IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

May 12, 2010

MICHAEL WARFEL, Appellant, v. UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA, Appellee.	)	Case No. 2D08-3134

BY ORDER OF THE COURT:

Appellee's motion for rehearing en banc is denied. Appellee's motion for certification of a question of great public importance is granted. The prior opinion dated December 9, 2009, is withdrawn and the attached opinion is issued in its place. No further motions for rehearing will be entertained in this appeal.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES BIRKHOLD, CLERK

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL WARFEL, Appellant, v. UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA, Appellee.	)	Case No. 2D08-3134

Opinion filed May 12, 2010.

Appeal from the Circuit Court for Pasco County; W. Lowell Bray, Jr., Judge.

Nancy A. Lauten and George A. Vaka of Vaka, Larson & Johnson, P.L., Tampa; and Jonathan Hall, Joshua E. Burnett, and Marshall Thomas Burnett, Tampa, for Appellant.

Alicia Lopez and Karl Forrest of Groelle & Salmon, P.A., Tampa, for Appellee.

LaROSE, Judge.

Michael Warfel appeals a final judgment entered in favor of Universal Insurance Company of North America in a sinkhole insurance coverage case. Mr. Warfel is entitled to a new trial because the trial court should not have instructed the jury on an evidentiary presumption that impermissibly shifted the burden of proof to him. Accordingly, we reverse.

In March 2005, Universal issued an all-risks homeowners' insurance policy to Mr. Warfel. The policy covered sinkhole claims. Effective June 1, 2005, the legislature amended sections 627.706 to 627.707, Florida Statutes (2005), and enacted sections 627.7065, 627.7072, and 627.7073 relating to database information, testing standards, and reporting requirements for sinkhole claims.

In August 2005, Mr. Warfel noticed damaged walls and floors in his home. He filed a sinkhole claim with Universal. After an investigation by a geotechnical, geological and engineering firm, SD II Global, Universal denied the claim, concluding that the damage was not caused by a sinkhole.[1] The SD II Global report found that the damage was caused by shrinkage, thermal stress, and differential settlement, all of which are excluded from coverage under the policy.

Mr. Warfel sued Universal. Before trial, Universal filed a motion asking the trial court to apply the above-referenced statutory provisions to the case. Universal contended that the 2005 amendments and enactments did not impair existing contract

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[1]Universal was required to retain these experts. Section 627.707 provides, in part, as follows:

> Upon receipt of a claim for a sinkhole loss, an insurer must meet the following standards in investigating a claim:
>
> (1) The insurer must make an inspection of the insured's premises to determine if there has been physical damage to the structure which may be the result of sinkhole activity.
>
> (2) Following the insurer's initial inspection, the insurer shall engage an engineer or a professional geologist to conduct testing as provided in s. 627.7072 to determine the cause of the loss within a reasonable professional probability and issue a report as provided in s. 627.7073, if:
>
> (a) The insurer is unable to identify a valid cause of the damage or discovers damage to the structure which is consistent with sinkhole loss; or
>
> (b) The policyholder demands testing in accordance with this section or s. 627.7072.

rights or obligations. Alternatively, Universal argued that any impairment was overridden by the State's interest in resolving a sinkhole insurance claim crisis. Universal also asked the trial court to determine that section 90.304, Florida Statutes (2007), allowed a jury instruction based on section 627.7073(1)(c) as a rebuttable presumption affecting the burden of proof. Over Mr. Warfel's objection, the trial court granted Universal's motion as it related to the jury instruction; that ruling is the crux of this appeal.[2]

At trial several experts testified about the cause of damage to Mr. Warfel's home. Mr. Warfel presented the testimony of a geologist, an engineer, and a structural engineer, all of whom had reviewed the SD II Global report. They concluded that a sinkhole, at least in part, caused the damage. Universal presented testimony of a structural engineer, a geotechnical engineer, and a geologist, all affiliated with SD II Global. They concluded that sinkhole activity did not damage the home.

