Filing # 58977755 E-Filed 07/13/2017 02:25:13 PM

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.
_____/

RECEIVED, 07/13/2017 02:28:27 PM, Clerk, Supreme Court

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Cases **Page**

I.

INTRODUCTION

In this Reply Brief, the parties will be referred to as they were referred to in the Initial Brief, to wit: as the Plaintiff and the Defendant and, alternatively, by name. The symbols "R," "T," and "A" will refer to the record on appeal, the trial proceedings and the rule-required Appendix which accompanied the Petitioner's Initial Brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

REPLY ARGUMENT

At page 2 of its brief, the Defendant writes that the trial Court's granting of the Plaintiff's motion for summary judgment as to the issue of Plaintiff's entitlement to general contractor overhead and profit ["GCOP" hereinafter]:

> "... 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 Homeowner's Policy was a replacement cost policy, such that any and all losses require replacement; repairs are not allowed..."

Putting aside for a moment all the rulings subsequent to that order [which granted summary judgment as to GCOP] and likewise putting aside any detailed argument in support of same, suffice it to simply note here that "all" of the Defendant's witnesses (which were struck) were but two in number - - Schmidt and Jacobson - - one of who, Jacobson, had no independent knowledge of the Plaintiff's damage, he merely agreed with Schmidt, (T. 258) and Schmidt, whose opinion was itself legally deficient (T. 232) as will be discussed, infra. Hence, the Plaintiff will first focus on his entitlement to GCOP, the ruling which led to the above quoted "cascade."

A.

When the Plaintiff filed his motion for partial summary judgment as to the Defendant's (alleged) breach of contract for failing to pay GCOP (R. 671) the Plaintiff reiterated that GCOP:

> "... is the amount of a covered property loss payable to an insured for the cost of a general contractor to coordinate repairs..." (R. 674).

"To coordinate repairs!" Neither Defendant's brief nor the recent brief of the Defendant's "amicus" acknowledge in any detail, if at all, this basic fact. Rather, both briefs suggest that this Plaintiff is seeking to advocate for a change to this Court's holding in TRINIDAD v. FLORIDA PENINSULA INSURANCE COMPANY, 121 So.3d 433 (Fla. 2013) that "overhead and profit" is due where the

insured is "reasonably likely" to need a general contractor for the repairs. *See:* TRINIDAD, supra, 121 So.3d, at page 436.

The Defendant and its amicus assert that this Plaintiff is urging that the "reasonably likely" test be changed to a "bright line" rule. *See:* Defendant's Brief, at pages 26, 28, and 35-39; Brief of Amicus, at pages 11-14. They both advance such argument in the hope that this Court will (1) accept their arguments that the District Court did not "mis-apply" the "precedent" of TRINIDAD and/or (2) find that the District Court was correct in reversing the trial Court as to the issue of GCOP. Let there be no mistake! Plaintiff is not suggesting anything of the sort. What this Plaintiff has argued, what this Plaintiff is urging, and what this Plaintiff requests of this Court is to address what was merely "concluded" in the District Court, and what was not addressed in TRINIDAD [as it was not (then)] at issue in TRINIDAD, and that is to determine:

> "... what type evidence (expert or otherwise) suffices to generate a fact question on when an insured is 'reasonably likely' to need a general contractor for either the 'repair' or 'replacement' of the insured's (damaged) property..." *See:* Plaintiff's Jurisdictional Brief, at page 10.

In TRINIDAD, this Court directed that the case be remanded to the trial Court to determine, consistent with the opinion:

> "... whether *Trinidad* is 'reasonably likely' to need a general contractor for the repairs that encompass his covered loss..." 121 So.3d, at page 443.

This Court's opinion was (appropriately) silent as to what evidence would be legally relevant in the determination of the (remanded) issue. Plaintiff's arguments throughout this litigation have come from the record facts of this case and from cases which have touched on the subject issue. Indeed, given the remanded directive in TRINIDAD and given the arguments advanced by both the Defendant and its amicus, Plaintiff finds it somewhat ironic that the Defendant writes at page 4 of its brief:

> "... this is a very fact specific case involving already established law that does not present any basis or need for far reaching legal rulings."

