

IN SUPREME COURT OF THE STATE OF FLORIDA

SCOTTSDALE INSURANCE COMPANY,

Petitioner,

vs.

APPEAL NO.: 92-467  
DISTRICT COURT OF APPEAL  
First District No. 97-438

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

Respondent.

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PETITIONER'S REPLY BRIEF

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### STATEMENT OF THE CASE AND THE FACTS

A full description of the facts governing this dispute has been set forth in Scottsdale's Brief on the Merits. To summarize briefly, the Respondent, (hereinafter DeSalvo), sustained a fire loss to a building on or about January 13, 1995. On or about January 25, 1995, DeSalvo submitted his proof of loss. By its January 31, 1995 letter, Scottsdale acknowledged receipt of DeSalvo's proof of loss. In that letter, Scottsdale notified DeSalvo that issues remained regarding the amount of damages claimed and noted a lack of documentation to support DeSalvo's claim for damages. (See Appendix to Petitioner's Reply Brief, p. 1).

Scottsdale's policy required that disputes regarding the amount of damages would be resolved through appraisal. DeSalvo never requested appraisal, nor did he allow Scottsdale a reasonable opportunity to initiate appraisal proceedings.

As of March 3, 1995, Scottsdale had agreed to pay the documented and undisputed portion of the damages claimed, \$404,402.08. (See Appendix to Petitioner's Reply Brief p. 2). There was no dispute as to coverage; only the amount of damages. However, on March 13, 1995, DeSalvo served suit on Scottsdale in complete disregard of the policy terms.

After DeSalvo initiated suit, Scottsdale moved the trial court to stay and abate the action pending appraisal. The trial court denied that motion and an interlocutory appeal was taken to the First District Court of Appeal. The First District Court of Appeal

reversed and ordered the parties to undergo appraisal. See DeSalvo v. Scottsdale Insurance, 666 So.2d 944 (Fla 1st DCA 1995).

In an effort to avoid further expenses, Scottsdale served an Offer of Judgement for \$100,001.00, after having already paid the \$404,402.08. That offer was served before the Appeal process began; but not accepted.

During appraisal, DeSalvo claimed that the building suffered damages totalling \$677,200.00 and was a complete loss. DeSalvo asked for the policy limits of \$563,000.00. However, the appraisers determined that the total damage to the building was \$489,536.00. That is, the appraisers determined that Scottsdale owed an additional \$84,133.92, over and above the \$404,402.08 which Scottsdale had already paid.

After the appraisal award was entered, DeSalvo moved the trial court for attorney's fees pursuant to Florida Statutes Section 627.428. Relying on Baker Protective Services v. FP Incorporated, 659 So.2d 1120 (Fla. 3d DCA 1995), the trial court held that DeSalvo was not entitled to attorney's fees because the appraisal award of \$84,133.92 plus pre-judgement interest of \$12,014.74 (a total of \$96,148.66) was less than Scottsdale's highest offer of settlement, which was \$100,001.00.

Following the trial court's denial of attorney's fees, DeSalvo appealed to the First District Court of Appeal. Relying on Danis Industries Corporation v. Ground Improvements Techniques Inc., 645 So.2d 420, 421 (Fla 1994), the First District Court of Appeal reversed the trial court's decision and directed the trial court to

conduct a hearing to determine the amount of fees owed to DeSalvo's counsel.

This Court has assumed jurisdiction based on the conflict between the First District Court of Appeal's decision and the holding in Baker.

**SUMMARY OF ARGUMENT IN REPLY**

DeSalvo argues that the issue of wrongful withholding of policy proceeds and the issue of whether the insurer's actions necessitated litigation are outside the scope of review. These arguments are unfounded.

The case law cited in Scottsdale's Brief on the Merits establishes that wrongful withholding and necessity of legal action are conditions precedent to an award of attorney's fees under Florida Statutes Section 627.428. Therefore, those issues are properly before this Court. Because DeSalvo cannot establish either of the conditions precedent, he should not recover attorney's fees.

DeSalvo also argues that attorney's fees may be properly awarded under Section 627.428 in appraisal proceedings whenever there has been a refusal to pay what is owed. However, this policy (The contract between Scottsdale and DeSalvo) provides that where the amount of damages is disputed, nothing is owed until the parties have completed appraisal proceedings. Because Scottsdale paid the appraisal award in full within thirty days of its entry, there was no failure to pay what was due under the policy. Accordingly, DeSalvo's argument must fail.

