IN THE SUPREME COURT OF FLORIDA
CASE NO. SC14-2124

KATHY JOHNSON,

Petitioner,

vs.

OMEGA INSURANCE COMPANY,

Respondent.

ANSWER BRIEF ON THE MERITS

OF

OMEGA INSURANCE COMPANY

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

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All emphasis is counsel's, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Johnson challenges the district court's ruling that she was not entitled to attorneys' fees under section 627.428, Florida Statutes, because Omega Insurance Company ("Omega") did not wrongfully force her to sue to obtain benefits. Johnson's residence was insured by Omega under a policy of homeowner's insurance. (R1. 106.)

On January 13, 2010, Johnson made a claim to Omega for damage resulting from alleged sinkhole activity at her property. (R2. 249.) Omega retained Rimkus Consulting Group, Inc. ("Rimkus") to perform a subsidence investigation at Johnson's property and determine the cause of the claimed damage, in compliance with the sinkhole statutes. (R2. 249.) Rimkus investigated the property and determined that the damages were not caused by a sinkhole. (R2. 249.)

On May 24, 2010, based upon Rimkus' report, Omega sent a letter to Johnson.[1] (R2. 249.) The letter explained that, based on Rimkus' investigation, the causes of Johnson's damages were "excepted and/or excluded from coverage under the terms and conditions of the policy of insurance." (R2. 249.) The letter advised Johnson of her right to participate in Neutral Evaluation as provided in section 627.7074, Florida Statutes (2011). (R2. 249.) The letter also stated, "If

[1] The letter was authenticated by Sam Townsend's affidavit, but it was not filed until after the evidentiary hearing. (*See* R2. 249; R3. 515-19.)

you have any questions that require further clarification of the foregoing, please contact me . . . ." (R3. 519.)

Johnson did not respond to Omega's letter. (*See* R2. 250.) Instead, she retained a lawyer who hired another expert, Bay Area Sinkhole Investigation & Civil Engineering ("BASIC"). (*See* R2. 250.) BASIC issued a report dated March 16, 2011. (R2. 250.) In this report, BASIC opined sinkhole activity was a cause of the damage to Johnson's property. (R2. 250.) Johnson did not provide BASIC's report to Omega for almost two months. (R2. 210, 250.)

On May 5, 2011, Johnson sued Omega for breach of contract. (R1. 1-3.) During discovery, Johnson finally provided the BASIC report to Omega. (R2. 250.) Johnson had never provided this report to Omega before the suit, despite the fact it was completed months earlier. (R2. 250.)

After receiving the BASIC report, Omega requested neutral evaluation under section 627.7074, Florida Statutes. (R1. 4-5; R2. 250; R3. 472.) The circuit court stayed litigation pending the neutral evaluation. (R1. 15.) The Department of Financial Services appointed a neutral evaluator. (R2. 250; R3. 470.) On October 19, 2011, the neutral evaluator issued a report indicating he concurred with the result of BASIC's report—that there was a sinkhole loss that required subsurface remediation at an estimated cost of $231,500. (R1. 60-63.)

Approximately twenty days later, Omega wrote a letter[2] to Johnson. (R3. 462-63.) In this letter, Omega agreed in writing to comply with the neutral evaluator's recommendation. (R2. 250; R3. 462-63.) Omega also enclosed payment for above-ground damages as set forth in the insurance policy.[3] (R2. 250; R3. 464.) And the letter informed Johnson that Omega would condition payment for subsurface repairs upon Johnson executing a contract with an appropriate remediation company subject to the terms of the policy.[4] (R2. 250; R3. 463.)

Johnson then filed a "Motion for Confession of Judgment and Motion for Attorney's Fees, Costs and Interest." (R1. 43-48.) The motion claimed that Omega's payment for above-ground damages was a "confession of judgment" that entitled her to attorney's fees, costs, and interest. (R1. 44.) She claimed Omega's initial denial of her claim "forced [her] to retain counsel and file suit to pursue the insurance benefits." (R1. 45.) Notably, Johnson did not mention that she had hired BASIC, she had BASIC's report for nearly two months before she sued, and

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[2] This letter was also authenticated by Sam Townsend's affidavit, but it was not filed until after the evidentiary hearing. (*See* R2. 250-51; R3. 461-66.)

[3] The policy included a "Sinkhole Loss Coverage" endorsement that provided as follows: "We may limit any payment for **Sinkhole Loss** to the actual cash value, not including any repairs below the foundation, until you enter into a contract for building stabilization or foundation repairs. . . ." (R1. 167.)

[4] Thereafter, Johnson did execute such a contract and the repair process began. (R2. 250.) The trial court never resolved any disputes as to the causes of loss or coverage provided by the Omega policy.

that she never told Omega any of this. (*See* R1. 43-48.) Johnson argued that section 627.428 "penalizes insurers for wrongfully causing its insureds to resort to litigation to resolve a conflict." (R1. 46.) Johnson claimed she had sued "[d]ue to OMEGA's wrongful denial of coverage and its failure to pay damages to [her] for the insurance claim[.]" (R1. 46.)

