IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
HILLSBOROUGH COUNTY, FLORIDA
Civil Appellate Division

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Appellant,

vs.

SUPERIOR AUTO GLASS OF TAMPA BAY, INC., a/a/o Matthew Dick,
Appellee.
_____/

Appeal number: 16-CA-5106
Division X
Co. Ct. Case No.: 15-CC-9347
(The Hon. Joelle Ann Ober)

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Appellant,

vs.

SUPERIOR AUTO GLASS OF TAMPA BAY, INC., a/a/o Ronald Robbins,
Appellee.
_____/

Appeal number: 16-CA-7959
Division X
Co. Ct. Case No.: 16-CC-7323
(The Hon. Herbert M. Berkowitz)

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Appellant,

vs.

SUPERIOR AUTO GLASS OF TAMPA BAY, INC., a/a/o David Gilbo,
Appellee.
_____/

Appeal number: 16-CA-7963
Division X
Co. Ct. Case No.: 16-CC-7306
(The Hon. Herbert M. Berkowitz)

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Appellant,

vs.

CERTIFIED WINDSHIELD, LLC, a/a/o French Lanham,
Appellee.
_____/

Appeal number: 16-CA-7041
Division X
Co. Ct. Case No.: 13-CC-30575
(The Hon. Frances Perrone)

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Appellant,

vs.

CERTIFIED WINDSHIELD, LLC, a/a/o George Hart,
Appellee.
_____/

Appeal number: 16-CA-8940
Division X
Co. Ct. Case No.: 15-CC-31547
(The Hon. Joelle Ann Ober)

On review of multiple final judgments of the County Court for Hillsborough County, Florida.
The Hon. Joelle Ann Ober, Herbert M. Berkowitz, and Frances M. Perrone, County Court Judges.

OPINION

Government Employees Insurance Company (GEICO) appeals five county court judgments that rejected its contention that its policy language limits the extent of its liability for windshield replacement claims. We conclude that the relevant policy language does limit GEICO's liability, but not as much as GEICO contends. The pertinent policy language unambiguously limits GEICO's liability to the "prevailing competitive price," which means the price the service would bring in a competitive market, not the price set in an agreement between GEICO and a particular provider. The judgments under review are vacated, and each case is remanded for further proceedings.

Procedural History and Factual Background

These cases are before the Court in this consolidated appeal to review five final judgments entered against GEICO and in favor of GEICO's insureds' assignees Superior Auto Glass of Tampa Bay, Inc. (Superior) and Certified Windshield, LLC (Certified) (collectively "the windshield companies"). GEICO's insureds each contracted with the windshield companies to replace their windshields. Insureds Dick, Gilbo and Robbins contracted with Superior Auto Glass of Tampa Bay (Superior); Lanham and Hart contracted with Certified Windshield, LLC (Certified).

On February 10, 2015, damage to the windshield of Matthew Dick's 2010 Ford Escape required the windshield to be replaced. Superior replaced Dick's windshield on February 18, 2015, and Dick assigned his benefits under GEICO's policy to Superior. Superior billed GEICO $818.60 for the work performed on Dick's vehicle. GEICO, however, paid $379.88. Superior filed suit against GEICO for breach of contract seeking the $438.72 payment deficiency.

New Port Richey resident David Gilbo sustained damage to the windshield of his 2008 Toyota Tundra truck on December 13, 2013. Gilbo contracted with Superior to replace the windshield and assigned his insurance benefits to Superior. Superior performed the work and billed GEICO $1,041.45. GEICO paid $525.50 of the invoice amount, leaving a balance of $515.95. Superior filed suit seeking the unpaid balance.

Ronald Robbins, from Holiday, Florida, suffered damage to the windshield of his Hyundai Sonata sedan on October 14, 2013. He contracted with Superior to replace it and assigned his benefits to Superior. Superior billed GEICO $954.54; GEICO paid $480.26, leaving a balance of $474.28. Superior filed suit against GEICO for breach of contract seeking the $474.28 unpaid balance.

George Hart, from Geneva, Florida, sustained windshield damage to his 2013 Hyundai Sonata sedan on May 5, 2014. Hart contracted with Certified to replace the glass and assigned his benefits to Certified. Certified billed GEICO $765.36, and GEICO paid Certified $461.36, leaving a balance of $304. Certified filed suit against GEICO for breach of contract seeking the unpaid balance.

