IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 92,467

SCOTTSDALE INSURANCE COMPANY,
a foreign insurance corporation,

Petitioner,

vs.

JOHN DESALVO, as Personal Representative
of the Estate of H. P. Demery,
deceased, d/b/a Port City Trading,

Respondent.
_____/

On Review from the District Court
of Appeal, First District, State of Florida
Case No. 97-438

RESPONDENT'S BRIEF ON THE MERITS

FANNIN, TYLER & HAMILTON, P.A.

H. TYRONE TYLER
Florida Bar No.: 363413
J. CLARK HAMILTON, JR.
Florida Bar No.: 311731
4069 Atlantic Blvd.
Jacksonville, Florida 32207
(904)398-9999
(904)398-0806 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA STATUTES

EXPLANATION OF SYMBOLS

All references to the record on appeal will be made by the use of the symbol "**R:**" together with the appropriate volume and page number(s).

All references to the appendix submitted by Petitioner with its brief will be made by the use of the symbol "**P. App.**" together with the appropriate page number(s).

PRELIMINARY STATEMENT

In this Brief on the Merits, Respondent, John DeSalvo, as Personal Representative of the Estate of H.P. Demery, deceased, d/b/a Port City Trading, will use the following abbreviations to identify the parties:

1. "DeSalvo" - Respondent, John DeSalvo, as Personal Representative of the Estate of H.P. Demery, deceased, d/b/a Port City Trading;

2. "Scottsdale - Petitioner, Scottsdale Insurance Company, a foreign insurance corporation.

This case arises out of a fire loss to a building which fire occurred on or about January 13, 1995. DeSalvo owns the building and Scottsdale insured it against loss by fire and certain other hazards.

STATEMENT OF THE CASE AND FACTS

DeSalvo is the personal representative of the Estate of H.P. Demery, the deceased owner of certain improved real property located at 13-27 W. Monroe Street, Jacksonville, Duval County, Florida. **R: Vol.I pp.1-7.** Prior to January 13, 1995, Scottsdale issued to DeSalvo a policy of insurance insuring the building, policy number CPS040037. **R: Vol.I pp.8-48.** That policy of insurance insured the building against certain losses, including loss by fire, and provided a limit of $563,000.00. **R: Vol.I pp.8-48.**

On or about January 13, 1995, the building was substantially damaged by fire. **R: Vol.I pp.1-7.** On January 25, 1995, DeSalvo submitted his Proof of Loss in support of the claim, which Scottsdale received no later than January 31, 1995. **R: Vol.I p.3.** Scottsdale failed to respond to DeSalvo's claim within the time (30

days) required under the policy, and DeSalvo filed suit in March 1995 to recover the proceeds of the policy, plus interest, costs and attorney's fees. **R: Vol.I pp.1-7; 8-48.** Thereafter, Scottsdale tendered to DeSalvo a check, "without prejudice", in the amount of $404,402.08, contending that sum was all it owed under the policy. **R: Vol.I pp.1-7.**

Scottsdale thereafter sought appraisal under the policy, which request was denied by the trial Court. **R: Vol.I pp.49-53.** Scottsdale proceeded with an interlocutory appeal (DeSalvo I) on the issue and ultimately prevailed. During the pendency of that appeal, DeSalvo agreed to submit to appraisal if Scottsdale would dismiss its appeal. DeSalvo v. Scottsdale Insurance Company, 705 So.2d 694, 695. Scottsdale would not agree unless DeSalvo in turn agreed to waive his claims for interest, costs and attorney's fees. **P. App. p.3.**

After the appeal, the parties were ordered to appraisal and on January 23, 1996, Scottsdale filed its third in a series of Offers of Judgment in the amount of $100,001.00 inclusive of fees, costs and interest. This offer was not accepted. Ultimately an appraisal award was rendered awarding DeSalvo $84,133.92 above and beyond the $404,402.08 previously tendered by Scottsdale. Thereafter, the trial court awarded DeSalvo prejudgment interest in the amount of $12,014.74, for a total recovery of $96,148.66. **R: Vol.II pp.227-228.**

After the appraisal award, DeSalvo filed his Motion for Attorney's fees. **R: Vol.I pp.144-147.** Scottsdale resisted the award of fees, contending fees are not awardable in appraisal and, also urging, DeSalvo could not recover his fees because the amount he recovered as a result of the appraisal (approximately $96,000.00) was less than the amount it offered in its last Offer of Judgment (100,001.00). **R: Vol.I pp.192-204.**

By Order dated August 21, 1996, DeSalvo's Motion for Attorney's fees was denied by the trial court, based on the authority of Baker Protective Services vs. F.P., Inc., 659 So.2d 1120 (Fla. 3rd DCA 1995). **R: Vol.I p.191.** Baker was the sole stated reason for denial. The trial court did not address the issue of applying §627.428 to appraisals/arbitration. **R: Vol.I p.191.** DeSalvo appealed that decision to the First District (DeSalvo II) and by opinion filed January 30, 1998, the trial court's order denying DeSalvo's Motion for Fees was reversed and the trial court's award of prejudgment interest was affirmed. DeSalvo v. Scottsdale Ins. Co., 705 So.2d 694 (Fla. 1st DCA 1998).

