Filing # 20304635 Electronically Filed 11/06/2014 04:54:21 PM

RECEIVED, 11/6/2014 16:58:39, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

KATHY JOHNSON,

Petitioner,

vs.

OMEGA INSURANCE COMPANY,

Respondent.

Case No.: SC14-2124

L.T. No.: 5D13-1701

PETITIONER KATHY JOHNSON'S BRIEF ON JURISDICTION ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEALS

TIMOTHY W. WEBER, B.C.S.
Florida Bar No.: 86789
Board Certified Appellate Specialist
timothy.weber@webercrabb.com
lisa.willis@webercrabb.com
WEBER, CRABB & WEIN, P.A.
5999 Central Ave., Suite 203
St. Petersburg, Florida 33710
(727) 828-9919
(727) 828-9924 (fax)
Attorneys for JOHNSON

MORGAN BARFIELD, ESQ.
Florida Bar No.: 605761
CORLESS BARFIELD TRIAL GROUP
mbarfield@corelessbarfield.com
4350 Cypress Street, Suite 910
Tampa, FL 33607
(813) 258-4998
(813) 258-4988 (fax)
Trial Counsel for JOHNSON

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF CASE AND FACTS 1

ARGUMENT 4

I. THIS COURT'S OPINION IN *UNIVERSAL INS. CO. OF NORTH AMERICA V. WARFEL*, 82 SO. 3D 47 (FLA. 2012), ESTABLISHED THAT THE PRESUMPTION ATTACHING TO SINKHOLE INVESTIGATION REPORTS PURSUANT TO FLORIDA STATUTES § 627.7073(1)(C) HAD NO APPLICATION TO COVERAGE DISPUTES. IN CONFLICT WITH *WARFEL*, THE FIFTH DISTRICT'S OPINION GIVES THE PRESUMPTION EVIDENTIARY WEIGHT TO IMPROPERLY INSULATE INSURERS FROM THE CONSEQUENCES OF ERRONEOUS COVERAGE DENIALS 4

II. THE FIFTH DISTRICT'S REQUIREMENT TO PROVE WRONGFULNESS TANTAMOUNT TO BAD FAITH FOR AN AWARD OF ATTORNEYS' FEES EXPRESSLY AND DIRECTLY CONFLICTS WITH *IVEY V. ALLSTATE INS. CO.*, 774 SO. 2D 679 (FLA. 2000); *INSURANCE CO. OF N. AMERICA V. LEXOW*, 602 SO. 2D 528 (FLA. 1992); AND *CINCINNATI INS. CO. V. PALMER*, 297 SO. 2D 96 (FLA. 4TH DCA 1974). 8

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF FONT COMPLIANCE 11

TABLE OF AUTHORITIES

CASES

Bassette v. Standard Fire Ins. Co.,
803 So. 2d 744 (Fla. 2d DCA 2001) 10

Cincinnati Ins. Co. v. Palmer,
297 So. 2d 96 (Fla. 4th DCA 1974) 8, 10

Gov't Employees Ins. Co. v. Battaglia,
503 So. 2d 358 (Fla. 5th DCA 1987) 10

Insurance Co. of North America v. Lexow,
602 So. 2d 528 (Fla. 1992) 9, 10, 11

Ivey v. Allstate Ins. Co.,
774 So. 2d 679 (Fla. 2000) 8, 9, 10, 11

Leaf v. State Farm Mut. Auto. Ins. Co.,
544 So. 2d 1049 (Fla. 4th DCA 1989) 10

Liberty Nat. Life Ins. Co. v. Bailey,
944 So. 2d 1028 (Fla. 2d DCA 2006) 10

Pawtucket Mut. Ins. Co. v. Manganelli,
3 So. 3d 421 (Fla. 4th DCA 2009) 10

State Farm Fla. Ins. Co. v. Colella,
95 So. 3d 891 (Fla. 2d DCA) 6

Stewart v. Midland Life Ins. Co.,
899 So. 2d 331 (Fla. 2d DCA 2005) 11

Time Ins. Co. v. Arnold,
319 So. 2d 638 (Fla. 1st DCA 1975) 10

Travelers Indem. Ins. Co. of Ill. v. Meadows MRI, LLP,
900 So. 2d 676 (Fla. 4th DCA 2005) 10