TRINIDAD did not supply any such criteria. The District Court never delineated any such guidelines. If what the Defendant writes is true [and Plaintiff disputes that any Florida appellate Court or this Court has set out such criteria such that there does not exist "already established law"] then it must (again) be asked: Upon what basis did the District Court reverse the trial Court, to wit: what evidence did Plaintiff lack, and/or what evidence did the Defendant present to generate a fact question on the subject issue?

B.

Prior to addressing (1) the evidence of record; (2) the Defendant's arguments; and, (3) the merits of the subject controversy, Plaintiff would note that he agrees with the Defendant's amicus that a "bright line" rule would not be practical. Plaintiff, as the aggrieved insured, and as the summary judgment movant below, argued for summary judgment and premised his argument, in part, on a "three tradesmen" rule given that no Florida case had, at that point in time, directly addressed the issue. TRINIDAD provided no guidelines, nor did it have to. It left the initial determination for trial Court decision subject to appellate review. That is precisely what happened here. The trial Court ruled on this issue and found no issue of fact. The District Court's reversal of the summary judgment and then remanding the case to the trial Court for submission to a jury simply "ducked the issue" [as opposed to addressing the issue.] The trial Court was reversed for finding an "absence" of a genuine issue of fact. The District Court's opinion and its' reliance on TRINIDAD will not aid the trial Court in that the District Court opinion never identified what facts or events would be required to generate an issue of fact.

To the subject at hand, Plaintiff agrees that in any consideration of when it would be "reasonably likely" that an insured would require the services of a general contractor (to coordinate repairs) the trier of fact should consider the factors the

amicus has set out at pages 6 and 7 of its brief:

1. While the number of trades is an important factor in determining whether it is "reasonably likely" that a repair would require the services of a general contractor, it should not be the only factor;

2. There are many factors that must be evaluated to determine whether the services of a general contractor are reasonably likely to be required, and each situation is unique and would need to be analyzed individually; and,

3. Such factors include, but are not limited to, the nature, scope, complexity, and potential danger of the work to be performed, and characteristics of the individual homeowner.

In point of fact, and without making reference to any legal source from which the above factors may have arisen, the trial Court granted the Plaintiff's motion (for summary judgment on the issue of entitlement to GCOP) because the evidence of record reflected Plaintiff's need for a general contractor, which evidence happens to meet several of the (now) proposed criteria [advanced by the amicus.] As will be shown, the Defendant presented nothing in opposition!

The answer to the question of which (and how many) of the above delineated factors are necessary for an insured to establish in order to generate a "fact question" as to his (or her) entitlement to GCOP remains with this Court! That the trier of fact

may consider the "totality of the circumstances" (using any number of the factors delineated above) states a workable rule. While the specific criteria required remains to be decided by this Court, the Plaintiff would argue that several of these factors are found in the subject record, were argued to the trial Court, and support in all respects the trial court's ruling on the Plaintiff's motion for summary judgment as to the issue of entitlement to GCOP. Moreover, the Defendant presented no evidence in opposition and (for the reasons advanced in Plaintiff's Initial Brief) failed to generate a fact question in that it failed to present any evidence in support of its position that it was not "reasonably likely" that the Plaintiff would need a general contractor. The evidence as to this matter is clear. Indeed, it surfaced almost immediately after the subject occurrence!

C.

When Plaintiff received the Massey estimate Plaintiff disagreed with the amount adjusted. Plaintiff sued. When, during the course of the litigation, Plaintiff (first) received the missing page 4 of the insurance company's estimate, the Plaintiff amended his complaint to include a claim for contractual breach because the page 4 summary sheet did not include an amount for GCOP which Plaintiff believed he was entitled to given there was going to be either "repair" or "replacement" of his damaged kitchen, either one of which would allow for GCOP. *See:* TRINIDAD,

supra. At page 34 of its brief, the Defendant writes:

> "Plaintiff improperly seeks to place the burden on Prepared at the summary judgment stage by arguing... the 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 (have) hired a general contractor ... 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..."