Scottsdale thereafter sought discretionary review to this court, citing the apparent conflict between the First District's decision in the case below with Baker Protective Services v. F.P., Inc.,*supra*, and Mendez v. Bakers Insurance Company, 696 So.2d 1210 (Fla. 4th DCA 1997). Although DeSalvo denied any conflict between the opinion below and Mendez, DeSalvo agreed there was apparent

conflict between the First District Opinion in DeSalvo II and Baker Protective Services, *supra.* Scottsdale urges that this court accepted jurisdiction "over the issue of DeSalvo's entitlement to attorney's fees". **P. Brief, p.5**. DeSalvo acknowledges that "entitlement" has been raised, but states that this court accepted jurisdiction because the First District's opinion in this case apparently conflicted with the opinion of the Third District in another case.

SUMMARY OF ARGUMENT

This appeal concerns the correctness of the opinion of the First District in finding the trial court erred by failing to award DeSalvo a reasonable attorneys' fee for the period ending with the service of the $100,001.00 offer of judgment. In addition, this appeal concerns the correctness of the First District in holding the trial court should have determined the amount of fees, costs and interest through the date of service of the Offer in order to

determine whether post-offer of judgment fees would be appropriate. Therefore, this appeal concerns the question of how courts should determine whether a settlement offer is exceeded by a recovery by the insured.

The trial court's order denying DeSalvo's Motion for Fees was based on Baker Protective Services, *supra*, which held an insured may not recover his attorney's fees under §627.428, Fla. Stat., where he fails to ultimately recover from the insurer more than the highest offer of settlement made by the insurer. The "offer of settlement" made by Scottsdale in this case was in the form of an offer of judgment propounded pursuant to §768.79, Fla. Stat. (1993). That offer of $100,001.00, was inclusive of interest, costs and attorney's fees. The trial court considered that offer of judgment, and because the appraisal award (which included no interest, fees or costs) of some $84,000.00 was less than the $100,001.00 offered, the court determined DeSalvo was not entitled

to any attorney's fees, regardless of whether they were incurred before or after the offer was made.

It was only after this civil action was filed by DeSalvo against Scottsdale (precipitated by Scottsdale's failure to timely respond to DeSalvo's claim) that Scottsdale sought appraisal. When that appraisal occurred it was determined Scottsdale, after its post-suit tender of some $404,000.00, still underpaid DeSalvo by

more than $84,000.00. Thus, the appraisal, which occurred because DeSalvo filed suit, resulted in recovery of substantial insurance benefits and forms the basis of an award for attorney's fees under §627.428, Fla. Stat.

An insured who is required to seek legal redress when his insurer fails to pay that which it owes under an insurance policy, is entitled to recover an attorney's fee from that insurer in the event he is successful in recovering those benefits §627.428, Fla. Stat.

In Baker Protective Services, *supra*, there is no indication whether the offer of settlement tendered included attorney's fees, interest and costs. However, we know the trial court in the present case did not consider those elements in determining that DeSalvo's ultimate recovery was less than the offer made by Scottsdale. That result is contrary to the rule of law set forth in Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So.2d 420 (Fla. 1994), wherein this Court wrote:

> "...an insurer or surety cannot avoid attorney's fees by making a belated offer of its insurance coverage or any amount which would be less than the insured or beneficiary could recover in a final judgment as of the date of the offer..." *Id.* at 422.

Thus, the First District was correct in concluding the trial court erred by refusing to award DeSalvo an attorneys' fee through the date the $100,001.00 offer of judgment was served. To hold otherwise would be to disregard the plain language and clear

meaning of Danis, *supra*, and the public policy behind §627.428, Fla. Stat. Moreover, the First District was correct in concluding the trial court needed to determine the amount of interest, costs and attorney's fees incurred by DeSalvo, as of the time of the service of the $100,001.00 Offer of Judgment, and add that amount to the appraisal award of some $84,000.00. If the total exceeds the amount of the offer of judgment, DeSalvo is entitled to attorney's fees for the work his attorneys did after the service of the offer of judgment. Because the $100,001.00 Offer of Judgment was "inclusive of all attorney's fees, interest and costs", the only way to determine whether DeSalvo ultimately recovered more than the highest settlement offer of Scottsdale ($100,001.00) is to calculate the total amount of DeSalvo's claim as of the date of the service of the offer of judgment.

ARGUMENT

I.

WHETHER SCOTTSDALE "WRONGFULLY WITHHELD" INSURANCE

PROCEEDS IS NOT AN ISSUE BEFORE THE COURT

In its first argument, Scottsdale attempts to interject an issue which is not properly the subject of review, that is; that Scottsdale never "wrongfully withheld" insurance proceeds and therefore, under §627.428, Scottsdale should not be obligated to pay an attorneys' fee because, Scottsdale contends, that statute impliedly requires a showing of "wrongful" conduct to support an award of fees. In fact, Scottdale's failure to pay was "wrongful", but that is not a critical issue. Neither Baker nor the case below addressed the issue of the claimed requirement under §627.428 for an insured to show the insurer "wrongfully withheld" insurance proceeds. Scottsdale suggests that to wrongfully withhold insurance proceeds means something more than failing to pay that which is owed under an insurance policy. DeSalvo states that an insurer can "wrongfully withhold" with the best intentions.