Universal Ins. Co. of N. America v. Warfel,
82 So. 3d 47 (Fla. 2012) .... passim

STATUTES

Fla. Stat. § 627.428 .... 2, 8, 9

Fla. Stat. § 627.707 1

Fla. Stat. § 627.7073(1)(c) 2, 4

Fla. Stat. § 627.7074 1

RULES

Fla. R. App. P. 9.030(a)(2)(A)(iv) 4

STATEMENT OF CASE AND FACTS

KATHY JOHNSON ("JOHNSON") noticed structural damage to her home and made a claim for benefits under a homeowner's policy issued by OMEGA INSURANCE COMPANY ("OMEGA"), contending that the damage was due to sinkhole activity. Op., at 2. OMEGA retained Rimkus Consulting Group, Inc. ("Rimkus") to conduct testing and render an opinion concerning the cause of the damage. *See* § 627.707, Fla. Stat. (2010); Op., at 3. Rimkus issued a report concluding that sinkhole activity was not the cause of damage to JOHNSON's property. Op., at 3. OMEGA denied coverage based upon the report. Op., at 3.

JOHNSON hired another engineering firm, Bay Area Sinkhole Investigation & Civil Engineering ("BASIC"), to investigate the cause of the damage to JOHNSON's property. Op., at 4. BASIC issued a report opining that sinkhole activity was the cause of the damage to JOHNSON's property. Op., at 4. Armed with the BASIC report, JOHNSON filed suit against OMEGA alleging that it breached the contract by failing to pay benefits due under the policy. Op., at 4.

During discovery, JOHNSON provided the BASIC report to OMEGA. Op., at 4. OMEGA did not pay JOHNSON's claim after receiving the BASIC report. Op., at 4. Instead, OMEGA demanded neutral evaluation pursuant to Florida Statutes § 627.7074; the trial court stayed the litigation pending neutral evaluation. Op., at 4. The neutral evaluator agreed with the BASIC report and concluded that sinkhole

activity was the cause of the damage to JOHNSON's home. Op., at 4. OMEGA relented and agreed to pay JOHNSON's claim in full. Op., at 5.

JOHNSON filed a motion for confession of judgment and for attorneys' fees pursuant to Florida Statutes § 627.428, arguing that OMEGA's post-suit abandonment of its coverage position was tantamount to a confession of judgment. Op., at 5; *See Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217 (Fla. 1983). The trial court agreed and awarded JOHNSON fees. Op., at 5.

On appeal, OMEGA argued that "it did not wrongfully withhold policy benefits from Johnson because it investigated according to the statutory directives and justifiably relied on the report issued by its engineering firm that sinkhole activity was not the cause of the damage to Johnson's home." Op. at 5. The Fifth District identified, as the issue on appeal, whether OMEGA "wrongfully withheld policy benefits to its insured . . . thereby forcing her to file suit to collect her policy benefits." Op., at 1-2. The Fifth District interpreted "wrongful" to require proof of wrongful conduct on the part of the insurer beyond an erroneous denial of benefits. Op., at 7-8.

The court next, citing the presumption of correctness which attached to the Rimkus report pursuant to Florida Statutes § 627.7073(1)(c), reasoned that, "Omega had the right to presume the report was correct and to deny the claim based thereon." Op., at 10. Thus, the court concluded:

> We do not believe that, under the facts and circumstances of this case, Omega's actions in investigating and handling Johnson's claim pursuant to the pertinent statutory provisions contained in chapter 627, and in relying on the presumptively correct report it commissioned to deny the claim, establish a wrongful or unreasonable denial of benefits that forced Johnson to file suit to obtain her policy benefits. We, therefore, conclude that application of the confession of judgment doctrine as a basis to award fees under section 627.428 was error.