French Lanham, from Mims, Florida, suffered damage to the windshield of his 2011 Lexus RX 350 on September 21, 2013, and he contracted with Certified to replace it. Lanham assigned his rights and benefits under his GEICO policy to Certified. Certified sent GEICO an invoice for $1,072.73. GEICO paid $605.39. This left an unpaid balance of $467.34. Certified filed suit against GEICO seeking the payment deficiency.

The windshield companies sued GEICO to recover the full amounts they claimed were due under GEICO's policies with these insureds. *Dick*, *Lanham,* and *Hart* were decided in favor of the windshield companies based on summary judgment motions. In *Hart*, only Certified moved for summary judgment, whereas in *Dick* and *Lanham*, both parties moved for summary judgment. In *Gilbo*, the court conducted a bench trial and found for Superior. The parties agreed the outcome of the *Gilbo* trial would also determine the outcome in *Robbins*.

In all of the cases, GEICO relied on Lee Foskey's testimony, either by affidavit or by live testimony, to support its argument that the payments made to the windshield companies complied with the terms of the policy because these amounts had allegedly been accepted by other competent and conveniently located repair facilities near the insureds to perform similar repairs.

In his affidavit filed in *Dick*, Foskey states:

> ... I have reviewed information regarding repair facilities, which are competent and conveniently located to Matthew Dick in February of 2015. These repair facilities were available in February of 2015 to complete the work as described in Plaintiff's invoice for the price paid by GEICO to Plaintiff for this claim. These repair facilities are competent and must provide proof of ongoing compliance with the American National Standards Institute automotive glass replacement standards.

Foskey then lists several repair facilities that would have done the work for the price GEICO paid. Foskey's affidavits in *Lanham* and *Hart* are essentially the same, except in *Hart*, Foskey simply asserts the listed facilities were competent without giving a basis for this opinion.

In its motion for summary judgment in *Dick*, Superior argued Foskey's affidavit "relies on inadmissible hearsay and details of which the affiant has no personal knowledge." It also

argued Foskey's affidavit does not indicate what information he allegedly reviewed to support these statements – despite Superior's discovery requests asking for this information.

Superior also provided documentation showing that, in a prior case before the same court, Foskey testified live and through affidavit that he relied on proof that repair facilities followed the *American National Standard Z26.1 Manual* in order to show the repair facilities he listed that would have accepted the amount paid by GEICO were competent. On cross-examination in that prior case, however, it was revealed this manual applies to manufacturers, not installers. Only 30 days later, Foskey signed an affidavit stating he determines competence by relying on proof of compliance with the American National Standard Institute automotive glass replacement standards. Superior argued this shows the information contained in Foskey's affidavit is not trustworthy.

In contrast to the information contained in the Foskey's affidavit, Superior filed in *Dick* the affidavit of Chuck Isaly. Isaly is the owner of Auto Glass America, one of the companies listed in the sworn affidavit of Steven Blome (the manager of GEICO's glass department) attached as an exhibit in support of GEICO's motion for change of venue. Auto Glass America appears in GEICO's sworn supplemental answers to interrogatories as a company GEICO contended would have accepted the $379.88 it paid Superior in this case. Isaly's affidavit, with supporting documentation, contradicts these sworn statements. Isaly averred that in 2015, GEICO could not have secured a price of $379.88 for the replacement of a windshield for a 2010 Ford Escape from Auto Glass America, and that his company never relayed or otherwise gave the impression to GEICO that it would have done so. Isaly's affidavit attached invoices submitted to GEICO showing GEICO had been billed in the range of $825 to $835 for comparable windshield replacements in this period. Superior's motion argued that the only admissible evidence came from Isaly and showed that Superior charged the so-called prevailing competitive price. Superior actually billed $818.60.

Based on the use of inadmissible hearsay, lack of personal knowledge, failure to provide supporting documentation and general lack of trustworthiness, Superior requested the court in *Dick* to strike Foskey's affidavit. At the hearing, the trial court reserved ruling on the motion, and, ultimately, granted Superior's motion for summary judgment without ruling on the motion to strike.

In *Hart*, Certified argued Foskey's affidavit was insufficient to dispute Certified's motion for summary judgment. Specifically, it claimed Foskey lacked personal knowledge as to whether the other listed repair facilities were competent and conveniently located. The affidavit also failed to provide any supporting documentation.

In the *Gilbo* trial, Foskey testified that there were 42 shops in the Safelite SGC network that purportedly would have accepted the amount GEICO claimed to be the "prevailing competitive price," and he testified that they were all "competent" simply because they were in the SGC network. But he testified specifically only about Steve's Auto Glass - stating that Steve's was competent and conveniently located to Gilbo - an opinion he conceded was based entirely on information and documentation he received from Safelite. Foskey admitted he had never been to Steve's, had never spoken to anyone at Steve's, did not know what certifications the shop holds, or how its installers are trained. As with the other 42 shops, Foskey testified Steve's was competent only because it was part of the SGC network.