The record in this case establishes Scottsdale never attempted to invoke appraisal until after the underlying lawsuit was initiated by DeSalvo, after Scottsdale failed to timely respond to DeSalvo's claim. The principal cases cited by Scottsdale, Manufacturers Life Insurance Company v. Cave, 295 So.2d 103 (Fla. 1974), and Equitable Life Assurance Society of the United States v. Nichols, 84 So.2d 500 (Fla. 1956), are not dispositive. In both of those cases, life insurance policies were in effect, and there were conflicting claims. In neither case did the insurer deny it owed

life insurance benefits. Rather, the insurers simply were unsure to which beneficiary payment should be made. Those carriers filed interpleader actions to deposit the funds with the court and allow the court to determine the rightful owners of the proceeds.

Contrary to the contention of Scottsdale, the Supreme Court in Wollard v. Lloyd's and Companies of Lloyd's, 439 So.2d 217 (Fla. 1983), did not require a "wrongful withholding" of policy proceeds as a prerequisite to recovery of attorney's fees. Rather, what is noted in footnote 2 at page 219 of the opinion was simply that in determining the reasonableness of the fee amount, a court should consider the actions of the insurer and whether the insurer was instrumental in arriving at a settlement and whether the actions of the insured tended to prolong the litigation. In Insurance Company of North America v. Lexow, 602 So.2d 528 (Fla. 1992), this court held in no uncertain terms that an insurer's "good-faith" in litigating against its insured was no bar to the award of an attorney's fees. This court held that the insurer's good-faith was irrelevant if the dispute was within the scope of §627.428 and the insurer did not prevail. Interestingly, this court also distinguished, in Lexow, Manufacturers Life Insurance Company v. Cave, 295 So.2d 103 (Fla. 1974), and Equitable Life Insurance Society of the United States v. Nichols, 84 So.2d 500 (Fla. 1956); two cases upon which Scottsdale has placed substantial import.

The issue before this court is simply whether the holding in Baker Protective Services, which would allow an insurance company,

late in litigation, to tender policy limits and thereby extinguish, retroactively, an insured's claim for attorney's fees, is the correct rule of law. No construction of §627.428 is required, and certainly no analysis of the motives or reasonableness of the insurance company's conduct need occur.

The subject policy of insurance contains a provision on page 6 of 10 (**P. App. p.11**) which provides, as follows:

> "4. Loss Payment
>
> a. In the event of loss or damage covered by this coverage form, at our option we will either:...
> b. We will give notice of our intentions within thirty days after we receive the Sworn Proof of Loss." (emphasis added; portions omitted)

Based upon Scottsdale's letter dated January 31, 1995 (**P. App. p.8**), which letter acknowledges receipt of the Proof of Loss, it is undisputed that Scottsdale received DeSalvo's proof by not later than January 31, 1995. It is also undisputed that in the event of loss or damage covered by the subject policy, Scottsdale was required to make its payment option election known to the insured within thirty days after receipt of the proof. While the exact date of the receipt of the proof is unknown, it was unquestionably received by January 31, thus making March 2, 1995, the 30th day, at the latest. Scottsdale urges that it complied with the terms and conditions of its policy of insurance by issuing a reservation of rights letter. In Petitioner's Brief, on page 13, Scottsdale writes:

> "Furthermore, the Court of Appeal [First District] erroneously stated that Scottsdale did not respond to DeSalvo's proof of loss within thirty days. This statement is simply incorrect. As stated above, Scottsdale provided DeSalvo with a reservation of rights letter on January 31, 1995, only one week after the proof of loss was submitted."

The foregoing passage reflects Scottsdale's inability to interpret the terms and conditions of the policy of insurance. The policy of insurance did not mandate that Scottsdale prepare and send a reservation of rights letter; rather, Scottsdale had the obligation within thirty days after receiving the proof of loss, to (1) pay the value of lost or damaged property; (2) pay the cost of repairing or replacing the lost or damaged property; (3)take all or any part of the property at an agreed or appraised value; or (4) repair, rebuild, replace the property with property of like kind and quality. **P. App. p.11.** Scottsdale's failure to comply with the terms and conditions of its contract, together with its ambiguous reservation of rights letter reasonably compelled action by DeSalvo.

The reservation of rights letter does not reject the proof of loss, rather it states that Scottsdale "must reserve further action" because it took issue with the amount claimed, the documentation, the interpretation of the valued policy law (a strictly judicial determination) and further because Scottsdale wished to retain all rights under the policy, including the right to raise coverage defenses. This reservation of rights letter

clearly indicates that Scottsdale kept available to it all of its defenses and furthermore it gave the insured no time frame within which Scottsdale would act. In fact, Scottsdale simply said it would "reserve further action" because of a number of questions.

Some of those questions related to value, some were related to potential exclusions or limitations under the policy and it leaves one of them (the interpretation of valued policy law) as a purely judicial issue which had to be determined in court. Thus, Scottsdale's ceaseless urgings that it "never contested coverage" seem to be inconsistent not only with the record in the case but with the reservation of rights letter included in Petitioner's Appendix.

II.

WHETHER DESALVO RETAINED COUNSEL AS A RESULT OF AN ACT COMMITTED BY SCOTTSDALE IS OF NO LEGAL SIGNIFICANCE IN DETERMINING SCOTTSDALE'S OBLIGATION TO PAY DESALVO'S ATTORNEY'S FEES

In its second "issue", Scottsdale again attempts to interject a controversy not discussed or addressed in either of the appellate opinions which form the bases for this court's jurisdiction. Scottsdale is apparently asking this court fashion a new interpretation of §627.428 which this court need not do in order to address the relevant issues.