Op., at 10-11.

JOHNSON timely filed a motion for rehearing, clarification, and certification arguing that the Fifth District's opinion was in direct conflict with this Court's opinion in *Universal Ins. Co. of N. America v. Warfel*, 82 So. 3d 47 (Fla. 2012) (holding that the presumption in § 627.7073(1)(c) had no application in coverage litigation or was, at most, a vanishing presumption which, once rebutted, disappeared). JOHNSON also requested certification to this Court of the following question:

> Does the presumption set forth in s. 627.7073(1)(c) operate to insulate an insurer from application of the confession of judgment doctrine where the insurer denied coverage based upon a statutorily compliant engineering report admitted or proven to be erroneous after the commencement of litigation?

The Fifth District denied JOHNSON's motions on October 9, 2014, and JOHNSON timely filed her Notice to Invoke the Discretionary Jurisdiction of the Supreme Court on October 27, 2014.

ARGUMENT

I. THIS COURT'S OPINION IN *UNIVERSAL INS. CO. OF NORTH AMERICA V. WARFEL*, 82 SO. 3D 47 (FLA. 2012), ESTABLISHED THAT THE PRESUMPTION ATTACHING TO SINKHOLE INVESTIGATION REPORTS PURSUANT TO FLORIDA STATUTES § 627.7073(1)(C) HAD NO APPLICATION TO COVERAGE DISPUTES. IN CONFLICT WITH *WARFEL*, THE FIFTH DISTRICT'S OPINION GIVES THE PRESUMPTION EVIDENTIARY WEIGHT TO IMPROPERLY INSULATE INSURERS FROM THE CONSEQUENCES OF ERRONEOUS COVERAGE DENIALS

This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv) as the opinion of the Fifth District expressly and directly conflicts with *Universal Ins. Co. of N. America v. Warfel*, 82 So. 3d 47 (Fla. 2012), on the same point of law. Specifically, the Fifth District's application of the presumption created by Florida Statutes § 627.7073(1)(C)[1] to deny the insured judgment directly conflicts with the rule announced in *Warfel* that the presumption has no application to this action.

In *Warfel*, this Court, in addressing a question certified to be of great public importance, held that the statutory presumption of correctness attaching to the report of the engineer or geologist hired by the insurer had no application in the first-party insurance litigation context. 82 So. 3d at 57-58. This Court expressly held that the

---

[1] Section 627.7073(1)(c) provides: "The respective findings, opinions, and recommendations of the insurer's professional engineer or professional geologist as to the cause of distress to the property and the findings, opinions, and recommendations of the insurer's professional engineer as to land and building stabilization and foundation repair set forth by s. 627.7072 shall be presumed correct."

trial court's treatment of the presumption as evidentiary was incorrect. *Id.* This Court continued by stating that, even if the presumption were applicable to the coverage dispute, it would, at most, be a "vanishing" or "bursting bubble" type of presumption which, once rebutted, completely dropped out of the case. 82 So. 3d at 58-63. This Court expressly rejected the argument that the statute created a presumption shifting the burden of proof to the insured. *Id.* This Court also noted that it would be unconstitutional to give the presumption conclusive effect. *Id.*

In direct conflict, the Fifth District's opinion not only gives evidentiary weight to the presumption, contrary to this Court's opinion, but gives it near conclusive effect. First, the mere discussion of the presumption by the Fifth District conflicts with the pronouncement in *Warfel* that it has no application to this action. The Fifth District went even further, however, stating that the presumption gives the insurer "the right" to deny the insurance claim, that compliance with the statute "goes a long way toward fulfilling [the insurer's] obligations under its contract," and that reliance on the presumptively correct report defeated JOHNSON's claim. Again, the Fifth District summarized:

> We do not believe that, under the facts and circumstances of this case, Omega's actions in investigating and handling Johnson's claim pursuant to the pertinent statutory provisions contained in chapter 627, and in relying on the presumptively correct report it commissioned to deny the claim, establish a wrongful or unreasonable denial of benefits that forced Johnson to file suit to obtain her policy benefits. We, therefore, conclude that application of the confession of judgment doctrine as a basis to award fees under section 627.428 was error.

