

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D24-388
LWR CASE NO.: CACE 21-11775 (21)

TOP NOTCH FLOORING
CONTRACTORS, INC.

APPELLANT

VS.

GRANADA INSURANCE COMPANY

APPELLEE

APPEAL FROM THE
17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF TOP NOTCH FLOORING CONTRACTORS, INC.
APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Citations	ii
Preface	1
Point on Appeal	2
This Court should find that the trial court erred when it failed to rule whether a provision of the insurance contract was ambiguous or was unambiguous.	
Statement of the Case and Facts.....	3-6
Summary of Argument.....	6-12
Conclusion.....	12
Certificate of Service	13
Certificate of Compliance with Font Requirement.....	14

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Auto-Owners Ins. Co. v. Anderson</u> 756 So.2d 29, 34 (Fla. 2000).....	6
<u>State Comprehensive Health Ass’n v. Carmichael,</u> 706 So.2d 319, 320 (Fla. 4 th DCA 1997).....	6
<u>Liberty Mut. Ins. Co. v. Capeletti Bros., Inc.</u> 699 So.2d 736, 738 (Fla. 3d DCA 1997).....	6
<u>Grant v. State Farm Fire & Cas. Co.,</u> 638 So.2d 936 (Fla. 1994).....	7
<u>Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.,</u> 711 So.2d 1135 (Fla. 1998).....	7
U.S. Bureau of Labor at https://www.bls.gov/ooh/construction-and-extraction/tile-and-marble- setters.htm#tab-2	10-11

PREFACE

In this Brief, Appellant Top Notch Flooring Contractors, Inc., will be referred to as “Top Notch”, Appellant O’Neill Brothers will be referred to “O’Neill” and Granada Insurance Company will be referred to as “Granada.”

(R)- - Record on Appeal

(A) - - Appendix

POINT ON APPEAL

This Court should find that the trial court erred when it failed to rule whether a provision of the insurance contract was ambiguous or was unambiguous.

STATEMENT OF THE CASE AND FACTS

INTRODUCTION

Comes, now the Appellant, Top Notch Flooring Contractors, Inc., and hereby seeks review of the lower court's final summary judgment order on Granada Insurance Company's Motion for Final Summary Judgment entered on

Appellant Top Notch Flooring Contractors, Inc., will be referred to as "Top Notch", Appellant O'Neill Brothers will be referred to "O'Neill" and Granada Insurance Company will be referred to as "Granada."

JURISDICTION

The Fourth District Court of Appeal has jurisdiction of the final summary judgment order pursuant to Florida Rules of Appellate Procedure 9.030(b)(1)(A).

STANDARD OF REVIEW

The standard of review is de novo as the Appellant is asking the Fourth District to review the interpretation of an insurance contract by the underlying Court in the Motion for Final Summary Judgment hearing and order.

STATEMENT OF FACTS

The instant appeal arises from an order granting Appellee's Motion for Final Summary Judgment dated November 28, 2023 by Judge Mark A. Speiser [R 1636 - 1638]

The underlying case was an action for Declaratory Relief filed by Granada on June 15, 2021.¹ Top Notch filed its Answer and Affirmative Defenses on May 20, 2022. [R 503- 507]

The facts that form the basis for the action for Declaratory Relief are not in dispute as follows:

Top Notch and Grenada had an insurance policy (contract) with a policy period of May 23, 2020 through May 23, 2021

O'Neill was hired by Stiles Construction to install flooring materials at 201 E Las Olas Boulevard for the 11th and 12th floors.

O'Neill hired Top Notch in the installation of flooring materials.

While completing this work, O'Neill asked Top Notch to level the floor.

On or about March 31, 2021 the leveling of the floor occurred.

The leveling of the floor caused some of the self-leveling cementitious compound to drip into the elevator shaft damaging the computer equipment related to the elevators.

The pouring of the compound happened in two pours because of the size of the recess in the slab.

¹ Granada originally filed its complaint with only every other page of the insurance policy contract and therefore filed the exact same amended complaint on May 12, 2022 only adding the correct insurance policy contract. The Order Granting the Motion was filed on May 21, 2022.

Granada filed a Motion for Final Summary Judgment on December 10, 2021 [R 138 - 201]

On August 17, 2022 Top Notch filed its Motion for Summary Judgment on the Amended Complaint [R 614 – 851]

As part of the Motion for Summary Judgment on the Amended Complaint, Lisa O’Neill filed an affidavit [R 691 – 692]

After the Motion for Summary Judgment was filed by Top Notch, Granada on November 21, 2022 filed a second amended complaint changing the theory for the reason(s) of no coverage in the policy. [R 863-948].