Suit was filed after Scottsdale failed to properly respond to the proof. 705 So.2d 694, 695. The policy contains a requirement

which in substance provides the insurance company must, within thirty (30) days after receipt of DeSalvo's claim, advise DeSalvo of its intentions with respect to method of paying the loss. **P. App. p.11.** When that thirty (30) days lapsed, and after receiving no communication from Scottsdale other than a reservation of rights letter, DeSalvo filed suit. It was only after suit was brought that Scottsdale attempted to invoke appraisal. Moreover, Scottsdale's conduct resulted in a substantial increase in the attorneys' fees incurred by both parties when it refused to appraise unless DeSalvo would agree to waive his claims to interest, costs and fees. 705 So.2d 694, 695.

III.

ATTORNEY'S FEES ARE PROPERLY AWARDED UNDER §627.428 IN ARBITRATION/APPRAISAL PROCEEDINGS WHERE THERE HAS BEEN AN EXPRESS DENIAL OF COVERAGE OR WHERE THERE HAS BEEN A REFUSAL TO PAY THAT WHICH IS OWED

Scottsdale attempts to fashion a distinction between denying coverage and accepting coverage, but making a "low-ball" offer or tender of settlement. Scottsdale admits that if it denies coverage and ultimately loses that issue it does owe an attorney's fee, regardless of whether that issue is resolved through appraisal or through the courts. **P. Brief p.14.** On the other hand, Scottsdale argues it should be free under the law and under its policy to issue a reservation of rights letter which does not expressly accept coverage, fail to timely respond to a claim, thereby leaving

its insured in limbo; then, after suit is filed, tender an inadequate amount in settlement and deny the right of the insured to recover attorneys' fee incurred to collect the sums recovered which are above the amount voluntarily, but belatedly tendered. This is not the law, and to hold as such would thwart the very purpose of §627.428 and the public policy so clearly enunciated by this court in Wollard, *supra*.

This court, and several appellate courts in Florida, have held unequivocally that §627.428 supports an award of an attorney's fee in a successful arbitration proceeding just as it does if the insured recovers a judgment in its favor. Insurance Company of North America v. Acousti Engineering Company of Florida, 579 So.2d 77 (Fla. 1991); Zac Smith & Company, Inc. v. Moonspinner Condominium Association, Inc., 534 So.2d 739 (Fla. 1st DCA 1988); Fitzgerald & Company, Inc. v. Roberts Electrical Contractors, Inc., 533 So.2d 789 (Fla. 1st DCA 1988); Fewox v. McMerit Construction Company, 556 So.2d 419 (Fla. 2nd DCA 1989).

Although the cases cited above are surety cases, a careful analysis of those decisions strongly indicates the intent of courts in Florida has been to render insurance carriers liable for attorney's fees under §627.428 and/or §627.756, a statute which applies in surety cases. In fact, the Supreme Court in Acousti Engineering, *supra*, affirmatively answered the following certified

question:

> "Do the attorney's fees recoverable under §627.428 include those incurred during arbitration proceedings?"

The cases cited by Scottsdale in support of its argument that attorney's fees are proper only where an insurer denies coverage are all uninsured motorist cases. Scottsdale fails to understand that in the context of an uninsured motorist claim, there is another statute, §627.727, which limits the uninsured motorist carriers' fee exposure to those fees incurred by the insured in establishing the uninsured motorist coverage. Because of the nature of U.M. coverage, fees incurred by the insured after coverage is resolved but before the damages are quantified, are not recoverable. That is why those cases hold fees are limited to those instances where coverage under U.M. is denied. Those cases are distinguishable and inapplicable to the analysis of this case.

Lumbermens Mutual Insurance Company v. American Arbitration Association, 398 So.2d 469 (Fla. 4th DCA 1981) involved an action for declaratory relief filed by an insurance company to establish that its obligation was limited by the policy limits of its insurance policy. The parties entered into a settlement agreement whereby the injured party conceded the insurer's obligation was limited by the coverage amounts. Thus, the insured was not a prevailing party and recovered only that which the insurer had always been willing to pay. Lumbermens Mutual offers no guidance in this case. Florida law has long recognized that fees are

recoverable when an insured prevails. If he wins by establishing coverage or by recovering more than was offered, or both, he is entitled to recover his fees.

Appraisal provisions in policies of insurance have often been considered agreements to arbitrate. Florida Farm Bureau Casualty Insurance Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997); Weigner v. State Farm Fire and Casualty Co., 620 So.2d 1298 (Fla. 4th DCA 1993); State Farm Fire and Casualty Co. v. Feminine Fashions, Inc., 509 So.2d 376 (Fla. 3rd DCA 1987); Intercoastal Ventures Corp. v. Safeco, 540 So.2d 162 (Fla. 4th DCA 1989); U.S. Fire Insurance Company v. Franklin, 443 So.2d 170 (Fla. 1st DCA 1983). Obviously, there is a difference between an "appraisal" and an "arbitration". The former is considered a fairly routine process by which items and/or damage are valued. The latter is typically a more involved process, adversarial in nature and quasi-judicial. Florida Farm Bureau Casualty Ins. Co. v. Sheaffer, *supra*. Under the circumstances of this case, the "appraisal" was in fact an arbitration and quasi-judicial in nature. In any event, suit was filed and proceeds recovered as a result thereof.

IV.