Analysis of the above underscores the basic flaws in the Defendant's arguments.

When Plaintiff moved for summary judgment as to the issue of GCOP the evidence of record established the need for several tradesmen as the Massey estimate itself reflected payment for a painter, a clean-up crew, and Schmidt (himself a cabinet refinisher). In addition, Schmidt's opinion that a plumber (and perhaps an electrician) "would be necessary" to complete the project is likewise of record. True, Plaintiff advocated his position premised on the "three-tradesmen" rule. However, the evidence supported that argument! Likewise, that the Plaintiff retained the services of a general contractor because he was advised that it would be very difficult to "match the same wood and give it the same look by only re-surfacing" (R. 1419, 1420) and that he did so because he would not himself coordinate the project (due to its complexity) are likewise factors falling within those criteria now advanced by the

Defendant's amicus. [R. 1420 (at 46, 47); R. 1426 (at 72).] In fact, all that the Defendant presented in opposition to the Plaintiff's evidence was Schmidt - - who did not speak to the Plaintiff's need for a general contractor. Schmidt never addressed the issue. Schmidt spoke to whether the cabinets could be "refinished" or "replaced" and "opined" as to cost. The Defendant argues with itself when it asserts Plaintiff was incorrect in stating that (even) Schmidt's opinion recognized the "necessity" for such (numerous) tradesmen. The District Court, in its opinion, (as barren of facts as it was) commented:

> "... the insuror's expert claimed he could restore the cabinets for $2,585.00. Alternatively, he could replace the cabinets for $19,065.00. 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 insuror's expert also did not include a general contractor's overhead and profit in his estimate as he admitted he did not know if hiring a general contractor would be necessary.." (A. 2).

Plaintiff emphasizes these matters because the Defendant ignores the very criteria it now advocates for (and the record evidence in support) when it repeatedly states that the Plaintiff "failed to present" any evidence that a general contractor was required for the repair job. *See:* Defendant's Brief, at pages 2, 10 and 11. As a matter of simple fact, all of the subject record facts discussed, supra, are factors within those now advocated for by both Defendant and its amicus. Moreover, sight should not be

lost of the fact that in TRINIDAD this Court directed that the case be remanded to the trial Court to determine, consistent with the opinion, whether TRINIDAD was "reasonably likely" to need a general contractor for the repairs (that encompassed his covered loss). *See:* TRINIDAD, supra, 121 So.3d, at page 443. Neither TRINIDAD nor the considerations advocated for by Defendant's amicus contemplate evidence that is "conclusive" ["that a general contractor was required for the repair job"] merely that evidence be presented in support of the "reasonable likelihood" that the insured would need a general contractor. With the mandated considerations in place it would then become a question of fact, for the trier of fact, as to whether or not such general contractor was "required" for the repair job!

With the above discussed criteria being record supported, upon the filing of Plaintiff's summary judgment motion and his reliance on such factors, the burden then shifted to the Defendant to generate a fact question as to whether the Plaintiff would not need a general contractor. This the Defendant did not do! Consequently, it should (again) be asked: Upon what did the District Court rely in its reversal of the trial court's ruling on the issue of Plaintiff's entitlement to GCOP other than its own mis-application of TRINIDAD! It identified no facts, inferences, or otherwise, it merely cited TRINIDAD (an opinion which on its face, did not address the subject issue). However, when the subject issue is now addressed and one applies to the

record facts - - the heretofore discussed factors, it is clear the trial Court was correct in granting Plaintiff's Motion for Summary Judgment as to the issue of GCOP. Interestingly, given the correctness of the trial court's ruling, it could not have led to a "cascade" of additional erroneous rulings, to which (correct) rulings the Plaintiff will now turn.

D.

The Defendant argues that the trial Court erred in striking "all" of the Defendant's witnesses (which we now know numbered "2") and states at page 41 of its Brief that:

> "Prepared was ready and willing to present evidence at trial as to the amount of money it would take to repair the damaged property..."

The Defendant proffered its evidence which did not establish such cost! (T. 232, 258). Plaintiff's arguments in reply to the above begin as follows.