On December 6, 2022 the Court granted Granada’s Motion to Amend the Complaint.

On December 13, 2022, Top Notch filed its answer and affirmative defenses [R 979-983]

On March 16, 2023 Granada filed its motion for final summary judgment [R 1020 – 1198]

On April 12, 2023, Top Notch responded to Granada’s motion for final summary judgment [R 1203 – 1603]

The language in question is found in the classification description “Classification Schedule page 2 of 5 form GIC CP R DEC (08/10) which states:

“Floor Covering Installations not ceramic tile stone or wood”, this is based on the endorsement GIC GL 3008 (9/96) which states: “Coverage under this policy is specifically limited to those operations described in the declarations under ‘Classification Schedule’” [R 1217, R 1269]

ARGUMENT

- A. The trial’s court’s Order on the Final Summary Judgment departs from the essential requirements of law in that the trial court did not rule whether the coverage provision of the policy was ambiguous

In Florida, insurance contracts are to be construed in accordance with the plain language of the policies. *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). Any ambiguities will be interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. *Id.* “If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage, an ambiguity is deemed to exist, and the court is bound to adopt the interpretation that favors coverage.” *Id.* “Florida law is equally well settled that coverage clauses are to be construed in the broadest possible manner to effect the greatest ex of coverage while exclusions are construed in the narrowest possible manner.” *Id.* “In fact, exclusionary clauses are construed even more strictly against the insurer than coverage clauses.” *Id.* citing

to *State Comprehensive Health Ass'n v. Carmichael*, 706 So.2d 319, 320 (Fla. 4th DCA 1997). Exclusions from coverage must be clearly defined. *Liberty Mut. Ins. Co. v. Capeletti Bros., Inc.* 699 So.2d 736, 738 (Fla. 3d DCA 1997).

A court will generally rely on definitions contained within an insurance policy when interpreting the meaning of policy language. *Grant v. State Farm Fire & Cas. Co.*, 638 So.2d 936 (Fla. 1994). Here, there is no definition of Floor Covering Installations not ceramic tile stone or wood.

One of the reasons courts construe insurance policies in favor of the insured is the fact that the insurer was the party drafting the policy, and if a different meaning had been intended, the insurer could have inserted such language into the policy. *Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998).

A reasonable interpretation of the policy language in question shows that the leveling of the floor is part of “Floor Covering Installation”

Granada’s own original complaint and second amendment complaint where they changed their theory of why no coverage shows the ambiguity of the provision as follows:

In the original complaint, the Plaintiff stated in paragraph 17: “On or about April 1, 2021, while Top Notch was allegedly pouring cement to install wood

flooring at the Property, it is alleged that cement dripped down elevator holes and damaged several elevators at the Property (the ‘Incident’) [R. 33]

In the original complaint the Plaintiff stated in paragraph 18: “Top Notch engaged in operations outside the scope of the Policy’s Classification Description ‘Floor Covering Installation not ceramic tile stone or wood.’ Specifically, Top Notch was installing wood flooring at the Property.” [R 33]

In the original complaint the Plaintiff stated in paragraph 35: “Top Notch’s work at the Property, both in actuality and as alleged, exceeds the permitted classifications in the Policy. Specifically, O’Neill retained Top Notch to install wood flooring at the Property...” [R 36]

On or about December 6, 2022, this Court granted the Plaintiff permission to amend the complaint as the theory of the case changed. [R 977 – 978]

In the Second Amended Complaint the Plaintiff states in paragraph 27 that “Top Notch’s work at the Property exceeded the permitted classification in the Subject Policy because Top Notch’s use or application of the self-leveling concrete material at the Property does not constitute ‘floor covering installation.’” [R 873]

In the Second Amended Complaint the Plaintiff states in paragraph 28 “Top Notch’s leveling of the Property floors does not constitute installation of flooring and is, in fact, an independent activity/scope of work other than

installation of flooring.” [R 873]

The underlying Court narrowly construed the coverage provision instead of following the case law where the Court is to broadly interpret the coverage provision.

B. Instead of ruling on the interpretation of the policy, the court ruled that the leveling of the floor is not “Floor Covering Installation”

During the hearing, the Court did not consider the deposition of Lisa O’Neill nor did the Court consider that Granada’s own expert used the word “typically” in his deposition in discussing the preparing the floor for the covering material. [R1974-1975].