Universal posited that section 627.7073(1)(c) required Mr. Warfel to prove that he suffered a sinkhole loss as specifically defined by statute. The 2005 version of section 627.7073(1)(c) provided as follows:

> The respective findings, opinions, and recommendations of the engineer and professional geologist as to the verification or elimination of a sinkhole loss and the findings, opinions, and recommendations of the engineer as

[2]The trial court denied Universal's motion as to sections 627.706 to 627.707, finding that these amendments were substantive and not applicable retroactively. The trial court granted Universal's motion as to the three new enactments, sections 627.7065, 627.7072, and 627.7073, relating to sinkhole database, testing, and reporting requirements, reasoning that the statutes were procedural and did not involve an issue of retroactivity. Although Mr. Warfel takes issue with the latter ruling, we find no error and discuss the matter no further.

> to land and building stabilization and foundation repair shall be presumed correct.[3]

Universal retained its experts under section 627.707(2) to conduct the testing required by section 627.7072 and to issue a report in accordance with section 627.7073. This report bears the presumption of correctness.

Universal also contended that section 627.7073(1)(c) created a section 90.304 presumption because it implemented public policy relating to a sinkhole insurance crisis.[4] Universal reasoned that the SD II Global report findings are presumptively correct; the presumption shifted the burden of proof to Mr. Warfel. The trial court agreed and instructed the jury as follows:

> You must presume that the opinions, findings, and conclusion in the SD II report as to the cause of damage and whether or not a sinkhole loss has occurred are correct. This presumption is rebuttable. The Plaintiff has the burden of proving by a preponderance of the evidence that the findings, opinions, and conclusions of the report are not correct.

(Emphasis added.) Universal stressed this instruction during its closing argument, emphasizing that the trial court would tell the jury that it

> must presume that the opinions, findings, and conclusions in the SD II report as to the cause of damage and whether or not a sinkhole loss has occurred are correct. You must presume that report is correct. That report is the only report in evidence.

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[3]The legislature made minor changes to section 627.7073(1)(c) in 2006, none of which are relevant here.

[4]**90.304 Presumption affecting the burden of proof defined.**--In civil actions, all rebuttable presumptions which are not defined in s. 90.303 are presumptions affecting the burden of proof.

> You can take it back in the room. Read it. You will presume--the Judge will instruct you you must presume that's correct.

Throughout the trial court proceedings, Mr. Warfel argued that the section 627.7073(1)(c) presumption was a "vanishing" or "bursting bubble" presumption, a presumption affecting the burden of producing evidence but not one shifting the burden of proof to him. See §§ 90.302(1),[5] 90.303.[6] Additionally, Mr. Warfel explained that the statutory scheme reflected no legislative intent to apply a public or social policy presumption so as to shift the burden of proof to the homeowner. He is correct.

We see no clear legislative expression that public policy compels a homeowner to shoulder the burden to disprove the findings and recommendations of the insurer's engineers and geologists. We are also mindful that, historically, an all-risks policy encumbers the insurer with the burden to prove that a claimed loss is not covered. See Wallach v. Rosenberg, 527 So. 2d 1386, 1388-89 (Fla. 3d DCA 1988).

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[5] **90.302 Classification of rebuttable presumptions.** Every rebuttable presumption is either:

(1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

[6] **90.303 Presumption affecting the burden of producing evidence defined.**--In a civil action or proceeding, unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence.

We must assume that the legislature was aware of this fact when it enacted section 627.7073(1)(c). Moreover, the legislature knows how to create burden-shifting presumptions under section 90.304. See C. Ehrhardt, Florida Evidence § 304.1 (2009 ed.) (explaining presumptions that affect the burden of proof and providing examples of conclusive presumptions). For example, the legislature included a burden-shifting presumption in a statutory amendment governing burdens of proof in will contests. There, the legislature announced that a presumption of undue influence implements public policy and shifts the burden of proof after the presumption of undue influence arises in a will contest. See § 733.107(2), Fla. Stat. (2002); Hack v. Janes, 878 So. 2d 440, 443-44 (Fla. 5th DCA 2004) (explaining the section 733.107(2) provision and the difference between vanishing presumptions, which merely affect the burden of production of evidence, and public policy-related presumptions that provide for shifting of the burden of proof). Other legislatively mandated public policy-related presumptions abound. See, e.g., Mallardi v. Jenne, 721 So. 2d 380, 383 (Fla. 4th DCA 1998) (discussing amendment to section 61.14, Florida Statutes (1992), which adopted a presumption relating to contempt for failure to pay alimony or child support under section 90.302(2) of the evidence code "to implement the public policy of this state"); Ferguson v. Williams, 566 So. 2d 9, 11 (Fla. 3d DCA 1990) (explaining that the statutory presumption of paternity under section 742.12(1), Florida Statutes (1989), is a rebuttable presumption and the legislature specifically provided that it was governed by section 90.304 of the evidence code).