Op., at 10-11. Because the Fifth District's opinion gives an effect to the presumption expressly rejected by this Court, this Court should accept jurisdiction and clarify, for the benefit of all homeowners and their insurers, that the presumption does not defeat what would otherwise have been a clear breach of contract and, ultimately, a confessed judgment.[2]

Notably, the basic facts of this case are materially indistinguishable from *Warfel*. In *Warfel*, the insured made a claim alleging damage caused by sinkhole activity. *Id*. at 50. The insurer hired an engineering firm to conduct testing and issue the report as required by statute. *Id*. The insurer denied the claim based on the report's conclusion that the damage was caused by things other than sinkhole activity. *Id*. The insured then filed suit for breach of contract. *Id*.

In *Warfel*, the presence of sinkhole activity as the cause of damage was the disputed issue at trial. *Id*. In the instant case, the insurer capitulated and paid the claim once faced with the reports of both the insured's engineer and the neutral evaluator agreeing with it. Op., at 5. This Court in *Warfel* reversed and remanded for a trial on breach of contract. In the instant case, the Fifth District applied the

[2] The Fifth District also noted that the Second District has relied upon the presumption to reverse a summary judgment in favor of the insured where the insurer paid the claim after litigation. *See State Farm Fla. Ins. Co. v. Colella*, 95 So. 3d 891 (Fla. 2d DCA), rev. denied, 108 So. 3d 654 (Fla. 2012). This only highlights the need for this Court to exercise its role to harmonize the law amongst the appellate courts.

presumption to conclusively determine that Johnson could never prove her claim. The conflict between the results of both cases is palpable.

The Fifth District's error stems from its misreading of this Court's statement in *Warfel*: "If anything, the presumption of correctness attached to the report appears to be aimed at shielding . . . insurance companies from claims of improper denials of claims." *Id*. at 57; Op., at 9. The court interpreted this language as shielding insurers from attorneys' fees for erroneous denials of coverage. Read properly, this Court was merely explaining that § 627.707 established minimum standards for insurers to avoid bad faith liability and did not create a defense to coverage.

This Court should accept jurisdiction to harmonize the decisional law regarding the presumption. As evident by the certified question in *Warfel*, the proper application of the presumption is a question of considerable importance to homeowners and insurers throughout the State. The misuse of the presumption to deny reimbursement for professional assistance puts homeowners, such as JOHNSON, at an extreme disadvantage in overcoming erroneous denials of coverage based upon the opinions of experts selected by the insurance company. The purposes of § 627.428 to level the playing field, compensate insureds, and deter improper denials would be defeated if the opinion were allowed to stand.[3]

---

[3] The Fifth District applied the opinion under review to another homeowner in *Ross v. Tower Hill*, 5D13-115. Ross is seeking discretionary review predicated on this

II. THE FIFTH DISTRICT'S REQUIREMENT TO PROVE WRONGFULNESS TANTAMOUNT TO BAD FAITH FOR AN AWARD OF ATTORNEYS' FEES EXPRESSLY AND DIRECTLY CONFLICTS WITH *IVEY V. ALLSTATE INS. CO.*, 774 SO. 2D 679 (FLA. 2000); *INSURANCE CO. OF N. AMERICA V. LEXOW*, 602 SO. 2D 528 (FLA. 1992); AND *CINCINNATI INS. CO. V. PALMER*, 297 SO. 2D 96 (FLA. 4TH DCA 1974).

