SUPREME COURT OF FLORIDA

KATHY JOHNSON,

Petitioner,

vs.

OMEGA INSURANCE COMPANY,

Respondent.

Case No.: SC14-2124

5th DCA No.: 5D13-1701

5th Cir. No.: 11-1315-CA-G (Singbush, J.)

PETITIONER KATHY JOHNSON'S INITIAL BRIEF ON THE MERITS ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEALS JUDGES SAWAYA, EVANDER AND BERGER, PRESIDING

TIMOTHY W. WEBER, B.C.S.
Florida Bar No.: 86789
Board Certified Appellate Specialist
timothy.weber@webercrabb.com
lisa.willis@webercrabb.com
JOSEPH P. KENNY, ESQ.
Florida Bar No.: 59996
joseph.kenny@webercrabb.com
sandra.peace@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 Petitioner

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)
Co-counsel for Petitioner

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PREFACE

Petitioner, KATHY JOHNSON, will hereinafter be referred to as "Johnson."

Respondent, OMEGA INSURANCE COMPANY, will hereinafter be referred to as "Omega.

Johnson will cite to the record on appeal as follows:

(DR. #) Record on Appeal to the District Court

(SC. #) Record on Appeal to the Supreme Court

(A. #) Initial Brief of Omega in District Court

(B. #) Answer Brief of Johnson in District Court

(C. #) Reply Brief of Omega in District Court

STATEMENT OF THE CASE AND FACTS

In January of 2010, Johnson noticed structural damage to her home and made a claim for benefits under the sinkhole provisions of her homeowner's insurance policy with Omega. (DR. 516). Omega initially assessed the cosmetic damages to the home at $5,766.60. (DR. 514). Omega additionally retained Rimkus Consulting Group, Inc. ("Rimkus") to conduct testing and render an opinion concerning the cause of the damage to the structure. (DR. 257); s*ee* § 627.707, Fla. Stat. (2010). Rimkus subsequently issued a report concluding:

> To the best of our knowledge and belief, the analysis conducted was of sufficient scope to eliminate, within a reasonable professional probability, sinkhole activity as the cause of damage to the structure in accordance with Florida State Statute 627.707, Standards for Investigation of Sinkhole Claims by Insurers: non-renewals.

(DR. 259). Rimkus concluded, among other things, that the damage to the home was due to differential settlement, poor building materials and installation, and "volumetric changes of the highly plastic clayey soils underlying the site resulting from fluctuations in moisture content." (DR. 258).

On May 24, 2010, Omega sent correspondence to Johnson denying coverage, stating "since your policy of insurance does not provide coverage for the loss claimed, Omega Insurance Company is not able to honor your claim." (DR. 516). The letter from Omega further advised Johnson that her policy did not cover damages which occurred prior to the inception of the policy and invoked a specific

exclusion for such damages. (DR. 518). Omega's letter concluded, "[w]e regret any inconvenience this determination may cause. If you have any questions that require further clarification of the foregoing, please contact me . . . ." (DR. 519). Omega did not request further information from Johnson, as was its right under the policy, nor indicate that additional information would be considered. (DR. 259).

Johnson hired a lawyer who retained another engineering firm, Bay Area Sinkhole Investigation & Civil Engineering ("BASIC"), to investigate the cause of the damage to Johnson's property. (DR. 322). BASIC issued a report opining that sinkhole activity was the cause of the damage to Johnson's property. (DR. 319). The BASIC report faulted Rimkus for failing to analyze the particle size of the soils, opining that "[t]he exclusion of this information renders an acceptable evaluation of the laboratory results to be questionable." (DR. 324). BASIC also performed additional testing and concluded that conditions indicative of sinkhole activity were observed and were a probable cause of damage to the residence. (DR. 334-335). After receiving the BASIC report, and approximately a year after coverage was denied, Johnson filed suit against Omega alleging that it breached the contract by failing to pay benefits due under the policy. (DR. 1).

Omega responded by filing a series of documents, including a motion for neutral evaluation and stay of the litigation pursuant to Florida Statutes § 627.7074, a motion for protective order and stay of discovery, and a response to requests for

admissions (which had been served with the initial complaint). (DR. 4-13). In these initial motion papers, Omega specifically advised the trial court that Johnson had made a claim for insurance coverage alleging damage to real property caused by sinkhole activity, (DR. 4), Omega determined that sinkhole activity was not the cause of Johnson's loss, (DR. 4), and there was "a dispute over whether sinkhole activity is causing damage to the insured residence/structure." (DR. 6). In responses to requests for admissions, Omega admitted the existence of insurance coverage for damages caused by sinkhole activity, admitted the existence of damage to Johnson's property, and admitted its refusal to pay benefits under the policy. (DR. 8-13). Specifically, Omega:

> Admitted that Plaintiff has made an application for insurance benefits under the policy. It is further admitted that Defendant has failed to pay said benefits as the damages to the Plaintiff's residence were not caused by a covered loss and/or peril pursuant to the terms and conditions of the subject insurance policy.