THE APPRAISAL PROVISION OF THE POLICY OF INSURANCE CONTEMPLATES INTERACTION WITH THE JUDICIAL PROCESS

On page 1 of its brief, Scottsdale recites the appraisal provision in the subject policy of insurance. That provision

provides, in pertinent part, as follows:

> "The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction."

In fact, in this particular matter, the parties were twice required to go to the court regarding the umpire. The parties initially petitioned the court to appoint the umpire. **R: Vol.I pp.116-121**. Thereafter, DeSalvo contended the umpire was unqualified because he was not impartial and on May 10, 1996 moved to disqualify the umpire. **R: Vol.I pp.128-130.** By orders dated May 24, 1996 and June 13, 1996, the court agreed and appointed a second umpire. **R: Vol.I pp.135-139.**

By the terms of its policy, Scottsdale acknowledges the occasional necessity of the judicial system in completing an appraisal. In this instance, the judicial system was used. If Scottsdale urges that because at all times it was "acting within its legal and contractual rights" there was no wrongful withholding of policy proceeds. **P. Brief p.11.** In fact, Scottsdale did not at all times act within its legal and contractual rights. Its reservation of rights letter gave no indications as to when, or even if, Scottsdale would respond to the claim. It asserted matters which could only be resolved by a court of law and it failed to invoke the appraisal clause to resolve those implied "differences in value"

The appraisal provision contained in the subject policy of

insurance contemplates, on occasion, interaction with the courts. It is apparently Scottsdale position that its insureds should have to pay for their own attorneys when this interaction with the court is necessary, and when Scottsdale does not prevail. This is simply in conflict with the stated purposes of Florida Statute §627.428.

V.

DESALVO IS ENTITLED TO ATTORNEY'S FEES BECAUSE HE WAS THE PREVAILING PARTY UNDER §627.428

This is the issue upon which this court granted jurisdiction. There is an apparent, though not certain, conflict between Baker Protective Services v. F.P., Inc., 659 So.2d 1120 (Fla. 3rd DCA 1995), and the First District's decision in this case. In Baker, Plaintiff (Baker Protective) sued, among others, an insurance carrier (Fidelity and Deposit Company of Maryland) which was a surety for another Defendant. The Third District's decision reflects that suit was filed in 1986. This decision further indicates that the offers of judgment began being served some five years later, in October 1991.

Ultimately, Baker prevailed on its claim and was awarded $86,972.68, which was a combination of $48,775.00 in net verdict and prejudgment interest in the amount of $38,197.86. The highest offer of judgment was in the amount of $125,000.00. It is unclear whether interest was awarded through the date of the offer of judgment or through the date of judgment, although there is nothing

about the decision which would lead one to believe that interest was awarded on any other basis than through the date of judgment. After an appeal, which established April 1, 1985 as the beginning date for the running of prejudgment interest, an additional $10,458.14 in interest was awarded, bringing the total recovery to $97,431.00. See Baker Protective Services, Inc. v. F.P., Inc., 643 So.2d 1099 (Fla. 3rd DCA 1994).

The Third District's opinion makes no mention of an attempt to establish an amount of attorney's fees through the date of any of the offers of judgment. Baker Protective moved for attorney's fees on contractual and statutory bases. It is the statutory basis which is of concern in this matter. Baker Protective moved for fees against the surety pursuant to Florida Statutes §627.428 and/or §627.756. The trial court, and later the Third District, found that Baker Protective could not recover under those statutes because it was not the "prevailing party". The Third District's opinion reflects a misinterpretation of this court's decision in Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So.2d 420 (Fla. 1994), which the Baker court cited as supportive of its decision. In substance, Baker held that no attorneys' fees could be recovered pursuant to Florida Statutes §627.756 and §627.428 because the sum recovered ($97,431.00) was less than the highest offer of judgment ($125,000.00) made by the insurer. What the Third District failed to calculate or take into account was the fact that those offers of judgment were made (at least the

$125,000.00 offer) substantially over five years after litigation began. There was no analysis in Baker of this court's holding in Wollard v. Lloyd's and Companies of Lloyd's, 439 So.2d 217 (Fla. 1983), nor was there an apparent adherence to this court's analysis and decision in Danis, *supra*.

In Danis, this court plainly stated that the "prevailing party test" does not apply to an award of attorney's fees under a statute entitling a prevailing insured or beneficiary to attorney's fees. In so doing, this court took pains to distinguish the prevailing party test set forth in Moritz v. Hoyt Enterprises, 604 So.2d 807 (Fla. 1992); and Prosperi v. Code, Inc., 626 So.2d 1360 (Fla. 1993). Unfortunately, this distinction was apparently ignored in Baker Protective Services, *supra*, as well as by Scottsdale. The test set forth in Danis is not the "prevailing party test", rather the test is whether the insured has obtained a recovery greater than any offer of settlement previously tendered by the insurer. It was, unfortunately, this last pronouncement by the court which has been misconstrued by Scottsdale and by the Baker court. In Danis, this court also wrote:

> "We emphasize, however, that any offer of settlement shall be construed to include all damages, attorney's fees, taxable costs, and prejudgment interest which would be included in a final judgment if the final judgment was entered on the date of the offer of settlement. We make this point so that it is plain that the insurer or surety relieves itself from further exposure to the insured or beneficiary's attorney's fees at the point and time that