Foskey claimed the document on which he relied for his information about Steve's was a GEICO document, but this document displays the SGC Network logo at the top of the page and only mentions GEICO under "Misc. Data." He admitted he had to request this document from Safelite - which he also admitted was a separate company from GEICO. Superior objected to the admission of the document because it was not a GEICO business record. The trial court overruled the objection and admitted the document.

The trial courts in all five cases ruled in favor of the windshield companies because each court found GEICO's "prevailing competitive price" provision in the *Limit of Liability* is ambiguous. In *Dick*, the judge entered final summary judgment for Superior on May 2, 2016. She found the policy language at issue to be "ambiguous and must be resolved in favor of the Plaintiff's interpretation." She further held that, based on the pleadings and summary judgment evidence before the court, no genuine issue of material fact remained that Superior billed for a repair or replacement using materials of like kind and quality; Superior was a competent and conveniently located repair facility; and GEICO could have secured the price Superior billed. In short, Plaintiff met the criteria for having billed the prevailing competitive price for which GEICO would be liable under the policy as construed for Plaintiff.

Similarly, in *Gilbo,* the trial judge granted Superior's motion for directed verdict following a bench trial, holding the definition of *prevailing competitive price* "is inherently ambiguous. It fails to provide any standard or measure against which an insured or its assignee can conjure the amount it may expect to be reimbursed." The trial court concluded this definition of "prevailing competitive price"

> cannot be stretched to mean "the lowest price we can secure;" it only refers to the ability to obtain something. Had it not included this ambiguous phrase, the reader would know that only the prevailing competitive price would be paid. This added phrase, taken together with the absence of any reference to any standard or schedule renders meaningless this attempt at limiting its liability. As such, the language in question must be construed against the author and in favor of the plaintiff as the insured's assignee.

As noted above, the parties in *Robbins* agreed to be bound by the outcome of the bench trial in *Gilbo*, so the trial judge entered judgment for Superior in that case as well.[1]

In *Lanham,* the policy language was also found to be ambiguous and summary judgment was granted for Certified. The judge disagreed with GEICO that Certified's interpretation produced an absurd, unreasonable result, stating: "Plaintiff's interpretation does not completely nullify the limit of liability section, as other limiting language exists in that provision - the facility must be competent and conveniently located, and requires the use of parts that are of like kind and quality."

The court in *Lanham* also stated GEICO could have defined "prevailing competitive price" as the "lowest price we can secure" or any other clear definition of prevailing competitive price. The court added that, had GEICO done so, "the insured would then be on notice that,

[1] The difference in procedural posture of *Gilbo* and *Robbins* does not impact this Court's resolution of this appeal.

although the insured is free to choose any repair facility, the insured may be liable for out-of-pocket expenses if the chosen facility charges in excess of [GEICO's] clearly defined prevailing competitive price." The *Hart* order is consistent with the trial court's findings in *Lanham.*

Summary of Arguments

GEICO appealed all five judgments, which the parties requested be consolidated for review. GEICO argues the judgments are erroneous because they gave no effect to the requirement that the cost to repair or replace the property "will not exceed" the "prevailing competitive price" "defined" in the Limit of Liability section of the policy as "the price we can secure from a competent and conveniently located repair facility." GEICO adds that the trial courts failed to give effect to the portion informing GEICO's insureds that, although they may choose their own repair facility, the limit of liability remains the prevailing competitive price. By their decisions, GEICO contends the trial courts rendered meaningless the policy's offer to assist the insured with locating a facility that would do the work at the prevailing competitive price. In so doing, they failed to give effect to the policy as a whole.

The windshield companies respond that they are competent, conveniently located repair facilities, and the prices they charged were prices GEICO could obtain. The prices charged were, therefore, consistent with the policy language for the "prevailing competitive price." Even if GEICO had something else in mind, the policy, being ambiguous, must be construed in favor of coverage. The windshield companies also argue the evidence relied upon by GEICO was incompetent as pure hearsay.