The facts in this case show that all the delays in the payment of this claim resulted solely from DeSalvo's refusal to proceed through appraisal, as the policy required him to do. DeSalvo's public policy argument is little more than a collection of hypotheticals, completely divorced from the facts of this case. DeSalvo's argument that not awarding attorney's fees in this case would encourage insurance companies to delay the payment of claims is unsupported by any facts or law. To the contrary, insurers are already required to handle and pay claims properly under this contract, pursuant to Florida's Claims Administration Statute, 627.426.

#### **ARGUMENTS**

##### **I. THE ISSUE OF WHETHER SCOTTSDALE "WRONGFULLY WITHHELD" THE POLICY PROCEEDS IS PROPERLY BEFORE THIS COURT.**

DeSalvo argues that the issue of "wrongful withholding" is not properly subject to review. This position is without support. In order for the Court to determine whether attorney's fees should be awarded under 627.428, the Court can and should consider whether the conditions precedent to such an award have been met. As more fully discussed in Scottsdale's Brief on the Merits, wrongful withholding is a condition precedent to awarding fees.

DeSalvo attempts to distinguish Manufacturer's 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). DeSalvo also attempts to trivialize the language in

Wollard v. Companies of Lloyd's, 439 So.2d 217, 219 (Fla. 1983), which states that wrongful withholding is a condition precedent to the award of attorney's fees. These attempted distinctions are unfounded.

This Court held in Nichols:

"This statute (625.08, predecessor to 627.428) has consistently been interpreted by this Court as authorizing the recovery of attorney's fees from the insurer only when the insurer has wrongfully withheld payment of the proceeds of the policy. . ." Nichols, at 502. (Emphasis added by underlining).

In Wollard, this Court held:

"The Fifth District in Gibson does not expressly address the requirement that the insurance company unreasonably withhold payment under the policy as a condition precedent to the award of attorney's fees. Recognition of this threshold issue is implicit however, in the District Court's instruction that the trial court inquire anew into the necessity of the legal services as well as their reasonable value." Wollard, at 219 (Emphasis added by underlining) (Citing Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1983)).

The language in these cases speaks for itself. These cases clearly and unambiguously require that the insurance company wrongfully withhold policy proceeds before the insured can recover attorney's fees under Florida Statutes Section 627.428. The relatively minor factual differences between the above cited cases and the case on appeal do not change the rule enunciated in Nichols and Wollard.

It is axiomatic that construction of statutes must be predicated upon a finding of ambiguity. See State of Florida v. William C. Egan, 287 So.2d 1 (Fla. 1973). Similarly, where the case law is clear, it should be applied according to its unambiguous holding. Under the clear language of the case law,



DeSalvo must show that there was a wrongful withholding of policy proceeds in order to recover attorney's fees. He has failed to do so and, accordingly, no attorney's fees should be awarded.

DeSalvo cites Insurance Company of North America v. Lexow, 602 So.2d 528 (Fla. 1992), in an attempt to negate Nichols and Cave. DeSalvo's reliance on Lexow is misplaced.

In Lexow, the dispute between the insurer and the insured concerned which of them was entitled to funds the insured had obtained from a tortfeasor. The insurer attempted to claim subrogation against those funds because it had paid the policy limits. However, those policy limits had been insufficient to fully compensate the injured insured. The case was tried in Federal Court and the insured prevailed. The Eleventh Circuit Court of Appeals certified to the Florida Supreme Court the question of whether attorney's fees could be awarded under Florida Statutes Section 627.428 where the company and the insured had litigated to determine entitlement to subrogation funds. The Supreme Court answered that question in the affirmative and awarded attorney's fees to the insured.

In the Lexow case, this Court never even addressed the issue of whether there had been a wrongful withholding, because the company had paid the policy limits at the outset of the matter. DeSalvo notes correctly, that in Lexow this Court held that an insurance company's good faith is not a bar to awarding attorney's fees. In the present case, any subjective feelings of Scottsdale is indeed irrelevant. The dispositive issue is whether Scottsdale

wrongfully withheld policy proceeds, i.e. withheld policy proceeds without the legal right to do so. Under the terms of the policy, Scottsdale had the right to defer making any payment until after the appraisal process was complete, and Scottsdale exercised that right... after paying in good faith the undisputed amount of the damages. Therefore, there was no wrongful withholding.

Although in Lexow, this court distinguished Cave and Nichols, that distinction actually supports Scottsdale's position. In Lexow, this Court held "This is not a case like Manufacturer's Life Insurance Co, v. Cave, 295 So.2d 103 (Fla. 1974) and Equitable Life Assurance Society v. Nichols, 84 So. 2d 500 (Fla. 1956), in which the insurance company did not deny liability, but simply became involved in a dispute over which of two claimants was entitled to the benefits of the policy."