> the insurer or surety offers in settlement the full amount which an insured or beneficiary would be entitled to recover from the insurer or surety at the time the offer is made. By our construction, an insurer or surety cannot avoid attorney's fees by making a belated offer of its insurance coverage for any amount which would be less than the insured or beneficiary could recover in a final judgment as of the date of the offer. On the other hand, an insured or beneficiary cannot continue to incur attorney's fees and costs or accrue interest and have those awarded against the insurer or surety after the insured or surety has offered the full amount for which it has liability on the date it offers to make the payment. This construction is in accord with our decision in Wollard v. Lloyds and Companies of Lloyds, 439 So.2d 217 (Fla. 1983)." (emphasis added)

The First District Court of Appeal properly interpreted this court's rulings in Danis and Wollard. The First District's opinion in this case tracks precisely this court's holding in Danis in that the First District determined that the trial court should conduct a hearing to determine the amount of fees, costs and interest due as of the date of the offer of settlement/judgment which purportedly exceeded the ultimate appraisal award. Those sums should then be added to the appraisal award to determine whether the insured is entitled to attorney's fees after the date the offer of judgment was made. Unquestionably, the insured is entitled to an attorney's fee up to the point of the operative offer of settlement. Because of the trial court's reliance on Baker, no hearing was held.

In this case, as noted in the First District's opinion,

Scottsdale made three offers of judgment, the first of which was in the amount $101.00. **R: Vol.I pp.63-64.** The second offer of judgment, made several months later, was in the amount of $50,001.00. **R: Vol.I pp.103-104.** The final and critical offer of judgment was made almost a year after the case was filed and was in the amount of $100,001.00. This court provided ample direction for the determination of fees in Danis by holding that the trial court could determine whether the insured or beneficiary has prevailed on all issues and the degree to which such failure to prevail extended the litigation or increased its costs. The same is true in this case. This matter is before the court only because of an apparent conflict with the Third District Court's ruling in Baker. The trial court never touched on the issue of whether fees should be awarded under the circumstances presented by DeSalvo. Rather, the court precluded any award of attorney's fees based solely upon the Third District's decision in Baker, which decision is clearly in conflict with Danis as well as Wollard.

Under the questionable logic of Baker, an insurance carrier whose liability is in almost all instances (in first party claims) limited by the actual cash value of the object insured, or a stated sum, could defend a case for months, or years, and then offer $1.00 more than its maximum possible contractual exposure, plus interest, inclusive of costs and attorney's fees. This would free the insurance carrier, under the Baker decision, from any

responsibility whatsoever for attorney's fees and costs. This would render meaningless the provisions of §627.428 in that it would corrupt the very purpose of the statute.

In Insurance Company of North America v. Lexow, 602 So.2d 520 (Fla. 1992), this court held that Florida Statute §627.428 is designed to discourage the contesting of valid claims by insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contract. If insurers are allowed to make an offer of settlement two, three or even five years (as in Baker) after the claim is denied or underpaid, in a sum which equals only their liability at the outset, then the purpose of the statute has been frustrated.

This would be particularly harmful to insureds in circumstances where claims are relatively small. For example, in a claim with maximum liability of $10,000.00, an insurance carrier could litigate for two years and then offer $10,001.00, plus interest, several weeks before trial. Under Baker, all attorney's fees and, perhaps, costs earned to the date of the offer would be retroactively eradicated. The insured would be forced either to take the $10,001.00 and pay his own costs and attorney's fees or go to trial where he could only recover $10,000.00, plus interest, and pay his own costs and attorney's fees.

The Baker decision would allow insurance carriers to deny coverage, particularly on relatively small claims, and then protect

themselves from the provisions of §627.428 by making a belated offer of settlement in an amount slightly exceeding the maximum possible principal and interest recovery by the insured. Insurers could deny or underpay substantial numbers of claims, secure in the knowledge that even on claims contested, they would never have to pay more than they originally owed, except for statutory interest.

Scottsdale's contention that DeSalvo was unsuccessful in his lawsuit is puzzling. An insurance company, by its contract with its insured, is obligated to pay the insured the amount of his insured loss. If the insured has to resort to court or to an appraisal/arbitration to recover that which he is owed under the policy, and if he in fact does recover, he is successful. Scottsdale's failure to properly respond and its ambiguous reservation of rights letter led DeSalvo to file suit. Scottsdale forced DeSalvo to proceed through the appellate process after it refused to appraise the loss unless DeSalvo would agree to waive his claims for interest, costs and attorney's fees. 705 So.2d 694, 695. It was the conduct of Scottsdale that required the first appeal and which prolonged the litigation.

In any lawsuit, there are preliminary skirmishes and battles, some of which are won and some of which are lost. This suit was no different. The trial court may take this into account in determining the amount of attorney's fees to which DeSalvo is entitled. DeSalvo filed suit and recovered a substantial amount ($96,000.00) as a result thereof. That is $96,000.00 more than

Scottsdale paid after it tendered its $404,000.00 payment, which was not tendered until after suit was filed. To declare Scottsdale was the "prevailing party", and DeSalvo as the "loser", defies the definitions of those terms.

VI.