This Court has consistently held that "where an insurer pays policy proceeds after suit has been filed but before judgment has been rendered, the payment of the claim constitutes the functional equivalent of a confession of judgment or verdict in favor of the insured, thereby entitling the insured to attorney's fees." *Ivey*, 774 So. 2d at 684–85 (discussing this Court's opinion in *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217 (Fla. 1983)). In conflict with *Ivey* and other opinions, the opinion of the Fifth District has added a wrongfulness requirement tantamount to bad faith as a condition of recovery.

In *Ivey*, the insured was struck by a car while walking on the sidewalk. *Id*. at 681. The insured timely applied for personal injury protection benefits. *Id*. The insured filed a health insurance claim form that was unclear on whether the insured received treatment for one or two injuries. *Id*. Without conducting any investigation, the insurer paid the insured benefits for the treatment of only one injury, even though the insured received treatment for two injuries. *Id*. The insured then filed suit to

---

Court's acceptance of jurisdiction in this case. *See Ross v. Tower Hill Preferred Ins. Co.*, SC14-2125.

obtain full payment for the treatment of two injuries. *Id*. During the deposition of the treating physician, the insurer realized its mistake of only paying for one injury instead of two. *Id*. The insurer then paid the benefits. *Id*.

In awarding the insured attorney's fees, this Court stated that "[i]t is the incorrect denial of benefits, not the presence of some sinister concept of 'wrongfulness,' that generates the basic entitlement to the fees if such denial is incorrect." *Ivey*, 774 So. 2d at 684. This Court reversed the lower court's ruling that the insurer was protected from paying attorney's fees because the insurer did not pay the claim "due to an error in the doctor's bill." *Id*. at 682. This Court was only concerned whether the insurer "voluntarily paid [the insured's] claim only after the lawsuit was filed." *Id.* Thus, in *Ivey*, the Court rejected an interpretation of § 627.428 which would relieve an insurer from liability for attorneys' fees based upon its good faith or mistake in failing to provide coverage.

In another case, this Court expressly stated that an insurer's good faith in denying coverage was irrelevant to an award of statutory attorneys' fees under § 627.428. *Insurance Co. of North America v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992). This Court stated, "[i]f the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees." *Id.*

Similarly, the Fourth District Court of Appeals stated: "The fact that the insurer's refusal to pay the amount owed by it under the terms of the policy was in

good faith and on reasonable grounds does not relieve the insurer from liability for payment of attorney's fees." *Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 98 (Fla. 4th DCA 1974).

In the present case, the Fifth District expressly and directly conflicts with these pronouncements, among others, by relieving OMEGA of the consequences of its erroneous denial of coverage solely based upon its good faith reliance on the investigatory report. In so doing, it has strayed from the proper analysis laid down by this Court in *Ivey* and *Lexow*. As this Court noted in reversing a District Court's denial of fees based on the insurer's good faith, "[t]he decision below would incorrectly deny application of statutory attorney's fees when insurers come to the realization during litigation that a denial of benefits has been incorrect." *Ivey*, 774 at 685.

Because the Fifth District's opinion constitutes an express and direct conflict with *Ivey*, *Lexow*, and *Palmer*, among others, this Court should accept jurisdiction.

CONCLUSION

Because the Fifth District Court of Appeal's opinion expressly and directly conflicts with *Warfel*, *Ivey*, *Lexow*, and *Palmer*, this Court should accept jurisdiction of the case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail to the following: Karl A. Forrest, Esq. (kforrest@gspalaw.com); Morgan Barfield, Esq. (service@corlessbarfield.com and mbarfield@corlessbarfield.com; Anthony J. Russo, Esq. and Jared Krukar, Esq. (arusso@butlerpappas.com, jkrukar@butlerpappas.com and eservice@butlerpappas.com) this 5th day of November, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

s/ Timothy W. Weber
TIMOTHY W. WEBER, ESQ.
Florida Bar No. 86789
Weber, Crabb & Wein, P.A.
5999 Central Ave., Ste. 203
St. Petersburg, Florida 33710
(727) 828-9919
(727) 828-9924 (facsimile)
timothy.weber@webercrabb.com
lisa.willis@webercrabb.com
Attorneys for Petitioner