Analysis

The construction of an insurance policy is a question of law we review *de novo. Washington Nat'l Ins. Corp. v. Ruderman, et al.,* 117 So. 3d 943, 948 (Fla. 2013). Whenever possible, courts construe insurance contracts in accordance with their plain language. *Swire Pacific Holdings v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003). "When analyzing an insurance contract, it is necessary to examine the contract in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Id.* Reading the contract "in its context and as a whole" also means that each part should be given its "full meaning and operative effect." *Allstate Ins. Co. v. Orthopedic Specialists,* 212 So. 3d 973, 976 (Fla. 2017).

An ambiguity in an insurance policy arises only where more than one *reasonable* interpretation may fairly be given to a particular policy provision, one providing coverage and the other limiting coverage. *Swire* at 165. In this case, coverage is not at issue—only the amount payable under that coverage is. Whether coverage or the amount is at issue, under *Orthopedic Specialists* the principle applies equally. When an ambiguity exists, it is resolved against the insurer. *Auto-Owners Ins. Co. v. Anderson,* 756 So. 3d 29, 34 (Fla. 2000); *Taurus Holdings, Inc. v. United States Fid. & Guaranty Co.,* 913 So. 3d 528 (Fla. 2005). "To allow for such a construction, however, the provision must actually be ambiguous." *Garcia v. Fed. Ins. Co.,* 969 So. 2d 288, 291 (Fla. 2007). A policy provision is not rendered ambiguous by its complexity or the requirement of analysis for application. *Swire Pacific Holdings* at 165.

The relevant language from the policy provides as follows:

The limit of our liability for *loss:*

> 2. Will not exceed the **prevailing competitive price** to repair or replace the property at the time of *loss,* or any of its parts, including parts from non-original equipment manufacturers, with other of like kind and quality and will not include compensation for any diminution of value that is claimed to result from the *loss.* Although *you* have the right to choose any repair facility or location, the limit of liability for repair or replacement of such property is the **prevailing competitive price** which is the price we can secure from a competent and conveniently located repair facility. At *your* request, we will identify a repair facility that will perform the repairs or replacement at the **prevailing competitive price.**

(emphasis added).

The policy language clearly limits GEICO's liability to the "prevailing competitive price." The term is used in three locations in the relevant section of the policy, but both sides seek to focus the court only on the second instance, which characterizes the "prevailing competitive price" as the "price we can secure from a competent and conveniently located repair facility."[2] Both sides have called the latter phrase a "definition" of the former, and focus on its language exclusively. GEICO contends the "definition" means any price it elects to pay that can get the repair done, while the windshield companies contend the same words mean any price they charge because GEICO could, as could any customer, also get the repairs done at that price.

The windshield companies' interpretation of the provision at issue is unreasonable for several reasons. Two circuits (and now three) have rejected it.[3] No one would *reasonably* expect the language—"price we can secure from a competent and conveniently located repair facility"—to be given a literal meaning such that it requires an insurer to pay any arbitrary price a repair facility decides to charge, as the windshield companies' argument necessarily implies. First, it requires the untenable behavioral assumption that GEICO would "secure" a higher price than necessary to get the repair done. No one does that. Second, it is equivalent to asserting the limitations section of the policy imposes no limitation at all. Insurance policies will not be construed to reach an absurd result. *BKD Twenty-One Mgmt. Co., Inc. v. Delsordo,* 127 So. 3d 527, 530 (Fla. 4th DCA 2012). Just because a contract can possibly be interpreted in more than one way does not mean a true ambiguity exists. *Id.* Absurd interpretations of plain language are always possible; it is the court's duty to prevent that. *Id.* Third, the windshield companies' argument is based on an excerpt out of context. The "price we can secure from a competent and conveniently located repair facility" comes in the context of "prevailing competitive price" and must be interpreted to support that, not displace it. The excerpt prevents the carrier from relying

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[2] *Id.* at 4; see also *Id.* at 14, where appellees lead their summary of argument with this "definition," and where it is their first argument, *Id.* at 17-18. For Appellant's part, see Initial Brief (9/28/16) at 9 ("Finally, the trial court ignored the express definition of 'prevailing competitive price' within the Limit of Liability as, 'the price we can secure from a competent and conveniently located repair facility.'")

[3] *Superior Auto Glass of Tampa Bay, Inc. a/a/o Jeb Shaffer v. GEICO General Insurance Co.*, Appeal No. 2014-AP-0007-WS (Fla. 6th Cir. App. Div. 2014), *reh'g denied* January 13, 2016, and *GEICO Indemnity Co. v. Superior Auto Glass of Tampa Bay, Inc. a/a/o Suzanne Renczkowski,* Appeal No. 2015-AP-0006 (Fla. 5th Cir. Ct. 2016) (Hernando County) *reh'g denied* September 7, 2016.

on a price quoted by an unqualified or distant facility, but it does not change the requirement that the price must be both prevailing and competitive. Essentially, the windshield companies maintain that GEICO should pay the windshield companies' proposed rates, which have been negotiated with *no one*. That simply is not a "prevailing competitive rate."