(DR. 9)

The parties stipulated to abate the litigation pending neutral evaluation, which the circuit court ratified and approved. (DR. 14-15). Omega made no offer to pay during the neutral evaluation process. (DR. 250); *see* § 627.7074(14), Fla. Stat. (2010). In October of 2011, the Neutral Evaluator issued a report concluding that the BASIC report was correct — sinkhole conditions existed on the property and were the likely cause of the damage to Johnson's home. (DR. 61). The Neutral Evaluator

recommended a below-ground remediation plan at a cost of $231,500.00, followed by a recommendation to reassess cosmetic repairs after the below ground remediation was complete. (DR. 60-68).

Three weeks later, Omega wrote to Johnson's counsel and advised, "Omega Insurance Company ("Omega") intends to abide by the Neutral Evaluation Report," and "Omega *concedes* the Insured is entitled to the subsurface remediation program as set forth by [the neutral evaluator] in his report." (DR. 463) (emphasis added). However, Omega did not tender policy proceeds for the subsurface remediation, instead asserting that "Omega is entitled to withhold payment of the subsurface repairs until the insured executes a contract with an appropriate subsurface remediation company." (DR. 163). OMEGA did tender $4,776.50 based on the original cosmetic estimate less $1,000 deductible and advised that it would be updating the cosmetic estimate. (DR. 163, 167).

Within a week, Omega obtained a revised estimate for cosmetic damages of $112,320.87. (DR. 511). However, this amount was not immediately tendered. Instead, Omega filed an Answer, Affirmative Defenses and Demand for Jury Trial admitting sinkhole damage but denying liability under the policy based on 11 affirmative defenses. (DR. 16-22). Omega asserted that Johnson's damages occurred either before or after the policy period; Johnson unreasonably failed to mitigate damages; coverage was excluded by one or more concurrent causation exclusions;

there was no coverage for land; Johnson's loss was caused by her neglect; Johnson failed to give timely notice of loss; Johnson failed to bring suit on time; and Omega could condition payment of benefits on Johnson's entry into a contract for subsurface remediation repairs. (DR. 16-22). Omega demanded a jury trial and prayed for judgment in its favor and costs against Johnson. (DR. 22).

During the ensuing discovery process, Omega answered interrogatories and filed objections to Johnson's requests for documents, maintaining that its general investigation, claims procedures, and claims file were outside the scope of discovery and constituted work-product. (DR. 25-26). In response to many of Johnson's requests for production, Omega objected on the grounds that it was irrelevant, citing *State Farm Florida Ins. Co. v. Gallmon*, 835 So. 2d 389 (Fla. 2d DCA 2003), and *State Farm Fire & Cas. Co. v. Valido*, 662 So. 2d 1012 (Fla. 3d DCA 1995). (DR. 36-42). It also objected to interrogatories requesting information about its investigation. (DR. 24-32). Omega produced a privilege log identifying all claims investigation activity as being privileged and not subject to discovery. (DR. 33-35).

In furtherance of these objections, Omega answered in an interrogatory:

> 4. State with specificity, the date when OMEGA reasonably anticipated litigation with Plaintiff and all circumstances, which gave, rise to OMEGA' reasonable anticipation or belief that litigation, would ensure [sic], result or arise regarding Plaintiffs claim.
>
> Response: The date the claim was reported to OMEGA on January 13, 2010.

(DR. 27, 98). Omega designated its May 24, 2010 letter denying coverage as the only information responsive to most of Johnson's interrogatories. (DR. 24-32, 516-519).

Johnson eventually filed a motion for confession of judgment and for attorneys' fees pursuant to § 627.428, Fla. Stat., asserting that Omega's post-suit concession of coverage and tender of payments were tantamount to a confession of judgment. *See Wollard v. Lloyd's & Companies of Lloyd's*, 439 So. 2d 217 (Fla. 1983). The circuit court found that Omega's denial of coverage created a bona fide dispute and that there was no indication that Johnson's suit was a race to the courthouse. (DR. 608) The circuit court noted that there was nothing in the contract which required the insured to demand reconsideration or present a contrary opinion before filing suit. (DR. 610) It found that the onus was rightfully on the insurer to hire competent evaluators and that it was bound by this Court's interpretations of the law. (DR. 609-611) The circuit court agreed that Omega had confessed judgment and found that Johnson was entitled to fees, costs and pre-judgment interest in an amount to be determined. (DR. 253). Before a further hearing, Omega stipulated to $100,000.00 in fees, costs, and pre-judgment interest, and the trial court entered judgment accordingly. (DR. 545). From this order, Omega appealed to the Fifth District Court of Appeals ("district court"). (DR. 546-548).

On appeal, Omega argued that § 627.428 was a penalty imposed on insurers and that absent proof of wrongful conduct an award of fees under the statute would not lie. (A. 11-12). 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." (SC. 149; A. 18-20). Relying on the Second District's opinion in *State Farm Florida Ins. Co. v. Colella*, 95 So. 3d 891 (Fla. 2d DCA 2012), Omega argued it was not required to pay attorney's fees because Johnson did not prove wrongfulness on the part of the insurer. (A.13, 20). Omega argued that Johnson was required to do more than prove her benefits were incorrectly denied; she had to prove she was forced to sue to get those benefits. (C.10).

