.

D. The trial court's evidentiary rulings were an abuse of discretion that deprived Prepared of a fair trial

1. The trial court abused its discretion by striking all of Prepared's witnesses and excluding Prepared's evidence of damages

From its summary judgment ruling that Prepared had breached the contract by making a loss payment that did not include general contractor overhead and profit, the trial court extrapolated backwards that a general contractor must have been required for the job as a matter of law, and that therefore ***only*** a general contractor could testify at trial about fixing the kitchen leak damage. The trial court improperly struck all of Prepared's witnesses because they were not general contractors, and excluded all evidence of the cost to address the kitchen leak damage, except for the estimate of $107,902.50 from general contractor Jean-Louis. (T 1, pp 129-130, 206). This left Prepared with no defense at trial.

These rulings precluded the jury from hearing evidence as to Prepared's estimate of the loss amount and its defenses to the case. Prepared submits that the Fourth District was quite correct in holding that the rulings were an abuse of discretion:

> 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.

Gal, 209 So. 3d at 18.

Even Plaintiff appears to recognize that this ruling was improper, conceding that Mr. Schmidt could have provided testimony as to his own estimate to repair, albeit with reservations as to the completeness of Mr. Schmidt's opinion, which could, of course, have been addressed through cross-examination:

> While Schmidt's deposition established his opinion that the water damaged lower cabinets could be 'repaired,' his opinion was incomplete . . . given his own admissions that he could not . . . 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.

(Initial Brief, p 46). Plaintiff thus concedes that the jury was entitled to hear Mr. Schmidt - a non-general contractor - testify on his proposed repair plan if Mr. Schmidt had only listed a dollar amount for hiring a plumber or electrician.[7]

Whether Mr. Schmidt's plan was complete or incomplete was for the jury to decide. The whole idea that ***only*** a general contractor can testify as to the cost of a plumber or electrician was wrong to begin with, and at odds with Plaintiff's own record evidence. Martin Rosenberg, Plaintiff's public adjuster, who is ***not*** a general

[7] Again, Mr. Schmidt never testified that an electrician was required for his limited repair plan.

contractor, created an estimate listing the costs for a plumber and electrician. (R 2, p 292). If the jury believed that a plumber and/or electrician was required for the job, there was Rosenberg's estimate, and also contractor Jean-Louis's estimate, both of which included costs for electricians and plumbers. (R 2, p 292; R 4, p 777).[8] Thus, the jury *would* have had at its disposal all the evidence necessary to determine the amount necessary to cover Plaintiff's loss under Mr. Schmidt's assessment *or* Mr. Jean-Louis' proposals even assuming they decided a plumber or electrician was needed. For example, the jury could have found that Mr. Schmidt could repair the cabinet for $2,585.00, with a plumber at the cost of $1,020.20 as estimated by Mr. Jean-Louis and an electrician at his estimate of $1,175.40. The total verdict would still be less than the amount paid by Prepared, so no breach of contract.

The jury never got the opportunity to decide the main dispute in the case. In fact, the jury on its own requested the information that was excluded by the trial judge. During deliberations, they asked: "Was there an estimate done by the insurance company, if so, amount?" (T 2, pp 418-419). The trial court declined to answer the jury's question, thereby preventing the jury from assessing the relevant facts necessary to a fair resolution of the case.

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[8] Plaintiff's public adjuster Rosenberg listed $166.50 for an electrician and $180.02 for a plumber. (R 2, p 292). Jean-Louis listed $1,175.40 for an electrician and $1,020.20 for a plumber. (R 4, p 777; T 2, p 357). Adding any of those amounts to Mr. Schmidt's $2,585.00 would be less than what Plaintiff was paid.

2. The trial court abused its discretion by excluding evidence and cross-examination about the October, 2012 subsequent water loss

Contractor Jean-Louis evaluated Plaintiff's damage on October 21, 2012 - one year and seven months after the March 22, 2011 incident involving the kitchen sink and after a subsequent 2012 water loss involving the upstairs A/C closet. Plaintiff retained Jean-Louis to provide an estimate only on the March 22, 2011 damages, but he testified in his deposition about damage from both water loss incidents. While he *said* the two incidents did not overlap, his testimony reflected otherwise. In fact, he testified that the water damage from upstairs spread down to the kitchen ceiling and that work dehumidifying the upstairs water loss caused warping of the kitchen cabinetry. (R 3, pp 410-411). He further testified that the damage "happened or occurred in combination, maybe, I don't know - you know, I don't have a crystal ball - in combination maybe with what was going on in the ceiling." (R 3, pp 411, 422). He concluded that the March 22, 2011 incident required replacement of the "whole kitchen," including all the cabinets, the ceiling, and the crown molding, which would cost $107,902.50. (R 3, pp 423-424, 434). He stated this conclusion even though he testified unequivocally that damage to the crown molding was 99.9% caused by the water loss on the second floor. (R 3, pp 413, 414).