At page 1 of its brief, the Defendant in speaking of (wood finisher) Schmidt states that he:

> "... could completely restore the one water-damaged cabinet to its pre-loss condition at a cost of $2,585.00..."

But Schmidt also stated, as the District Court reminded, that he would need a plumber (T. 232) (or electrician) and the record shows that he, Schmidt, could not quantify the

total cost of his repair/refinishing (thus rendering his "opinion" incomplete - - legally deficient if you will!) *See:* Plaintiff's detailed argument on this issue at pages 17-20 of his Initial Brief.

As an aside, but clearly on point to the issues implicated herein, at no time in the entire litigation process did the Defendant, nor did the District Court, make the crucial distinction between the record evidence bearing on the issue of "entitlement to" GCOP - -whatever the ultimate test may be - - and the evidence regarding the cost of "repair" and/or "replacement." True, the District Court identified four "issues" on appeal, but there existed only two subject matters implicated, to wit: the evidence bearing on Plaintiff's "entitlement" (to GCOP) - - having nothing to do with the actual costs of the project itself; and the evidence bearing on the issue of the actual "costs" to "repair" and/or to "replace." Schmidt had no opinion as to who would hire the plumber (or if needed, an electrician) as he reminded "that's not my business." (R. 796). Defendant proffered no testimony to cure this omission! Schmidt's statements that it was not "his business" to hire necessary tradesmen emphasizes the already discussed deficiencies in the Defendant's proof at trial. Defendant, at pages 11 and 12 of its Brief writes:

> "While Mr. Schmidt testified that he generally coordinates with plumbers, he has never actually been hired by a general contractor indicating that a plumber and

> cabinetmaker can coordinate on a cabinet repair job without the need for a general contractor."

Respectfully, Schmidt can "coordinate" to his heart's desire. The question presented herein: Who hires the tradesmen to work with Schmidt? Schmidt testified "that's not my business." (R. 796). Consequently, the Plaintiff would note we have come full circle: Whose business is it?

The Plaintiff would suggest to this Court Schmidt's opinions, whether directed at "GCOP" or directed at the cost of repair were deficient for the numerous reasons heretofore discussed and hence, were legally incapable of generating a genuine issue of material fact as to GCOP and/or the cost of the project [however minimal in cost it may arguably have been.] Florida law has long recognized that an opinion is worth no more than the reasons on which it is based. *See:* ERIK ELECTRIC CO., INC. v. ELLIOT, 403 So.2d 1041 (Fla. App. 3rd 1981) and cases cited therein. Consequently, it should be found that the trial Court was well within its considerable discretion in striking "all" of the Defendant's witnesses. *See:* Cases cited at page 34 of the Plaintiff's Initial Brief.

E.

As to the remaining arguments advanced in the Defendant's Brief, subject to the following observation, the Plaintiff stands on the arguments advanced in his

Initial Brief.

At page 43 of its Brief, the Defendant argues that this Plaintiff "appears to recognize" that the trial Court's striking of Schmidt was "improper." Defendant quotes from Plaintiff's Initial Brief, at page 46. Defendant's observations miss the mark. Schmidt's opinion was directed at the cost of "refinishing" the wood and not to the total cost of the repair (R. 791)! All of these matters were brought out during the course of his pre-trial deposition. *See:* Plaintiff's arguments, at pages 18 and 19 of his Initial Brief. Consequently, it may be concluded that 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, such that Schmidt could remove the cabinets, "refinish" the wood and to then reverse the entire process. "Refinishing" the wood was only part of the total cost. The trial Court did not abuse its discretion in striking Schmidt.

The decision of the District Court of Appeal, Fourth District, should be quashed, and the final judgment entered in favor of the Plaintiff , David Gal, should be affirmed in all respects.

III.

CONCLUSION

For all of the reasons advanced in the Plaintiff's Initial Brief and those contained in this Reply Brief, 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 ***Reply Brief of Petitioner*** was served via e-mail upon the following counsel of record this **13th** day of **July, 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 Roman or 12 point Courier New.

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