Johnson replied that Omega's interpretation of "wrongful denial" was nowhere to be found in the statute nor was it consistent with controlling precedent. (B.10-11). Relying on this Court's decisions in *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528 (Fla. 1992)(holding an insurer's good faith was irrelevant to an award of attorney's fees under § 627.428), and *Wollard*, 439 So. 2d at 217(holding the insured is entitled to an award of attorney's fees based upon post-suit payments), Johnson argued that "wrongfulness" or subjective good faith was irrelevant to the entitlement to fees under Florida Statutes § 627.428. (B.10-15). Johnson submitted that Florida

courts, following *Wollard* and *Lexow*, have equated an incorrect denial of benefits with wrongfulness and have held the insurer's good faith in contesting claims on reasonable grounds was irrelevant. (B.13, 15).

Johnson further argued that the presumption of correctness found in Florida Statutes § 627.7073(1)(c) was "designed solely to insulate insurers from bad faith claims, not to prohibit the insured from suing for her benefits or to deny attorney's fees where such benefits are later obtained, whether by judgment or settlement." (B. 18-19).

The district court 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." (SC. 145-146). The district court interpreted "wrongful" to require proof of wrongful conduct on the part of the insurer beyond an erroneous denial of benefits. (SC. 151-152).

Citing the presumption of correctness which attached to the Rimkus report pursuant to § 627.7073(1)(c), Fla. Stat., the district court reasoned that "Omega had the right to presume the report was correct and to deny the claim based thereon." (SC. 154). 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.

(SC. 154-155).

Johnson timely filed a motion for rehearing, clarification, and certification arguing that the district court's opinion was in direct conflict with this Court's opinion in *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47 (Fla. 2012)(holding that the presumption in § 627.7073(1)(c) had no application in coverage litigation). (SC. 157). 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?

(SC. 161-162). The district court denied Johnson's motions, and Johnson timely filed her Notice to Invoke the Discretionary Jurisdiction of the Supreme Court on October 27, 2014. (SC. 176-178). After jurisdictional briefing, this Court accepted jurisdiction based on conflict of decisions.[1]

[1] The district court followed the opinion under review by issuing a citation PCA in *Ross v. Tower Hill*, 39 Fla. L. Weekly 1985 (Fla. 5th DCA September 9, 2014). Ross sought discretionary review in this Court as a "tag" case, and this Court has stayed *Ross* pending the outcome of the instant case. *See generally Ross v. Tower Hill Preferred Ins. Co.*, Docket No. SC14-2125.

SUMMARY OF ARGUMENT

In *Warfel*, this Court held that § 627.7073(1)(c)'s presumption of correctness attaching to the report of the engineer hired by the insurer to determine the existence of sinkhole activity had no application in litigation between the insurer and insured concerning the existence of coverage. Following the Court's opinion, the Second District Court of Appeals has reiterated that "the application of a specific provision within that scheme [such as the presumption in section 627.7073(1)(c)] to the evidentiary context is both misguided and inappropriate." *Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671 (Fla. 2d DCA 2014)(citing *Warfel*, 82 So. 3d at 57). That court continued, "the . . . presumption in favor of the insurer's engineer's report neither alters the fact of sinkhole damage nor forecloses litigation that attempts to discover the fact of sinkhole damage." *Id.* (quoting *Herrera v. Tower Hill Preferred Ins. Co.*, 161 So. 3d 565, 567 (Fla. 2d DCA 2014) (quoting *Cook v. First Liberty Ins. Corp.*, 8:10-CV-02636-EAK, 2011 WL 5834743, *2 (M.D. Fla. 2011)).

In contrast to the opinions of this Court and the Second District, the district court below applied the § 627.7073(1)(c) presumption to this litigation to determine that Omega had "the right" to deny a valid insurance claim so long as it had obtained a presumptively correct engineer's report. The district court held that no consequence could befall Omega for incorrectly denying coverage and delaying payment of Johnson's claim for 534 days based upon its report. Not only did the

district court's opinion apply the presumption in the litigation context, it unconstitutionally gave it conclusive effect. This was even after the Rimkus report was discredited by two different engineers and ultimately abandoned by Omega itself. Application of the presumption to shield an insurer from attorney's fees where it is later determined or admitted (as in this case) that the denial of coverage was incorrect would defeat the purposes of § 627.428 by allowing insurance companies to deny claims risk-free and leaving insureds less than whole.

Likewise, the district court's requirement that the insured somehow prove that an insurer's incorrect denial of coverage was subjectively done in bad faith is a departure from this Court's precedents. This Court has made clear that an insurer's good faith in maintaining its coverage position is irrelevant to an award of fees under § 627.428. Moreover, the district court's injection of subjective bad faith into the coverage dispute is clearly in tension with Florida cases recognizing an insurer's claim to work-product protection for its claims file during the underlying coverage litigation. In fact, Omega itself made such a claim in this case, denying Johnson the means to even question its good or bad faith.