AWARDING FEES AFTER APPRAISAL/ARBITRATION IS CONSISTENT WITH THE PURPOSES OF §627.428

Contrary to the contention of Scottsdale, imposing attorney's fees on an insurance company as a result of an appraisal/arbitration award is entirely consistent with the purposes behind §627.428. The purpose of §627.428, as set forth in Insurance Company of North American v. Lexow, *supra*, is to discourage the contesting of valid claims by insurance companies and to reimburse successful insureds for their attorney fees when they are compelled to defend or sue to enforce their insurance contracts. In Clay v. Prudential Insurance Company of America, 617 So.2d 433 (Fla. 4th DCA 1993), the court wrote:

> "The purpose behind §627.428 is plainly to place the insured or beneficiary in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorneys' fees."

The record in this matter reflects that all material times, Scottsdale was represented by skilled and able counsel. Scottsdale's assertion that no fee should emanate from an appraisal or arbitration means either that an insured must alone face an

insurance company and its attorneys, or obtain counsel to assist the insured and then suffer the loss of a portion of his insurance policy by virtue of the fact that appraisal/arbitration proceedings do not come within the purview of §627.428. The purpose of the statute is, in part, to assist the insured in being made whole when his claim is valid. To hold that §627.428 does not apply in arbitration/appraisal proceedings is essentially to hold that an insured must, often, proceed in quasi-judicial proceedings unrepresented against an insurance company which is typically in a better financial position to minimize or defeat the insured's claim. The alternative is for the insured to engage counsel and then be required to pay counsel out of the proceeds of his payment under the contract. In essence, the insured loses a part of his property in order to enforce his valid contract. This simply defeats the purpose of Florida Statute §627.428.

In this case, suit was filed after Scottsdale failed to properly respond to the proof within thirty (30) days. This failure to respond followed a reservation of rights letter which reserved to Scottsdale all its rights under the policy and which raised issues of law. There was no demand for appraisal, no offer to pay and no statement by the insurance company as to how or when the claim would be paid. There was nothing but silence. Scottsdale had an affirmative obligation which it ignored. It breached its obligation to the insured in this respect, and inferred by its conduct that a coverage issue existed. If the only

issue had been value, presumably Scottsdale would have demanded appraisal.

Even in circumstances where suit has not been filed but an insured is forced to retain counsel in order to appraise/arbitrate, fees should be awarded under Florida Statute §627.428 in order to give substance to that statute's purpose. This is particularly true in connection with arbitration/appraisals in view of this court's decision in State Farm Fire and Casualty Company v. Licea, 685 So.2d 1285 (Fla. 1996), where it was determined that a broad variety of issues may be determined by arbitration/appraisal.

One of the purposes of Florida Statute §627.428 is to encourage the prompt and fair resolution of insurance claims. Whether an insurer is required to pay a claim because it is brought to court or because it engages in the arbitration/appraisal process does not reasonably seem to matter. To adopt Scottsdale's position would be to adopt a position whereby the purpose of Florida Statute §627.428 could be frustrated by an insurer which simply chose to arbitrate whether or not a loss was caused by an insured event, the amount of the damages, wear and tear and other limitations and exclusions which relate to the manner and extent of loss under the umbrella of this court's decision in Licea. Fees would be available only where there was an outright denial of coverage; for example an assertion that the policy had lapsed or had been canceled or that the insured intentionally procured the loss. That would leave large numbers of insureds without the benefit of

Florida Statute §627.428 in a variety of circumstances where an insurance company could demand an arbitration/appraisal and utilize its economic advantage to deprive the insured of his or her rights under the policy, simply by virtue of the fact that the insured would be faced with the proposition of either hiring counsel and losing part of the property, or proceeding unrepresented, against the insurance company and its attorneys.

Florida Statute §627.428 allows the Florida insured to obtain competent counsel to represent them in disputes with their insurance carrier without losing a substantial portion of the ultimate recovery. An insured who loses insurance benefits because of an arbitration determination that the loss was caused by a non-insured event is in no better position than the insured who is not paid because it is determined that the policy was not in effect at the time of the loss. In Wollard v. Lloyd's and Companies of Lloyd's, *supra*, this court addressed the absurdity of not allowing attorney's fees when an insured had proceeded to suit and the insurance carrier had decided to pay the claim during the course of litigation. In departing from the strict language of Florida Statute §627.428, this court wrote:

> "Requiring the Plaintiff to continue litigation in spite of an acceptable offer of settlement merely to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system, failed to protect any interest - insured, the insurers or the public - and discourages any attempt at settlement. This literal requirement of the statute exalts form over substance to the detriment of public policy, and such a

> result is clearly absurd. It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result."

It would be an equally absurd construction of the statute to hold that while an insured may recover attorney's fees if he or she prevails against his or her insurer in a court of law, that same insured could not recover attorney's fees by resolving the same issues in a quasi-judicial proceeding such as arbitration. Such a construction might lead insureds and their attorneys to devise various, inventive methods to bring their cases into a judicial setting as opposed to resolving the controversy by the less burdensome method of appraisal/arbitration.

In State Farm Fire and Casualty Company v. Licea, 685 So.2d 1285 (Fla. 1996), this court wrote:

> "We interpret the appraisal clause to require the assessment of the amount of a loss. This necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for repair or replacement was caused by a covered peril or a cause not covered, such as normal wear and tear, dryrot, or various other designated, excluded causes".

