

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-2124

KATHY JOHNSON,

Petitioner,

vs.

OMEGA INSURANCE COMPANY,

Respondent.

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**RESPONDENT'S BRIEF**

**ON**

**JURISDICTION**

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On Notice to Invoke Jurisdiction from the  
Fifth District Court of Appeal,  
Case No.: 5D13-1701

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## STATEMENT OF THE CASE AND FACTS

Omega Insurance Company (“Omega”) insured a house owned by Kathy Johnson. *Omega Ins. Co. v. Johnson*, No. 5D13-1701, 2014 WL 4375189, at \*1 (Fla. 5th DCA Sep. 5, 2014). Johnson notified Omega that she had a claim for damage to the house, contending the damage was caused by sinkhole activity. *Id.*

Omega engaged a professional engineering and geology firm to investigate, in accordance with section 627.707, Florida Statutes (2009). *Johnson*, 2014 WL 4375189, at \*2. The engineering and geology firm performed tests. *Id.* They found no evidence of sinkhole activity. *Id.* Accordingly, Omega wrote to Johnson that it could not honor her claim. *Id.* The letter invited Johnson to contact the claims adjuster with any questions about the letter or the claim. *Id.* Johnson did not respond to this letter. *Id.*

Instead, almost a year later, Johnson filed a breach of contract lawsuit against Omega. *Id.* Johnson had hired different engineers, who also did tests but reported a different opinion from that of the engineers Omega had engaged. *Id.* Johnson did not provide a copy of that conflicting report to Omega until after she sued Omega, during the discovery process. *Id.*

Omega moved the trial court to stay the case and order a “neutral evaluation” under section 627.7074. *Id.* The neutral evaluator inspected Johnson’s house. *Id.* He concurred with the report issued by Johnson’s engineers. *Id.* Upon

receipt of the report, Omega accepted the neutral evaluator's recommendations and tendered the policy benefits to Johnson. *Id.*

Johnson then filed a Motion for Confession of Judgment and Motion for Attorney's Fees, Costs and Interest. *Id.* Johnson asserted that the payments by Omega, after Johnson had filed suit, were the functional equivalent of a "confession of judgment." *Id.* at \*\*2-3. The trial court granted Johnson's fee motion and ruled that Omega had confessed judgment when it agreed to pay the claim and tendered the policy benefits. *Id.* On appeal, the Fifth District reversed and remanded because there had been no "wrongful or unreasonable denial of benefits that forced Johnson to file suit to obtain her policy benefits." *Id.* at \*5.

### SUMMARY OF THE ARGUMENT

The Fifth District's decision does not conflict with any of the cases cited by Johnson. The issue in this case is whether Omega's action forced Johnson to resort to litigation to obtain her policy proceeds. Johnson claims the Fifth District's opinion conflicts with cases involving personal injury protection (PIP) claims, fire claims, and the effect of statutory presumptions at trial. None of those cases involved payment of a sinkhole claim, or a neutral evaluation that occurred after the policyholder had filed suit. Thus, there is no express and direct conflict on the same question of law in any of the cases cited by Johnson, such that there could be conflict jurisdiction. And even assuming conflict jurisdiction existed (which it

does not), the Court should not exercise that jurisdiction because the Fifth District's decision was correct in light of the statutory sinkhole scheme.

## ARGUMENT

Johnson's alleged basis for jurisdiction is express and direct conflict with four different opinions. To demonstrate such a conflict, she must show that the district court's decision "expressly and directly conflicts with [the four] decision[s] . . . on the same question of law." Art. V, § 3(b)(3), Fla. Const. In other words, the decisions must be irreconcilable. *Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166 (Fla. 2006). Moreover, this Court's conflict jurisdiction is discretionary. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv). Thus, this Court must decide not only whether conflict exists but, if so, whether to review the case.

**I. The district court's decision does not expressly and directly conflict with any of the decisions raised by Johnson.**

**A. The Fifth District's decision does not conflict with *Universal Ins. Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012).**

Johnson's first argument is that the Fifth District's opinion, that she was not forced to file suit, conflicts with *Warfel*. (Pet's Br. 4-7.) Johnson's argument is wrong. The Fifth District's decision did not announce a rule contrary to *Warfel* and did not involve the same controlling facts as *Warfel*. Therefore, Johnson cannot show any basis that would support this Court taking jurisdiction to review the Fifth District's decision based on express and direct conflict with *Warfel*.

**The Fifth District's decision did not announce a rule contrary to *Warfel*.**

The issue in this case was whether Johnson was entitled to attorney's fees pursuant to section 627.428 under the confession of judgment doctrine. *Warfel* was not about the confession of judgment doctrine or section 627.428. Instead, the issue in *Warfel* was whether section 627.7073(1) created a rebuttable presumption affecting the burden of proof *at trial*. 82 So. 3d at 51. This Court held that it did not. *Id.* at 57-58. The Fifth District did not announce a contrary rule. In fact, it could not have done so because this case did not involve any trial issues. Omega paid Johnson's claim, and that "payment rendered moot all issues other than the question of attorney's fees[.]" See *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993) (citing *Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96 (Fla. 4th DCA 1974)).