Departing from traditional concepts of contract law, which do not require proof of willful breach, the district court has imported a tort standard of care into contract law to deny Johnson relief where, under any reasonable measure, she has

succeeded in obtaining more than $325,000 in insurance benefits once denied to her, principally due to the efforts of counsel and an expert witness retained by counsel.

In the district court, Omega cobbled together the § 627.7073(1)(c) presumption, Johnson's failure to provide a report she had no obligation to provide before suit was filed, and the optional neutral evaluation procedure, to create a requirement that the insured continually give the insurer a last clear chance to do the right thing before filing suit. From behind this fabricated shield, Omega portrayed itself as having done everything correctly and being unfairly punished. However, Omega and the district court have simply lost sight of the undisputed fact that Omega denied coverage which existed under its insurance policy. The district court's decision shifts the risk and the cost of the insurer's engineer's incorrect decision to the insured. Such a result was never contemplated by the Legislature nor consonant with the salutary purposes of § 627.428. Moreover, it simply requires a disregard of this Court's established precedents to adopt.

ARGUMENT

I. THE DISTRICT COURT'S APPLICATION OF THE PRESUMPTION CREATED BY SECTION 627.7073(1)(c) TO INSULATE OMEGA FROM LIABILITY FOR FEES, COSTS AND PREJUDGMENT INTEREST CONFLICTS WITH THIS COURT'S OPINION IN *WARFEL*

Omega issued a homeowner's policy to Johnson agreeing to provide insurance coverage for damage to her home due to sinkhole activity. 534 days after denying coverage for the loss, Omega conceded that Johnson's home suffered damage due to sinkhole activity during the policy period. Nonetheless, the district court concluded that the presumption created by Florida Statutes § 627.7073(1)(c) gave Omega "the right" to deny Johnson's insurance claim and precluded Johnson from obtaining a judgment against Omega. (SC. 154). The district court opined that although the "presumption may not completely insulate an insurer from claims, compliance with the statutes governing the investigation process 'goes a long way toward fulfilling [the insurer's] obligations under its contract." (SC. 153-154) (quoting *Colella*, 95 So. 3d at 895). Because the district court's opinion conflicts with this Court's opinion in *Warfel*, holding that the presumption had no application to coverage litigation, and because the presumption is wholly irrelevant to the issue of whether coverage existed under the policy or whether Omega breached the policy in failing to provide it, this Court should quash the decision of the district court and reinstate the circuit court's final judgment in favor of Johnson.

A. The application of the presumption to create a "right" to deny coverage directly conflicts with *Warfel*.

Up until the point that Omega paid Johnson's claim, the basic facts of this case are indistinguishable from *Warfel;* yet, the conflict in the result is palpable. In *Warfel*, the insured made a claim for benefits under his homeowner's policy asserting damage due to sinkhole activity. *Warfel*, 82 So. 3d at 50. Warfel's insurance carrier hired an engineering firm to conduct testing and issue a report in accordance with § 627.707. *Id.* The insurer denied Warfel's claim based on the report's conclusion that the damage was not caused by sinkhole activity. *Id.* Warfel filed suit for breach of contract. *Id.* At trial, Warfel presented his countervailing expert testimony. *Id.* However, based upon § 627.7073(1)(c), the jury was instructed that the insurer's engineering report was entitled to a presumption of correctness and that Warfel had the burden of proving otherwise. *Id.* The jury returned a verdict in favor of the insurer. *Id.* The Second District reversed and remanded for a new trial; this Court affirmed that decision, holding that the presumption under 627.7073(1)(c) had no application whatsoever to the litigation. *Id.* at 57-58.

As in *Warfel*, Omega denied Johnson's sinkhole claim after obtaining an engineer's report. Johnson filed suit and presented a contradictory engineering report indicating sinkhole activity was the cause of damage. Had Omega not conceded coverage and made payment of the claim, Johnson would have been entitled to a trial

like the one this Court granted to Mr. Warfel, at which the only issue would have been whether sinkhole activity was the cause of the damage. Yet, by applying the presumption, the district court concluded that Johnson could never have prevailed at such a trial; otherwise, it would have found Omega's decision to abandon its trial posture as a confession of final judgment. In granting Omega "the right to deny coverage" based upon the presumption, the district court gave § 627.7073(1)(c) unconstitutional effect, directly in conflict with this Court's opinion. *See Warfel*, 82 So. 3d at 58 ("The application of a presumption as alleged and argued by Universal at trial, that an insured could not overcome this presumption, would render any portion of section 627.7073 unconstitutional and inconsistent with all other provisions of the sinkhole statutes) (citations omitted).