In contrast, the legislature has not declared that the presumption in section 627.7073(1)(c) is a public policy-related presumption. Nor did the legislature

specifically provide that section 627.7073(1)(c) was to operate as a burden-shifting presumption under sections 90.302(2) or 90.304. Absent a clear legislative directive, we must conclude that section 627.7073(1)(c) is a "vanishing" or "bursting bubble" presumption that affected only Mr. Warfel's burden of producing evidence. See C. Ehrhardt, Florida Evidence § 303.1.[7] An explanation of this type of presumption was reiterated in International Alliance of Theatrical Stage Employees & Moving Picture Technicians, Artists & Allied Crafts of the United States, its Territories, & Canada Local 500 v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators Holding Co., 902 So. 2d 959, 963 (Fla. 4th DCA 2005) (quoting Caldwell v. Div. of Ret., 372 So. 2d 438, 440 (Fla. 1979)):

> [W]hen credible evidence comes into the case contradicting the basic fact or facts giving rise to the presumption, the presumption vanishes and the issue is determined on the evidence just as though no presumption has ever existed. Conversely, if the basic facts are sufficiently proven so as to give rise to the presumption and not thereafter contradicted by credible evidence, the party in whose favor the presumption exists becomes entitled to a directed verdict. Thus, in either event, the presumption is productive of these procedural consequences but is not a matter for the jury to consider.

The jury is not told of this presumption. See Pub. Health Trust of Dade County v. Valcin, 507 So. 2d 596, 600 (Fla. 1987); Murray v. Schreiner, 825 So. 2d 527, 528 (Fla. 2d DCA 2002) (" 'When the defendant produces evidence which fairly and reasonably

[7]We recognize the legislature's desire to stem the tide of sinkhole-related insurance claims. Unquestionably, certain provisions of the statutes described earlier in this opinion reflect a concern with identifying and advising homeowners and others of potential sinkhole-prone areas. See §§ 627.7065, 627.7072, 627.7073. For example, the reporting and recording provisions of sections 627.7065 and 627.7073 promote public awareness. But we are hesitant to conclude that this concern with enhancing public information, absent clear legislative direction, extends to the micromanagement of trial proceedings between private parties.

tends to show that the real fact is not as presumed, the impact of "the presumption is dissipated." Whether the ultimate fact has been established must then be decided by the jury from all of the evidence before it without the aid of the presumption.' " (quoting Gulle v. Boggs, 174 So. 2d 26, 28-29 (Fla. 1965))); Aetna Cas. & Sur. Co. v. Pappagallo Rest., Inc., 547 So. 2d 243, 244 (Fla. 3d DCA 1989) (explaining that when adverse party introduces credible evidence to disprove a presumed fact, the presumption vanishes and the jury is never told of it); Nationwide Mut. Ins. Co. v. Griffin, 222 So. 2d 754, 756 (Fla. 4th DCA 1969) ("A presumption is a rule of law which attaches to certain evidentiary facts and is productive of certain procedural consequences. The presumption is not itself evidence and has no probative value.").

Because the trial court misapplied the presumption at work in this case and gave the jury an instruction improperly shifting the burden of proof, a new trial is required.

Reversed and remanded.

However, because our ruling may affect insurance claims for sinkhole losses throughout Florida, we certify the following question to the supreme court as one of great public importance:

> DOES THE LANGUAGE OF SECTION 627.7073(1)(C) CREATE A PRESUMPTION AFFECTING THE BURDEN OF PROOF UNDER SECTION 90.304 OR DOES THE LANGUAGE CREATE A PRESUMPTION AFFECTING THE BURDEN OF PRODUCING EVIDENCE UNDER SECTION 90.303.