In Florida Farm Bureau Casualty Insurance Company v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997), the First District followed the dictates of Licea, *supra*, but held that the appraisal provision in the policy in that case, which is essentially the same as the appraisal provision in this policy, is in essence an agreement to arbitrate. The First District recognized that often, in such appraisals, the appraisers are required to do more than merely

evaluate the value of a lost or damaged item. The appraisers are compelled to review policy language and make determinations regarding limitations, exclusions and restrictions in the contract. This is made more important considering this court's holding in Licea, *supra*. In holding that the appraisal provision of the policy of insurance in question in Sheaffer was in essence an agreement to arbitrate and was governed by the Florida Arbitration Code, the First District wrote:

> "Here, the appraisal provision neither excludes application of the Florida Arbitration Code,...nor sets forth procedures inconsistent with the Arbitration Code. While a requirement for notice and an opportunity to be heard in proceedings before appraisers is not well-settled in the United States, consistent with the policy expressed in Cassara and the legislative intent of the Arbitration Code, we conclude that the proceeding contemplated by the insurance policy in this case is required to be conducted in accordance with the procedures set forth in the Florida Arbitration Code." (citations omitted)

In essence, the First District recognized that substantial rights of the parties were involved and, as this court long ago held in Cassara v. Wofford, 55 So.2d 102 (Fla. 1951), procedural safeguards in such quasi-judicial proceedings are a must. These procedural safeguards include the proper and orderly presentation of evidence and the process of questioning the evidence of one's opponent in a manner consistent with the rules of arbitration. In many cases, the assistance of skilled counsel is necessary to direct those efforts. Insurance companies are typically

economically situated to provide themselves with such counsel. Many insureds are not.

The insured who retains counsel to file suit and who is paid after suit is filed should be no more entitled to an attorney's fee than the insured who proceeds to an arbitration, represented by counsel, and then obtains insurance proceeds which have been withheld by the insurance carrier. To deny successful insureds the benefit of Florida Statute §627.428 when they have prevailed by way of arbitration/appraisal opens new vistas for insurance companies with which to improve their bottom-line by "low-balling" their insured's claims. If the insured must pay thirty or forty percent of the disputed amount to counsel in order to be adequately represented, the insured will have suffered a real loss of property which cannot be replaced, absent an action under §624.155, Fla. Stat. This is inconsistent with the terms and conditions of the contract of insurance as well as the legislative intent of Florida Statute §627.428, as interpreted in Wollard and Danis, *supra*. Furthermore, forcing insureds to file "bad-faith" actions in order to be made whole would be inconsistent with the stated reasons for favoring alternative dispute resolution programs such as arbitration.

In its brief at page 26, Scottsdale makes the following statement:

> "Indeed, even DeSalvo acknowledged in his initial brief to the First District Court of Appeal that appraisals

> like that in the case at hand should be conducted by the appraisers and the umpire without attorney involvement."(DeSalvo's Initial Brief, p.11).

That statement is inconsistent with DeSalvo's brief to the First District. In fact, DeSalvo wrote in his Initial Brief, as follows:

> "Such appraisal provisions usually provide that the appraisal be conducted by inspection by two appraisers and an umpire. There is, at least facially, no necessity of presenting evidence, gathering data or doing any of a number other things that an attorney might be required in an arbitration proceeding...<u>However, there are no doubt certain cases where there is substantial attorney involvement in appraisal which is ultimately completed pursuant to the terms of the property insurance contract. The present dispute is one such case</u>..." (emphasis added)

DeSalvo has contended at all times that the attorneys' services were necessary in connection with this case, and Scottsdale's assertion to the contrary reflects an apparent misunderstanding.

For many years, the trial judges of this state have been entrusted to determine reasonable fees under §627.428. If an insured's counsel's "involvement" in an appraisal is limited to writing a letter or two, then the fee awarded, if any, will presumably reflect this slight effort. However, insureds who are compelled to seek counsel in such proceedings should have available §627.428 so they can also be made whole.

CONCLUSION

The issue upon which this court issued certification, that is, the apparent conflict between the First District's opinion in this case and the Third District's opinion in Baker Protective Services, is clear cut and easily determined. The First District's decision tracks this court's decisions in Danis and Wollard, and is consistent with those cases. The Third District's opinion in Baker conflicts substantially with Wollard and directly with Danis. This pure issue, upon which certification was granted, requires an

affirmance of the First District's opinion in this case and disapproving the inconsistent aspects of Baker.

With respect to the other "issues", some of which have not yet been determined by the trial court, DeSalvo states that the discussion of whether attorney's fees should be awarded in appraisals/arbitrations is largely academic as it relates to this case. In this case, DeSalvo filed a civil action which resulted, ultimately, in an award of damages. However, to the extent this court is inclined to take up the issue of the award of attorney's fees to successful insureds in appraisals and arbitrations, DeSalvo states that denying these insureds the benefits of Florida Statute §627.428 is contrary to the purpose of that statute and detrimental to insurance consumers in this state. The legislative intent of Florida Statute §627.428 should be rigidly enforced and insureds should have the opportunity to be made whole when insurance proceeds have been withheld in violation of the terms and conditions of their insurance contracts.

.

FANNIN, TYLER & HAMILTON, P.A.

H. TYRONE TYLER, ESQUIRE
Florida Bar No.: 363413
J. CLARK HAMILTON, JR., ESQUIRE
Florida Bar No.: 311731
4069 Atlantic Blvd.
Jacksonville, Florida 32207
904/398-9999
Fax No. 904/398-0806

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by United States Mail this 10th day of June, 1998, to **Heath B. Nailos, Esquire**, Neilson and Tosko, P. O. Box 547638, Orlando, FL 32854-7638.

_____
Attorney