This district court's error appears rooted in its misreading of this Court's statement in *Warfel* that "the presumption . . . appears to be aimed at shielding . . . insurance companies from claims of improper denials of claims." *Id.* at 57; (SC. 153). Read in context, however, it is clear that this Court was confining the presumption's applicability to tort suits by explaining that § 627.707 was merely intended to establish minimum standards for insurers to avoid bad faith liability and a means for the engineer to avoid slander of title liability. When considering the express holding of this Court, and the pages of explanation preceding this quote, it should have been abundantly clear to the district court that the presumption created

no defense to coverage. Nonetheless, the district court equated this Court's use of the phrase "improper denials" with "erroneous denials" to reach the conclusion that § 627.7073(1)(c) was intended to shield insurance companies from the consequences of denying coverage they agreed to provide.

Indeed, this Court in *Warfel* examined the plain text of § 627.7073(1)(c) and determined that it did not contain any language justifying its application to coverage litigation. The Court observed that § 627.7073 was enacted to govern the claims process and sinkhole reports that must be obtained by the insurer and filed by the professional engineer or geologist. *Warfel*, 82 So. 3d at 57. Rather than being evidentiary in nature, this Court concluded that the presumption was instead aimed at shielding the engineers and insurance companies from tort liability. *Id.* (reasoning that the presumption was "aimed at shielding the engineer or professional geologist from liability for title defects and the insurance companies from claims of improper denials of claims.") The district court's attempt to import into this breach of contract action the insurer's standard of care for bad faith tort liability is simply misguided and foreclosed by *Warfel*.

B. The district court's reliance on *State Farm Fla. Ins. Co. v. Colella* was likewise unavailing

To bolster its erroneous conclusion, the district court extended the Second District's opinion in *Colella*, which used the presumption to reverse a summary judgment in favor of the insured, even after the insurer paid the policy benefits and

attorney's fees. *See Colella*, 95 So. 3d at 895 (suggesting that "'compliance with the sinkhole statute' goes a long way toward fulfilling [the insurer's] obligations under its contract"). However, in subsequent opinions, the Second District has seemingly receded from *Colella*. *See e.g Roker v. Tower Hill Preferred Ins. Co*., 40 Fla. L. Weekly D764 (Fla. 2d DCA Mar. 27, 2015) (stating that "the idea that an insurance company is entitled to rely on that presumption in the litigation context was rejected by the Florida Supreme Court in *Warfel*"); *Munoz*, 158 So. 3d at 673-674 (noting that "the . . . presumption in favor of the insurer's engineer's report neither alters the fact of sinkhole damage nor forecloses litigation that attempts to discover the fact of sinkhole damage"); *Herrera*, 161 So. 3d at 568(rejecting argument that the insured was required to furnish a contrary expert report after a denial of coverage but before suit was filed in order to create a valid dispute as to the existence of coverage); *Diaz v. Tower Hill Prime Ins. Co.*, 152 So. 3d 835, 836 (Fla. 2d DCA 2014) (same); *Tower Hill Select Ins. Co. v. McKee*, 151 So. 3d 2, 3 (Fla. 2d DCA 2014) (denial of coverage created a valid dispute as to the existence of a covered loss under the policy, entitling the homeowner to file suit); *Cuevas v. Tower Hill Signature Ins. Co.*, 40 Fla. L. Weekly D310 (Fla. 2d DCA Jan. 30, 2015)(homeowner was entitled to file suit to dispute insurer's proposed remediation plan, even after request for neutral evaluation).

While *Colella* is internally inconsistent and fails to explain why the insurer's complete capitulation and payment of previously denied coverage, interest, attorney's fees and costs was not a concession of breach, it appears that the court was trying to apply the presumption to head off what it viewed as a misguided bad faith suit. Unlike the instant case, the insurer in *Colella* had already tendered policy limits and attorneys' fees by the time the insured filed an amended complaint adding a companion bad faith claim, leading the district court to wonder what the plaintiff could recover on her breach of contract claim. *Colella*, 95 So. 3d at 895–896.

However, in the instant case, Omega never tendered attorney's fees, costs, or prejudgment interest to Johnson. These items became components of the claim once coverage was denied and post-suit payment of the coverage alone was insufficient to discharge the insurer's obligations under the policy. *See Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 98 (Fla. 4th DCA 1974)(insurer's refusal to pay the amount owed even on reasonable grounds, does not relieve the insurer from liability for payment of attorney's fees where it is subsequently found liable). Regardless, this Court should simply disapprove *Colella* to the extent that it suggests that obtaining an engineer's report is sufficient to comply with the obligation to provide agreed-upon coverage.

C. The district court's use of the presumption to create a "sinkhole exception" to the confession of judgment doctrine was error

Whether or not an insurance company relied in good faith on an engineer or geologist to deny coverage is simply not relevant to whether coverage existed and was incorrectly denied. In fact, one would hope that insurers always have a good faith basis for the coverage positions they choose to take. However, insurance policy disputes are governed by the law of contract. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 892 (Fla. 2003). Omega contracted to provide coverage for covered losses, including losses due to sinkhole activity. Omega denied any obligation to cover Johnson's losses and only honored its coverage after Johnson sued to prove it wrong.[2] Omega's failure to pay for the covered loss constituted a breach of the insurance policy. *See Id.* (an insurer's refusal to pay a covered loss is the breach that triggers a cause of action).