GEICO's arguments are similarly uninformed by context. The carrier cannot say "prevailing competitive price" is the limit of its liability and then effectively limit its exposure to a lower price it alone could obtain through a non-open-market transaction. Under the policy language, the test is what the service would cost in a competitive market in a normal, arms' length non-insurance transaction. This is hardly a new or mysterious concept in the law.

It is true that when a policy redefines a term, that language should control. *State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc.,* 678 So. 2d 397, 401 (Fla. 4th DCA 1996). But the "price we can secure" language does not redefine "prevailing competitive price." Rather, it modifies it. It prevents one from looking to prices quoted by facilities that are incompetent or inconveniently located when evaluating the competitive price that prevails. Neither side's view, therefore, fairly confronts nor is a reasonable construction of the "prevailing competitive price" language. This Court therefore rejects both parties' interpretations of the subject policy provision because they focus on the wrong language and are unreasonable. We conclude the more reasonable and logical interpretation of this limitation provision is that it requires GEICO to pay the price of the repair it can secure in a competitive market from a competent and conveniently located repair facility.

Moreover, "prevailing competitive price" is not ambiguous. The term "competitive price" appears in the legal vernacular frequently and without need for elucidation. *Titusville Assocs. v. Epoch Mgmt., Inc.,* 702 So. 2d 1309, 1310 (Fla. 5th DCA 1997) ("competitive price quotations"); *State, Dept. of Prof'l Regulation, Bd. of Accountancy v. Rampell,* 589 So. 2d 1352, 1358 (Fla. 4th DCA 1991), *approved in part, quashed in part sub nom. Dep't of Prof'l Regulation, Bd. of Accountancy v. Rampell,* 621 So. 2d 426 (Fla. 1993) ("CPA competitive price quotation"); *Smith v. Fla. Dept. of Revenue*, 512 So. 2d 1008, 1010 (Fla. 1st DCA 1987) ("offer gas at a competitive price and make a profit"); *Godheim v. City of Tampa*, 426 So. 2d 1084, 1089 (Fla. 2d DCA 1983) ("the best competitive price in the shortest reasonable time"); *MYD Marine Distrib., Inc. v. Int'l Paint Ltd.*, 76 So. 3d 42, 45 (Fla. 4th DCA 2011).

Accordingly, we hold that "prevailing competitive price" is a question of fact, in the same sense that "fair market value," "reasonable and necessary," "usual customary charges," and plain "reasonable" are in other contexts. The same standards—and in particular the same standard for the grant or denial of summary judgment—apply.

Turning now to the individual cases before the court, the plain language of the policy limits GEICO's liability to the price that is both "competitive" and "prevailing," but the county court, at the instance of both parties before it, decided the summary judgment (or in one case, bench trial) without reference to either criterion. That methodological error urged upon the county court in each case under review leaves us with an insufficient record to evaluate whether the prices proposed by either party in any of them met the "prevailing competitive price" standard. Hence, the judgments below must be vacated, and it will be up to each county judge on remand to decide whether the price proposed by the plaintiff or the defendant, or some price in

between, is the "prevailing competitive price" available from a competent facility reasonably nearby.

Conclusion

Based on the foregoing, this court concludes that the judgments in the cases under review were based on an erroneous view of the law and must be vacated. It is important to note that this opinion does not direct any particular process or result on remand. Therefore, on remand, the trial courts can decide on a case-by-case basis whether to entertain additional summary judgment proceedings under the legal standard described in this opinion or to proceed directly to trial. Accordingly, it is

ORDERED that the judgments below are **REVERSED** and the cases are **REMANDED** for further proceedings consistent with this Opinion. It is further **ORDERED** that GEICO's motion for appellate attorney's fees is **GRANTED,** conditioned upon its prevailing under the terms of its proposals for settlement in the proceedings below, specifically *Dick, Lanham,* and *Hart,* and on the determination that its proposals for settlement are valid. The windshield companies' motion for appellate attorney's fees is **DENIED.**

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

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S. SCOTT STEPHENS, CIRCUIT JUDGE

RICE and HUEY, JJ., Concur.

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Cc:
The Hon. Joelle Ann Ober
The Hon. Herbert M. Berkowitz
The Hon. Frances M. Perrone