In the case on appeal, there was no denial of liability. At all times, Scottsdale was prepared to pay whatever the appraisers awarded, up to the policy limits.

In Nichols and Cave, the insurance company did not know who it was obligated to pay until the interpleader action was resolved. Similarly, Scottsdale did not know how much it was obligated to pay until the appraisal process was completed. Therefore, the holdings in Nichols and Cave are applicable to the case at hand.

DeSalvo also argues that Scottsdale's January 31, 1995, reservation of rights letter did not comply with an alleged duty to respond within 30 days. This position is without merit. This Court held in State Farm Fire and Casualty v. Licea, 685 So.2d 1285

(Fla. 1996) that an appraisal provision in an insurance policy was not void for lack of mutuality of obligation. In light of Licea, Scottsdale's reservations of rights letter was an entirely appropriate response to DeSalvo's proof of loss. If DeSalvo had provided further documentation of his loss, as the reservation of rights letter requested, this litigation might have been avoided altogether.

**II. THE ISSUE OF WHETHER SCOTTSDALE COMPELLED DESALVO TO RETAIN COUNSEL IS PROPERLY BEFORE THE COURT.**

The cases setting forth the requirement that the insurer compel the insured to retain legal counsel are set forth in the Petitioner's Brief on the Merits. The language in those cases, including Lexow, is clear, unambiguous, and speaks for itself. Just as the case law required DeSalvo to establish wrongful withholding of proceeds, it also requires DeSalvo to show that he was compelled to retain counsel. In the instant case, DeSalvo was not compelled to retain counsel, and his fishing of suit prematurely violated section D of the policy, regarding legal action against the company.

Also, section E of the policy provides that if the parties disagree as to the value of the property, either party may make a written demand for appraisal of the loss. It is undisputed that Scottsdale did make a demand for appraisal. However, DeSalvo proceeded with litigation anyway. Therefore, his actions were in direct violation of sections D and E of the policy. More specifically, Section D provides as follows:

"LEGAL ACTION AGAINST US"

No one may bring a legal action against us under this coverage part unless:

- (1) There has been full compliance with all the terms of this Coverage Part; and
- (2) The action is brought within two years from the date on which the direct physical loss or damage occurred.

(Appendix to Petitioner's Reply Brief, p. 3)

The fact that Scottsdale invoked its right to appraisal after DeSalvo prematurely initiated suit does not alter DeSalvo's duties under the policy. As soon as Scottsdale invoked the appraisal right, all litigation activities by DeSalvo should have stopped. Accordingly, DeSalvo should be denied attorney's fees for proceeding with litigation in breach of the insurance contract.

**III. FLORIDA STATUTES SECTION 627.428 DOES NOT MANDATE AWARDING ATTORNEY'S FEES IN CASES RESOLVED THROUGH APPRAISAL.**

DeSalvo argues that case law, including but not limited to Insurance Company of North America v. Acousti Engineering Company of Florida, 579 So.2d 77 (Fla. 1991), requires that attorney's fees be awarded under 627.428 when there has been an appraisal award. However, as noted in Scottsdale's Brief on the Merits, the Court's decision in Acousti was based on the interaction of 627.428 and 627.756. The latter specifically provides that attorney's fees may be awarded in arbitrations involving surety bonds. DeSalvo overlooks the effect of 627.756 in his Answer Brief, just as he did in his Brief to the First District Court of Appeal.

DeSalvo also argues that the terms of the policy required Scottsdale to pay all amounts claimed in the proof of loss within

thirty (30) days of the date the proof of loss was submitted. That argument is erroneous.

DeSalvo cites section 4.a. and 4.b. of the policy. However, DeSalvo completely disregards section 4.f., which provides :

"We will pay for covered loss or damage within 30 days after we receive the proof of loss if:

- (1) You have complied with all the terms of this coverage part; and
- (2)(a) We have reached agreement with you on the amount of loss; or
- (b) An appraisal award has been made.

(Emphasis added by underlining.)(See Appendix to Petitioner's Reply Brief p. 4).

Under section 4.f., Scottsdale did not owe anything at all until an appraisal award was made. Therefore, DeSalvo's argument that Scottsdale was required to pay all amounts claimed within 30 days of the proof of loss is incorrect.

Under the policy, Scottsdale's decision to defer paying any additional funds until the resolution of the appraisal could not constitute a refusal to pay what was owed. Only if Scottsdale failed to make payment within 30 days of the appraisal award could Scottsdale have been guilty of failing to pay what was due. It is undisputed that Scottsdale paid the appraisal award in full less than thirty days after it was entered. Therefore, DeSalvo's argument must fail.