However, the district court's decision uses § 627.7073(1)(c) to engraft a sinkhole exception onto § 627.428 to deny Johnson a confessed judgment. Such a result was never contemplated by the Legislature nor consonant with the salutary purposes of § 627.428. There is simply no Florida precedent to support the contention that an insurance carrier has the "right" to deny a valid policy claim

[2] Even then, Omega maintained the denial of Johnson's claim in the face of additional opinions questioning the accuracy of its engineer's conclusions and affirmatively asserted 11 defenses to coverage.

merely because it conducted an investigation of the claim which met the minimum requirements to avoid bad faith liability and came to an incorrect decision on coverage. This Court has consistently held otherwise. *See New York Life Ins. Co. v. Lecks*, 165 So. 50, 55 (Fla. 1935) ("the recovery of attorney's fees is a statutory right of the beneficiary . . . even though payment under the policy was contested in good faith and upon reasonable grounds") (emphasis added); *Lexow*, 602 So. 2d 528 (same). The district court's approach would shift the risk and the cost of the insurer's erroneous determination to the insured, exacerbating the already imbalanced playing field.

The district court's decision, if permitted to stand, would invite insurers to deny claims as a matter of course so long as the denial could plausibly be maintained. This would defeat the dual purposes of § 627.428 to discourage denial of claims and make insureds whole. Insureds, who are already at an economic disadvantage, would be required to disprove their insurance company's engineering report before suit could even be brought, at which point the insurance company could concede coverage and be no worse off. Omega reads this "right to deny coverage" into § 627.7073(1)(c), even in the face of this Court's controlling interpretation that the sinkhole statutes were "specifically designed to protect the public during the claims process," and not to benefit insurance companies. *Warfel*, 82 So. 3d at 62–63 (stating that "nothing in [the legislative history] indicates that the presumption articulated in

section 627.7073(1)(c) is an expression of *any* social policy, let alone one that favors insurance companies.")

Because the district court's opinion applying the presumption to this litigation stands in conflict with *Warfel*, this Court should quash it.

II. THE DISTRICT COURT'S REQUIREMENT THAT THE INSURER'S INCORRECT DENIAL OF COVERAGE WAS SUBJECTIVELY WRONGFUL CONFLICTS WITH THIS COURT'S CONTROLLING INTERPRETATIONS OF SECTION 627.428.

Section 627.428 mandates an award of attorney's fees in favor of an insured who obtains a judgment or decree against an insurer under a policy or contract executed by the insurer. § 627.428, Fla. Stat. (2010). The district court's opinion has added an additional element to the statute by requiring proof of subjectively wrongful conduct rather than a mere incorrect coverage determination before fees may be awarded under § 627.428. In adding the requirement of subjective wrongfulness, the district court's opinion 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." *See Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 685 (Fla. 2000). This Court should quash the district court's opinion and make clear that an incorrect denial of coverage, even if done in good faith and on reasonable grounds, is sufficient to require an award of fees under § 627.428.

In *Ivey*, this Court expressly rejected any requirement that a denial of coverage must be subjectively wrongful and instead held that an insured is entitled to recover

attorneys' fees in any dispute that leads to judgment in favor of the insured. *Id.* This Court should quash the district court's decision and hold that a denial of coverage later proven or admitted to be erroneous entitles an insured to fees under § 627.428, regardless of whether the insurer acted in good faith or on reasonable grounds in making its initial coverage determination.

Florida courts have long interpreted § 627.428 as having both a compensatory and deterrent effect. Under Florida law, each party normally bears its own attorneys' fees, unless a contract or statute provides otherwise. *Pepper's Steel & Alloys, Inc. v. United States*, 850 So. 2d 462, 465 (Fla. 2003). In 1893, the Florida Legislature first enacted a fee shifting provision in insurance disputes to allow for "the recovery of reasonable attorney's fees against life and fire insurance companies in suits upon policies issued by them." *Tillis v. Liverpool & London & Globe Ins. Co.*, 35 So. 171 (Fla. 1903). The limitation to life and fire was removed in 1917 and changes were made in 1953 and 1959. *See generally Manufacturers Life Ins. Co. v. Cave*, 295 So. 2d 103 (Fla. 1974). Today, the section provides in relevant part:

> Upon the rendition of a judgment or decree by any of the courts of this state **against an insurer and in favor of any named or omnibus insured**, or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428(1), Fla. Stat. (2010) (emphasis added).