Johnson also argues that the Fifth District "applied the presumption to conclusively determine that Johnson could never prove her claim." (Pet's Br. 7.) But the Fifth District's opinion does not say that. The Fifth District's holding was limited to whether the "application of the confession of judgment doctrine as a basis to award fees under section 627.428 was error." 2014 WL 4375189, at \*5. The district court noted Omega paid Johnson's claim. *Id.* And the Fifth District clearly stated that the "presumption may not completely insulate an insurer from claims[.]" *Id.* The district court merely applied the statutory presumption to



Omega's presuit actions to determine whether Johnson was forced to file suit in the first place. This analysis was consistent with *Warfel*, which states that the presumption was "aimed at shielding . . . insurance companies from claims of improper denials of claims." 82 So. 3d at 57.

The Fifth District held Johnson had not been forced to file suit because she concealed her engineer's report before suing Omega. This holding is not affected by anything in the *Warfel* opinion. Therefore, there is no express and direct conflict because the Fifth District's decision did not announce a "rule of law which conflicts with a rule previously announced by this Court" in *Warfel*. *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960).

**The Fifth District's decision did not involve the same controlling facts as *Warfel*.** In this case, Omega denied Johnson's sinkhole claim based on a report issued by a professional engineer Omega had engaged pursuant to section 627.707. *Johnson*, 2014 WL 4375189, at \*2. Omega provided the report to Johnson and advised her to contact Omega if she had any questions regarding her claim. *Id.* Johnson never contacted Omega. *Id.* Johnson then obtained her own engineering report, which disagreed with Omega's report. *Id.* Based on this report, Johnson sued Omega for breach of contract. *Id.* But Johnson did not disclose her conflicting report before she sued Omega; this report was first disclosed in the discovery process. *Id.* Omega and Johnson then resolved her claim through

post-suit neutral evaluation. There was no trial, as there was in *Warfel*. The circuit court ruled that Omega's post-suit payment of policy benefits was a confession of judgment, and that Johnson was entitled to attorney's fees under section 627.428.

*Id.*

The facts in *Warfel* were far different. The insurer in *Warfel* had denied the policyholder's claim based on a professional engineer's report pursuant to section 627.707. 82 So. 3d at 50. But the similarity ends there. The *Warfel* opinion does not state that the policyholder obtained a contrary report before suit, or that the policyholder concealed any such report before filing suit. The *Warfel* opinion states only that the policyholder filed suit. *Id.* The insurer in *Warfel* moved the trial court to apply a presumption of correctness to its position pursuant to section 90.304, Florida Statutes, and to further instruct the jury that section 627.7073(1) created a rebuttable presumption affecting the burden of proof. The trial court granted the insurer's motion. *Id.* This ruling is at the center of *Warfel*. At trial, the parties adduced conflicting evidence as to whether there was sinkhole damage. *Id.* The jury returned a verdict for the insurer, and the policyholder appealed. *Id.*

*Warfel* was not about the confession of judgment doctrine or section 627.428, which are the issues in this case. The *Warfel* court did not need to determine whether the insurer had wrongfully caused the policyholder to sue. For this reason, there was no need for this Court in *Warfel* to discuss or consider the

policyholder's actions before filing suit, e.g. whether the policyholder obtained an engineer's report that disputed the insurer's report, or whether the policyholder concealed any such report from his insurer before filing suit. Neither the facts nor the issues in *Warfel* are like the facts in this case. Thus, there is no express and direct conflict because the Fifth District did not apply "a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court [*Curran*]." *Nielsen*, 117 So. 2d at 734.

**The Fifth district's decision does not conflict with *Citizen's Property Insurance Corp. v. Munoz*, No. 2D13-3899, 2014 WL 7331095 (Fla. 2d DCA Dec. 24, 2014).** Johnson cited this case in her notice of supplemental authority. *Munoz* is like *Warfel* because it addressed the application of section 627.7073(1) in the context of a sinkhole trial. And *Munoz*, like *Warfel*, did not address the confession of judgment doctrine or section 627.428. Moreover, *Munoz* specifically states that the Fifth District's opinion is distinguishable. 2014 WL 7331095, at \*2 n.2. Thus, the Fifth District's opinion does not expressly and directly conflict with *Munoz*.