**IV. THE APPRAISAL PROVISION CONTEMPLATED RESORT TO THE JUDICIAL PROCESS ONLY FOR THE LIMITED PURPOSE OF NAMING AN UMPIRE.**

DeSalvo cites policy section E.2 which states in relevant part:

"...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..." (Appendix to Petitioner's Reply Brief, p. 5).

By its clear language, this policy provision contemplates and authorizes resort to the judicial process solely for the purpose of naming an umpire. Nothing in this provision expresses or implies any intent that an insured be allowed to circumvent the appraisal procedures, conduct extended litigation and appeals, and then have the insurance company pay for that violation of the policy. Such an interpretation of the policy would nullify sections D and E of the policy (regarding prerequisites to legal action and appraisal) and encourage unnecessary litigation.

**V. DESALVO CANNOT JUSTIFY AN AWARD OF ATTORNEY'S FEES UNDER THE "RESULTS OBTAINED" TEST SET FORTH IN DANIS.**

DeSalvo correctly points out that in Danis this Court held that the "prevailing party" test set forth in Moritz v. Hoyt Enterprises, 604 So.2d 807 (Fla. 1992), does not apply to cases involving Florida Statutes Section 627.428.

However, as more fully explained in Scottsdale's Brief on the Merits, in Danis, this Court approved the Fifth District Court of Appeal's decision that an award of attorney's fees should be governed by the "results obtained" test set forth in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Danis Industries v. Ground Improvement Techniques, Inc., 645 So.2d 420 (Fla. 1994) and Danis Industries Corporation v. Ground

Improvement Techniques, Inc., 629 So.2d 985 (Fla.5th DCA 1993).

Under the Rowe test, DeSalvo must allocate any and all fees to his successful claims.

Although it is true that DeSalvo recovered additional money, he did so through the appraisal process. DeSalvo had at all times attempted to avoid the appraisal process. DeSalvo also requested the policy limits, an amount almost seventy-five thousand dollars (\$75,000.00) more than what he was in fact awarded. Thus, DeSalvo lost on his attempt to litigate the claim, lost his interlocutory appeal in which he attempted to avoid appraisal, and lost on his claim for the policy limits. Therefore, there does not appear to be any successful claim to which DeSalvo can allocate attorney's fees.

DeSalvo argues that he is the "winner" merely by virtue of the fact that the appraiser awarded him additional money. However, throughout most of the litigation and the interlocutory appeal, the real issue in contention was whether or not DeSalvo was required to proceed through appraisal. DeSalvo clearly lost that issue. Consequently, DeSalvo should be denied fees.

**VI. PUBLIC POLICY DOES NOT MANDATE AWARDING ATTORNEY'S FEES IN MATTERS DETERMINED BY APPRAISAL/ARBITRATION.**

The primary purpose of having an appraisal clause in an insurance policy is to avoid the delay and expense of litigation, especially attorney's fees. This is a perfectly legitimate goal, and within Scottsdale's rights under well recognized concepts of freedom of contract. Awarding attorney's fees in the context of

property appraisals would render that protection meaningless.

DeSalvo hypothesizes a wide variety of potential abuses of the appraisal process. However, there is absolutely no evidence that any such abuse occurred in this case. DeSalvo's argument amounts to little more than speculation about what might happen on a dark and gloomy day. There was only Florida sunshine in this case.

Like individuals, insurance companies have the right to determine their own contractual relationships. That right should not be infringed upon lightly, and certainly not on the basis of mere speculation that someone might abuse the process.

#### **CONCLUSION**

The plain language of the controlling case law establishes two conditions precedent to an award of attorney's fees: wrongful withholding of policy proceeds; and some act on the insurer's part which compelled the insured to resort to litigation. DeSalvo has failed to show that either condition precedent exists. Therefore, his claim for attorney's fees must fail.

The Court cannot award attorney's fees on the grounds that Scottsdale failed to pay what was owed because nothing was owed until the appraisal process was completed. Although the policy contemplated resorting to judicial intervention to name an umpire, nothing in the policy contemplated any greater involvement in the legal process.

DeSalvo cannot allocate any of his attorneys fees to any successful claim in this case. Accordingly, DeSalvo is entitled to



no attorney's fees.

**WHEREFORE**, Scottsdale asks this Honorable Court to reverse the First District Court of Appeal's order awarding DeSalvo attorney's fees and reinstate the trial court's order denying same. Respectfully Submitted this fourth day of August 1998.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to **J. CLARK HAMILTON, ESQUIRE**, 4069 Atlantic Blvd., Suite D, Jacksonville, FL 32207 this fourth day of August, 1998.

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APPENDIX TO PETITIONER'S REPLY BRIEF

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