Section 627.428 differs from prevailing party fee shifting provisions as it affords relief to prevailing insureds but not prevailing insurers. *McCarthy Bros. Co. v. Tilbury Const., Inc.*, 849 So. 2d 7, 11 (Fla. 1st DCA 2003); *Smith v. Conlon*, 355 So. 2d 859, 860 (Fla. 3d DCA 1978). Florida courts have long viewed § 627.428 as serving the purposes of discouraging insurance companies from contesting valid claims and reimbursing "insureds for their attorney's fees incurred when they must enforce in court their contract with the insurance company." *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403, 411 (Fla. 1999); *Aksomitas v. Maharaj*, 771 So. 2d 541, 544 (Fla. 4th DCA 2000) ("The purpose of the statute is to make the insured whole, *i.e.*, in the same position the insured would have been if the insurer had paid the claim without litigation").

This is precisely why Florida courts have refused to carve out an exception for denials of coverage subjectively made in good faith but nonetheless wrong. *See e.g. Lexow*, 602 So. 2d at 531 ("[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.") (emphasis added); *Lecks*, 165 So. At 55 ("the recovery of attorney's fees is a statutory right of the beneficiary . . . **even though payment under the policy was contested in good faith and upon reasonable grounds.**") (emphasis added); *Palmer*, 297 So. 2d at 98 ("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 where it is subsequently found liable on the policy.") (citations omitted); *Salter v. Nat'l Indem. Co.*, 160 So. 2d 147, 148 (Fla. 1st DCA 1964) ("The fact that an insurance company's refusal to pay the amount owed by it under the terms of its contract of insurance was in good faith and on reasonable grounds does not necessarily relieve it from liability for payment of attorney's fees.")

A special problem arises when an insurer, after initially denying the claim, abandons its coverage position and pays the claim in full prior to entry of judgment. In such cases, this Court has held that fees are still owing, recognizing 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 *Wollard*, 439 So. 2d 217). In simple terms, the insurer's payment of disputed amounts is the functional equivalent of a verdict in favor of the insured. *Pepper's Steel & Alloys, Inc.*, 850 So. 2d at 465.

In *Ivey*, the insured was struck by a car while walking on the sidewalk. *Ivey*, 774 So. 2d 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 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.* The insured was awarded attorneys' fee based upon the insurer's confession of judgment. The Third District reversed, holding that the insurer was not liable for attorneys' fees because its failure to pay the entire claim was the result of an error in the doctor's bill and not the fault of the insurance company. *Id.*

This Court quashed the Third District's opinion and reinstated the award of attorney's fees, stating:

> It 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. It is clear to us that the purpose of this provision is to level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts.

Id. at 684. The Court further concluded that the insurer's payment of the claim after suit was filed operated as a confession of judgment requiring an award of attorneys' fees. *Id.* at 685.

Similarly, this Court in *Lexow*, held that an insurer's good faith in disputing a claim was irrelevant for the purposes of an award of attorneys' fees under § 627.428.

Lexow, 602 So. 2d at 529. In *Lexow*, an insurance company recovered $100,000 from a third-party tortfeasor. *Id.* Because the insured had yet to be fully compensated for the loss, the insurer sued its insured for a declaratory judgment regarding the rights and obligations of the parties to the $100,000 sum; the insured counterclaimed. *Id.* When the insured prevailed at trial, the insurer argued that it should not be required to pay attorneys' fees under § 627.428 because there was a good faith dispute concerning the parties' respective rights to the $100,000. *Id.* Rejecting this argument, this Court held that "[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.*

In the present case, the district court's opinion expressly and directly conflicts with this Court's opinions in *Ivey* and *Lexow* by requiring proof that Omega's incorrect denial of coverage be wrongful in the sense that it was done in bad faith. The district court's wrongfulness inquiry interjects the issue of the insurer's good or bad faith in denying coverage into a breach of contract action, causing unnecessary confusion in contract law and calling into question cases shielding the insurer's investigation from discovery during the coverage dispute. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91 (Fla. 1995) (noting that claims handling procedures and investigative standards "appear irrelevant" in UM coverage dispute). Notably, while Omega argued the absence of evidence of wrongfulness in the circuit court, Omega

objected to discovery seeking to determine its good or bad faith by claiming that its claims file was irrelevant and work-product, citing *State Farm Florida Ins Co. v. Gallmon*, 835 So. 2d 389 (Fla. 2d DCA 2003), and *State Farm Fire & Cas. Co. v. Valido*, 662 So. 2d 1012 (Fla. 3d DCA 1995). (DR. 36-42). Omega's duplicity demonstrates the problem of requiring such proof.

The district court's reliance on clearly distinguishable precedents reveals just how far astray its opinion has gone. The district court string cited a number of cases it believed stood for the proposition that § 627.428 was intended to be applied only as a punitive measure and only in response to some wrongful conduct on the part of the insurer beyond an incorrect denial of coverage. (SC. 150). However, in each of the cases cited, the insurer either never denied the claim, had no obligation to pay, or was misled by the insured's provision of erroneous information. *See Gov't Employees Ins. Co. v. Battaglia*, 503 So. 2d 358, 360-36 (Fla. 5th DCA 1987)(UM insurer was not required to pay benefits under the policy until tortfeasor's coverage was exhausted); *Liberty Nat'l Life Ins. Co. v Bailey ex rel. Bailey*, 944 So. 2d 1028 (Fla. 2d DCA 2006) (insured submitted erroneous information resulting in facially insufficient claim); *Time Ins. Co. v. Arnold*, 319 So. 2d 638, 640 (Fla. 1st DCA 1975) (insured's notice of claim contained erroneous information); *Bassette v. Standard Fire Ins. Co.*, 803 So. 2d 744, 746 (Fla. 2d DCA 2001)(insurance company never denied the claim); and *Leaf v. State Farm Mut. Auto. Ins. Co*., 544 So. 2d 1049 (Fla.