WALLACE, J., Concurs.
VILLANTI, J., Dissents with opinion.

VILLANTI, Judge, Dissenting.

I respectfully dissent because I do not agree that the trial court erred in its jury instruction regarding section 627.7073.

The standard of review applicable to a trial court's decision to give or withhold a jury instruction is abuse of discretion. Barbour v. Brinker Fla., Inc., 801 So. 2d 953, 959 (Fla. 5th DCA 2001). "Trial courts are generally accorded broad discretion in formulating jury instructions." Id.; see also Barkett v. Gomez, 908 So. 2d 1084, 1086 (Fla. 3d DCA 2005) (noting that decisions regarding jury instructions rest within the trial court's discretion and will not be reversed absent a showing of prejudicial error). In this case, the statute stated that the findings, opinions, and recommendations of the experts were presumed correct. See § 627.7073(1)(c). I fail to see how a trial court can abuse its discretion by giving an instruction that merely tracks the governing law. In fact, it would have been an abuse of discretion for the trial court to deny giving the requested instruction, since it was undisputed that Universal met its obligations under the new legislation and that Mr. Warfel's claim both arose and was filed after the statute's effective date. See, e.g., Barkett, 908 So. 2d at 1086-87 (holding that failure to give jury instruction which tracked statutory language and which was warranted by the evidence or arguments required a new trial).

Furthermore, the parties do not dispute that social policy concerns drove the legislative changes at play in this case. They only disagree as to whether the presumption that accompanied these changes was one shifting the burden of proof or one that merely vanished once countervailing evidence was adduced. I contend that

because the statutory sections at issue in the case were enacted to advance social or public policy, a burden-shifting presumption applies.

Section 90.303, Florida Statutes (2005), provides:

> **Presumption affecting the burden of producing evidence defined.**—In a civil action or proceeding, unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence.

(Emphasis added.) Section 90.304 then provides:

> **Presumption affecting the burden of proof defined.**—In civil actions, all rebuttable presumptions which are not defined in s. 90.303 are presumptions affecting the burden of proof.

(Emphasis added.) Section 90.304 applies to presumptions implementing public policy and, therefore, applies in this case.

Caldwell v. Division of Retirement, Florida Department of Administration, 372 So. 2d 438, 439 (Fla. 1979), provides a useful analytic framework. In Caldwell the supreme court analyzed presumptions where the relevant statute did not expressly create a burden-shifting presumption. The case involved section 112.18(1), Florida Statutes (1975), which provided that a fireman's disability or death caused by heart disease was presumed to have been suffered in the line of duty unless the contrary was shown by competent evidence. Id. In Caldwell, there was conflicting expert testimony as to the cause of the fireman's injury. Id. The supreme court concluded that the presumption created by the statute "embodie[d] the social policy of the state" which recognized that firemen are subjected to certain hazards which could cause heart disease. Id. at 440. Therefore, the statutory presumption was intended to shift the

burden of proof/persuasion, even though the statute did not expressly so state. The court reasoned that the presumption would be meaningless and would negate the statutory language if it simply vanished following testimony from the employer's expert regarding causation. Id. at 440-41.

Similar public policy considerations are evident in this case. In 2004, in response to the increase in sinkhole claims and policy cancellations, the Florida Legislature commissioned a study by Florida State University on matters related to the affordability and availability of sinkhole insurance. See Fla. S. Banking & Ins. Comm., CS for SB 1488 (2005) Staff Analysis 18 (Apr. 7, 2005) (on file with comm.) [hereinafter SB 1488 Staff Analysis]. The study found that sinkhole claims had dramatically increased in a five-year period, from 348 in 1999 to 1108 in 2003, and that payments for sinkhole claims had almost tripled, from $22.4 million in 1999 to $65 million in 2003. Id. As a result of the increase in sinkhole claims and the high costs associated with investigating those claims, many private insurers withdrew from Florida, forcing residents to obtain property insurance through Citizens Property Insurance Company, Florida's insurer of last resort. Cassandra R. Cole, Ph.D., et al., Potential Solutions to the Sinkhole Problem in Florida, CPCU eJOURNAL (CPCU Society, Malvern, PA), Dec. 2005, at 2. This situation resulted in substantial rate increases for Citizens' policy-holders in sinkhole-prone counties. Id. at 2. The 2005 study made several recommendations to address the "sinkhole problem." Id. at 1. These recommendations included creating uniform procedures for adjusting sinkhole claims utilizing experts and establishing a database with sinkhole claims information. Id. The study recognized the