**B. The Fifth District's decision does not conflict with the cases cited by *Johnson* on the issue of wrongfulness.**

The cases cited by Johnson on pages 8 through 10 of her brief did not apply the same rule of law to reach a different result under substantially the same facts as in this case. The reasoning in *Johnson* is consistent with *Ivey v. Allstate Ins. Co.*,

774 So. 2d 679, 684-85 (Fla. 2000), and *Wollard v. Lloyd's & Companies of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983), *approving Palmer*, 297 So. 2d 96. These cases are in agreement that the confession of judgment doctrine applies only when the insurance company unreasonably withholds payment. *Johnson* is just another case in this long line of cases<sup>1</sup> requiring that the trial court determine whether there was a necessity for the policyholder to file suit. The *Johnson* court merely explained, before there can be such dispute and necessity to sue, an insured should at least try to discuss his or her disagreement with the insurance company. *See Johnson*, 2014 WL 4375189, at \*5. Because *Johnson* is consistent with *Wollard*, *Ivey*, and their progeny, there is no express and direct conflict with those decisions.

Further, *Insurance Co. of North America v. Lexow*, 602 So. 2d 528 (Fla. 1992), was a case involving a fire claim where the policyholder obtained a judgment against the insurer. For this reason, the confession of judgment doctrine did not apply in *Lexow*.

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<sup>1</sup> *See e.g. State Farm Fla. Ins. Co. v. Colella*, 95 So. 3d 891, 896 (Fla. 2d DCA 2012) (finding no basis to apply confession of judgment doctrine where policyholder “opted to pursue litigation without ever attempting to discuss the disagreement with the insurance company”); *Barreto v. United Servs. Auto Ass’n*, 82 So. 3d 159, 162 (Fla. 4th DCA 2012) (examining whether the filing of the suit served a “legitimate purpose”); *Travelers of Fla. v. Stormont*, 43 So. 3d 941, 944 (Fla. 3d DCA 2010) (stating that confession of judgment doctrine applies where insured is forced to file suit); *Jerkins v. USF&G Specialty Ins. Co.*, 982 So. 2d 15, 17 (Fla. 5th DCA 2008) (same).

Moreover, Johnson does not claim there is conflict with the only other case addressing the confession of judgment doctrine under the sinkhole statutory scheme. *Colella* was the first case to address this issue. And the Fifth District's holding in *Johnson* is in harmony with the holding in *Colella*. Because there is no conflict between the cases addressing the confession of judgment doctrine under the sinkhole statutes, there is no conflict jurisdiction to review this case.

**II. This Court should not exercise its discretion to accept this case because the Fifth District reached the correct result.**

Johnson complains about the Fifth District's reversal of the trial court's ruling that Omega had confessed judgment. But she really hopes to unravel the statutory scheme created by the legislature to govern sinkhole insurance claims. Omega processed Johnson's sinkhole claim as required by section 627.707, obtained a sinkhole report presumed correct under section 627.7073(1)(c), and then denied the claim as allowed by section 627.707(4)(a). *Johnson*, 2014 WL 4375189, at \*5. The sinkhole report has a statutory presumption of correctness that applied to Omega's "initial claim process and investigation," presumably to shield "the insurance compan[y] from claims of improper denials of claims." *Warfel*, 82 So. 3d at 57. Based on the sinkhole statutes and *Warfel*, the Fifth District reached the correct result.

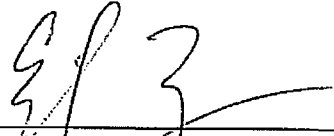
Furthermore, application of the confession of judgment doctrine turns on whether there was a necessity for the policyholder to file a suit. *Clifton v. United*

*Cas. Ins. Co. of Am.*, 31 So. 3d 826, 829 (Fla. 2d DCA 2010); *Jerkins*, 982 So. 2d at 18; *see also Wollard*, 439 So. 2d at 219 n.2 (Fla. 1983) (noting that the requirement that the insurer “unreasonably withhold payment under the policy [is] a condition precedent” to application of the confession of judgment doctrine). Here, no bona fide dispute existed because Johnson did not bring the conflicting report of her engineers to Omega’s attention. Nor did she request a neutral evaluation. Omega did not know there was a disagreement with its own statutorily-mandated sinkhole report. So, Omega did not unreasonably or wrongfully withhold payment under the insurance policy and, thus, did not force Johnson to file suit. That is why the Fifth District properly reversed and remanded this case.

### CONCLUSION

This Court lacks discretionary jurisdiction to review the decision below because there is no conflict with any of the cases cited by the Petitioner. And assuming, *arguendo*, this Court had discretionary jurisdiction (which it does not), the Court should not exercise that jurisdiction to consider the merits of the Petitioner’s arguments because the Fifth District’s decision was correct.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been furnished to the following via Email on December 30, 2014.

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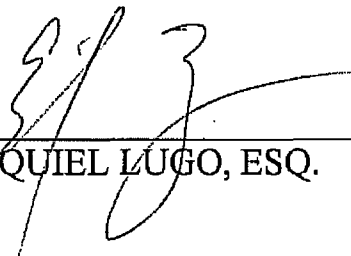
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