4th DCA 1989) (the subject matter of the case was not the denial of coverage but the right to arbitrate rather than litigate). Properly read, none of these cases support denying fees to an insured who filed suit in the face of a complete denial of coverage.

In fact, neither Omega nor the district court ever cited a Florida case holding that an insurer's complete denial of coverage after a full and complete investigation by the insurer, unimpeded by any act of the insured, was an insufficient predicate for an award of fees where the insurer subsequently concedes coverage and pays the claim. Florida courts have held otherwise. *See Palmer*, 297 So. 2d at 98 ("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 where it is subsequently found liable on the policy.") (citations omitted). This Court should be loathe to create such an unwarranted exception to the statute, particularly where, as here, Johnson obtained over $325,000 in policy benefits because she hired a lawyer able to retain experts capable of successfully disputing Omega's denial of coverage. Without the availability of fees under § 627.428, homeowners such as Johnson would rarely be in a position to overcome the conclusions of the insurer's engineer and obtain the coverage provided by the contract. The denial letter would, in most instances, simply be the end of it. Such a result is anathema to this Court's precedents and serves only to create incentives for mischief by insurers.

Since the late-nineteenth century, Florida law has recognized the necessity of leveling the playing field between insureds and insurers. Omega's attempt to invoke the presumption of correctness created by § 627.7073(1)(c) to shield it from judgment where the presumption has been rebutted dangerously tips the balance of power against the homeowner. In concluding that reliance on the engineer's report makes denial of coverage a "right" of the insurer, the district court has erred and brought conflict into Florida law. This Court should quash its decision.

III. WITH RESPECT TO PREJUDGMENT INTEREST, THIS COURT REJECTED THE PENALTY THEORY IN *ARGONAUT INS. CO. V. MAY PLUMBING CO.*, 474 SO. 2D 212 (FLA. 1985), IN FAVOR OF A LOSS THEORY; THE DISTRICT COURT'S REVERSAL OF THE TRIAL COURT'S CONFESSED JUDGMENT ALSO ERRONEOUSLY DENIED JOHNSON PREJUDGMENT INTEREST

In reversing the confessed judgment, the district court also denied Johnson prejudgment interest and costs. In *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985), this Court addressed an argument that prejudgment interest was a penalty imposed on defendants for wrongfully disputing a claim rather than an element of the plaintiff's loss, payment of which was necessary to make the plaintiff whole. In rejecting the penalty theory of prejudgment interest, this Court recognized that "neither the merits of the defense nor the certainty of the amount of loss affects the award of prejudgment interest." *Id.* at 215. Instead, this Court recognized that prejudgment interest was necessary to make the plaintiff whole. *Id.*

The district court's application of a subjective wrongfulness standard to deny Johnson a confessed judgment, including prejudgment interest, costs, and mandatory fees, renders the insured less than whole and denies part of the coverage. *See Palmer*, 297 So. 2d at 98 (concluding that statutory attorney's fees are part of the insured's suit and post-suit payment of the coverage does not discharge the insurer). Johnson was entitled to interest on the delayed benefits, and the district court was in error in refusing it. Given that an award of interest would result in judgment in Johnson's favor, Omega has no basis to deny application of the plain text of the fee statute as well.

IV. BECAUSE THE DISTRICT COURT SHOULD HAVE AFFIRMED THE JUDGMENT IN FAVOR OF JOHNSON, THIS COURT SHOULD REMAND TO THE DISTRICT COURT WITH INSTRUCTIONS THAT IT AWARD JOHNSON FEES FOR THE SERVICES OF HER ATTORNEYS IN THE DISTRICT COURT

Because the district court reversed the judgment in favor of Johnson, it denied her an award of fees for the services of her attorneys in the district court. (SC. 156) This Court should, in reversing the district court, remand with directions that the district court either award or reconsider Johnson's motion for fees for the services of her attorneys in the district court.

CONCLUSION

Because the Fifth District Court of Appeal's opinion expressly and directly conflicts with *Warfel*, *Ivey*, *Lexow*, and *Palmer*, and because the district court erred

in denying Johnson a confessed judgment, this Court should quash the district court's opinion and reinstate the trial court's final judgment. Moreover, this Court should award fees to Johnson for the services of her attorneys in this Court and the district court pursuant to Florida Statutes § 627.428.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the foregoing using the Florida Courts E-Filing Portal, which will electronically serve the following: 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 10th day of July, 2015.

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/ Joseph P. Kenny

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