The Court hearing of September 26, 2023 transcript Page 44 line 6 – Page 45 Line 25. [R1974 – 1975]

During the hearing, Granada’s own counsel admitted that minor leveling would be covered but not the pouring of once inch to one – and – a half inches. [R-1942-1943] page 12 line 22 – Page 13 line 5 of the hearing transcript September 26, 2023.

Mr. Atkinson: “Here, what Top Notch was doing was essentially construction work. They were raising the floor by an inch to an inch-and-a-half by using this construction-grade material, the self-leveling concrete in an amount that, while

someone can say well can't you use that product to fix a divot, to fix a blemish on a concrete floor, you can, but that's not what was behind done here, and that's not what has been testified to."

The Court stated that the ruling was based on "the perspective of the insurance carrier, Granada [R2102 -2105]

Page 53 page Line 2- 6 and Page 55 line 19 – Page 57 line 25: Judge Mark A. Speiser stated the following: "Not in this area. Okay. So – but the bottom line is, and the issue before the Court is whether or not from the perspective of the insurance carrier, Granada Insurance, as to whether or not the installation of the tile carpet is."

"All right. So basically, what I'm being asked to do here is to make a decision as to whether or not from the insurance carrier's perspective as to whether or not the insurance that was extended for purposes of installation of the flooring also included the process that was necessary as a prerequisite to raise the level."

The Court made its final ruling on Page 58 line 4 – line 17 Judge Speiser stated the following: "So based on everything that I've heard in this particular case as to what was contemplated and what the position is of the insurance carrier..." [R 2106]

The Court further ruled: Page 58 line 19 – Page 62 line 4 Judge Speiser ruled that the leveling of the floor is a "separate and distinct process". [R2106 -2110]

The position of the Court is not consistent with the U.S. Bureau of Labor at <https://www.bls.gov/ooh/construction-and-extraction/tile-and-marble-setters.htm#tab-2>, states the following regarding Floor Installers and Tile and Stone Setters: “Flooring installers and tile and stone setters lay and finish carpet, wood, vinyl, and other materials, such as ceramic, glass, marble, and granite.

Duties

Flooring installers and tile and stone setters typically do the following:

- Remove existing materials from floors, walls, or other surfaces
- Clean and level the surface to be covered
- Measure the area and cut material to fit
- Arrange materials according to design plans
- Place materials and secure with adhesives, nails, or staples
- Fill joints with filler compound and remove excess compound
- Trim excess carpet or linoleum
- Apply finishes, such as sealants and stains

Flooring installers and tile and stone setters lay the materials that improve the look and feel of homes, offices, restaurants, and other buildings. Many of these workers install materials on floors. However, they also work on walls, ceilings, countertops, and showers.

Installing floors and tiles requires a smooth, even base of mortar or plywood. Flooring installers and tile and stone setters or other construction craftworkers lay this base. On remodeling jobs, workers may need to remove old flooring and smooth the surface before laying the base.”

Lastly, as the changing positions of Granada from their initial complaint (that the leveling of the floor is part of the installation and the installing of wood is excluded to the second amended complaint that the leveling of the floor is a separate and distinct job from floor covering installations.

Ms. O’Neill’s affidavit was based on the first argument of Granada. It is

ambiguous whether the leveling on the floor is “floor covering installations not ceramic tile stone or wood. Both positions could be correct and as such, the coverage is to be liberally construed. Liberally construing the coverage endorsement allows for coverage as the floor covering installations can include the leveling of the floor as done here.

Granada’s first position that wood is not covered based on the wording in the endorsement: “Floor Covering Installations not ceramic tile stone or wood.” There are no commas between ceramic, tile, stone or wood. This can mean ceramic tile, ceramic stone or ceramic wood or it could mean ceramic, tile, stone, or wood. Since this line is excluding certain installations of floor coverings, the line has to be narrowly construed allowing for coverage. Reading this as ceramic tile, ceramic stone or ceramic wood allows for coverage in this instance as originally they were going to install carpet tile and instead ended up installing wood. Either way, the floor had to be leveled and the recess had to become even.

CONCLUSION

Based upon the foregoing, this Court should reverse the lower Court’s summary judgment order and rule that the policy is ambiguous and the facts of this case show that there is coverage for the work completed by Top Notch including the leveling of the floor award entitlement of attorney fees pursuant to Florida Statute 627.428.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct photocopy of the foregoing was e-filed with the Clerk of Court this 1st day of July, 2024 and has been furnished via email to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing was printed in 14-point Times New Roman and thereby satisfies the requirements of Florida Rule of Appellate Procedure 9.045.

By: /s/ David Bierman
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