high cost of sinkhole testing[8] and the fact that accurate testing requires a certain level of "geotechnical expertise." Id. at 3. One of the problems with sinkhole testing was the lack of standardized methods for identifying sinkholes, which caused a large number of disputed claims. Id. The 2005 report recommended the creation of a uniform approach to identify sinkholes, in an effort to "provide consistency in claims handling" and a reduction in the number of disputed sinkhole claims. Id. at 4. It was obvious, based upon the study, that a collapse of the sinkhole insurance market was imminent without legislative reform. Against this critical economic background, the legislature revised the statutes at issue in this case "in response to a continuing crisis regarding the availability and affordability of sinkhole coverage." Fla. S. Banking & Ins. Comm., CS for SB 286 (2006) Staff Analysis 3 (Apr. 11, 2006) (on file with comm.).

Specifically, section 627.707, Florida Statutes (2005), was amended to revise the standards for investigating sinkhole claims. See SB 1488 Staff Analysis at 24. Section 627.707(2) requires an insurer who receives a sinkhole claim to engage an engineer or professional geologist to conduct testing as set forth in section 627.7072, to determine the cause of loss. Section 627.7072 sets forth specific standards to test for the presence or absence of sinkholes. The testing must conform to the Florida Geological Survey Special Publication No. 57 (2005). § 627.7072(2). Section 627.707(2) then requires that a report be issued as provided in section 627.7073. Id. Section 627.7073 specifies what must be included in that report. Section 627.7073(1)(c) then clearly states:

[8]In 2005, the cost of testing for sinkhole losses ranged from $4000 to $8000 and higher. Cassandra R. Cole, Ph.D., et. al., supra at 3.

> The respective findings, opinions, and recommendations of the engineer and professional geologist as to the verification or elimination of a sinkhole loss and the findings, opinions, and recommendations of the engineer as to land and building stabilization and foundation repair shall be presumed correct.

(Emphasis added.) As in Caldwell, it is clear that these statutory sections were enacted with a common social policy: to address the critical sinkhole insurance problem in Florida. Presumptions based on social policy are not "vanishing" presumptions; they do not automatically disappear. See Caldwell, 372 So. 2d at 440. Rather, they are presumptions shifting the burden of proof. Id. (holding that presumption could be overcome only by clear and convincing evidence and that, in the absence of such cogent proof, public policy must be given effect). The majority points out that the legislature knows how to expressly create burden-shifting presumptions under section 90.304. While this may be true, as illustrated by Caldwell, the fact that the statute does not expressly state that it contains a burden-shifting presumption is not always dispositive of the issue.

In fact, this case illustrates why section 627.7073's presumption ought to be a burden-shifting presumption. Upon receiving Mr. Warfel's claim, Universal hired experts whose qualifications met the requirements of the relevant statute and had those experts conduct the type of testing required by the statute. The experts then prepared a report as required by section 627.7073. This was all done at Universal's expense. At trial Mr. Warfel offered his own experts, who simply reviewed Universal's report and visited the property; they did not conduct independent testing consistent with the standards set forth in section 627.7072. Mr. Warfel's experts then simply disagreed with the report's conclusions and opined that a sinkhole contributed to the damage to Mr. Warfel's property. To apply a "vanishing" presumption under these facts effectively

negates the presumption of correctness conferred upon the report by section 627.7073(1)(c). It is inconceivable that the legislature would enact a statute containing extensive detail regarding sinkhole testing and expert reports and that it would express its intent that the report "be presumed correct," only to have this presumption "vanish" when an expert hired by the insured simply testifies that he disagrees with the conclusions contained in the report. Allowing Mr. Warfel's experts to "vanish" the presumption created by the statute by simply testifying that they disagree with the report negates the statute's efforts to provide consistency in claims handling and reduce the number of disputed sinkhole claims. This type of ipse dixit logic from the insured's experts is not consistent with the history and intent of the statute.