Jean-Louis' actual testimony from his deposition established Prepared's right to argue at least some portion of the damage covered by the $107,902.50 estimate was caused by the second water leak in 2012. Thus, Mr. Jean-Louis' conclusory

statement in the deposition that the "whole kitchen" loss was due only to the first incident was entirely fair game for cross-examination. But, the trial court improperly decided that contractor Jean-Louis' conclusion about the whole kitchen loss was ***correct***, and disallowed any cross-examination into his deposition testimony that conflicted with the conclusion.

Evidence relating to a subsequent incident is admissible to prove that some or all of the presently claimed damages resulted from that subsequent incident. *State Farm Fire and Cas. Co. v. Pettigrew,* 884 So. 2d 191, 197 (Fla. 2d DCA 2004) (quoting *Holmes v. Redland Constr. Co.,* 557 So. 2d 911, 912 (Fla. 3d DCA 1990)). *See also Allstate Ins. Co. v. Kidwell,* 746 So. 2d 1129 (Fla. 4th DCA 1999) (holding it was an abuse of discretion to exclude testimony and photographs which showed that Plaintiff's injury could have resulted from a way other than the subject accident).

The trial court inexplicably decided to weigh the testimony of Jean-Louis, and elected to believe his conclusory statement that the entirety of the water loss damage (walls, ceiling, et cetera) was related solely to the initial incident, despite his contradictory testimony that some of the damage was attributable to the subsequent incident. After weighing the testimony, the court excluded all evidence of the subsequent incident. (T 1, pp 129, 131-132).

The trial court compounded its previous improper rulings during trial by precluding Prepared from cross-examining contractor Jean-Louis about what

damage had been included in his estimate for total replacement of the kitchen, since his deposition testimony showed that it included damage from the 2012 water loss. At trial, Plaintiff asked contractor Jean-Louis what "*the* reason" was for total replacement of the cabinetry, crown molding, and ceiling. He responded, because they are "all integrated." (T 2, pp 334-335). His deposition testimony, however, reflected *another* reason, to wit, that the 2012 water leak from the upstairs A/C closet seeped down to the kitchen. (T 2, pp 370-375, R 3, pp 410-414, 422). Prepared should have been allowed to impeach Plaintiff's expert with his deposition testimony, which reflected more than one reason for his conclusions. Fla. R. Civ. P. 1.330(a)(1); § 90.608, Fla. Stat. (2015).

The trial court acted far outside the scope of its authority by weighing witness testimony, and abused its discretion by excluding evidence and cross-examination as to the subsequent water intrusion. *Volusia County v. Niles,* 445 So. 2d 1043, 1047 (Fla. 5th DCA 1984) ("It was the province of the jury, as the finder of fact, to determine the weight and credibility of the testimony of expert witnesses"). As the Fourth District correctly held, this ruling improperly invaded the province of the jury, and warrants a new trial.

CONCLUSION

Based on the foregoing facts and authorities, Defendant/Respondent Prepared Insurance Company respectfully submits that these review proceedings should be dismissed for lack of jurisdiction. Alternatively, Prepared Insurance submits that the decision of the Fourth District Court of Appeal below should be affirmed in full for the parties to proceed with a new trial.

Respectfully submitted,

DIAZ BRISCOE MEDINA, P.A.
service@dbmlegal.com
ebriscoe@dbmlegal.com
mmedina@dbmlegal.com
myepez@dbmlegal.com
100 S.E. 2nd Street, Suite 3310
Miami, Florida 33131
Telephone: (786) 866-3377
-and-
RUSSO APPELLATE FIRM, P.A.
e-service@russoappeals.com
7300 North Kendall Drive, Suite 600
Miami, Florida 33156
Telephone: (305) 666-4660

Counsel for Respondent

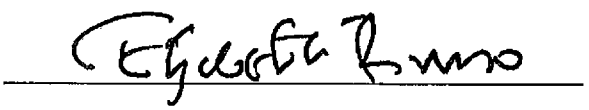
By: Elizabeth K. Russo
ELIZABETH K. RUSSO
Florida Bar No. 260657
ekr@russoappeals.com
KEVIN D. FRANZ
Florida Bar No. 15243
kdf@russoappeals.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Answer Brief of Respondent was sent by electronic mail this 26th day of June, 2017 to:

Justin P. Cernitz, Esquire
Cernitz & Shanbron, P.A.
777 Brickell Avenue, Suite 400
Miami, Florida 33131
jcernitz@cernitzlaw.com
glugo@cernitzlaw.com

Arnold R. Ginsberg, Esquire
Arnold R. Ginsberg, P.A.
9400 S. Dadeland Boulevard, Suite 600
Miami, Florida 33156
aginsberglaw@aol.com



CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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