Omega responded that it did not wrongfully cause Johnson to file suit. (R1. 84.) She had the BASIC report for nearly two months before she filed her lawsuit, but she never put Omega on notice of that report. (R1. 83-84.) Omega argued that Johnson "clearly opted to pursue litigation without ever attempting to discuss the disagreement with OMEGA." (R1. 87.) And Omega cited *State Farm Florida Ins. Co. v. Colella*, 95 So. 3d 891 (Fla. 2d DCA), *rev. denied*, 108 So. 3d 654 (Fla. 2012), to argue that there had been no confession of judgment and Johnson was not entitled to attorneys' fees, costs, and interest. (R1. 87.)

Johnson's Reply to Omega's argument (R2. 215-27) did not dispute Johnson had the BASIC report before suit, and that she did not disclose it to Omega before she sued. (*See* R2. 215-27.) Instead, Johnson now argued that "wrongfulness" was not "the standard required for a determination of a confession of judgment[.]" (R2. 217.) Johnson claimed that "some courts such as *Colella* seemed to have wrongfully focused only at the issue of the wrongful conduct of the insurer to determine fee entitlement. The Supreme Court and the 5th DCA have not applied

the same blind logic." (R2. 219-20.) According to Johnson, this Court did not require policyholders to prove that the insurer wrongfully caused the policyholder to sue. (R2. 217.) Lastly, Johnson contended there was a bona fide dispute once Omega denied Johnson's claim. (R2. 225.)

On May 24, 2012, the circuit court entered a written order. (R1. 96-97.) In this order, the court ruled that application of the confession of judgment doctrine "depends upon whether the insured's filing of a lawsuit was a 'necessary catalyst' for resolution of the dispute and forcing payment of the insurer's obligations under the contract." (R1. 97.) And because the parties' written arguments were not verified or "accompanied by an affidavit," there were issues of fact that required "an evidentiary hearing." (R1. 97.)

The evidentiary hearing took place on November 20, 2012. (R4. 565.) At the hearing, Omega presented the only evidence before the circuit court: the affidavit of Sam Townsend. (R4. 603-04.) Mr. Townsend's affidavit set out the facts described above regarding the timing of the BASIC report and its eventual post-suit disclosure to Omega. (R2. 248-51.) Despite the fact that only Omega produced evidence, and Johnson produced none, the court ruled that "Plaintiff is clearly carrying its burden." (R4. 610.) And the court found that "[o]f course, there was a real dispute." (R4. 608.) The circuit court also agreed with Johnson's argument regarding "wrongfulness," and ruled that "[t]he Court doesn't have to get

involved in a discussion about punishing an insurance carrier." (R4. 608.) The court then issued a written order granting Johnson's motion and holding that Johnson was entitled to recover a reasonable amount of attorney fees, taxable costs, and interest from Omega. (R2. 253.) The circuit court entered a final judgment for Johnson, and Omega timely appealed. (R3. 545-46.) Johnson never sought a judicial determination of any coverage or breach of contract issue, and the trial court never issued any such ruling. The trial court only ruled on Johnson's entitlement to fees.

On appeal, the district court reversed this singular ruling, and remanded. (SC.155.) The district court held that a policyholder is entitled to attorneys' fees based on the confession of judgment doctrine only if the insurer has wrongfully withheld insurance benefits thereby forcing the policyholder to sue. (SC.152.) The district court determined Johnson was not entitled to attorneys' fees because there had been no "wrongful or unreasonable denial of benefits that forced Johnson to file suit to obtain her policy benefits." (SC.154.)

SUMMARY OF THE ARGUMENT

Issue I. The district court applied the decades-old rule that an insurance company must pay attorney's fees pursuant to section 627.428 if it has **wrongfully** caused the policyholder to resort to litigation by not resolving a conflict when it

was reasonably within the insurer's power to do so. (See cases cited at SC. 150-151.)

In this case, the wrongfulness of the insurer's conduct is viewed in the light of the Sinkhole Statutes (sections 627.7015 - 627.7074, Florida Statutes), which restrict the power and discretion of sinkhole insurers to determine for themselves whether claimed property damage has been caused by covered sinkhole or some other, excluded cause. Upon receipt of the sinkhole claim, the insurer must investigate the loss, and if physical damage is found, retain an independent engineer to perform testing. § 627.707(2). This engineer prepares a report that guides the insurer's claim decision. Section 627.7073(1)(c) provides the report is presumed to be correct. This Court has ruled that presumption applies to the initial claim process and investigation. *Warfel*, 82 So. 3d. at 58. If the report states sinkhole is the cause of loss, then the insurer must pay the claim. § 627.707(5). If the report eliminates sinkhole as the cause of loss, the insurer is authorized by statute to deny the claim. § 627.707(4)(a). Omega abided the statutory rubric for investigating and deciding Johnson's claim.

Johnson could have notified Omega of her disagreement with the decision, and explored non-litigation options. She could have exercised her statutory right to force Omega to participate in neutral evaluation, the non-litigation alternative

procedure for resolution of disputed sinkhole claims. § 627.7074(4). These non-litigation options cost the policyholder nothing.

Johnson also had the option to go silent once her claim was denied. She was free to hire a lawyer, to incur thousands of dollars of expense for a second opinion, and to withhold from Omega the competing report that contained contrary findings. She was free to sue Omega. But Johnson *chose* this path of litigation; she was not forced to sue by any wrongful act of Omega. Had she voiced disagreement to Omega, and had Omega not responded, then she could have claimed she was forced to sue Omega. Or, had she invoked neutral evaluation, and then had Omega rejected the neutral evaluator's report, Johnson could have claimed she was forced to sue. But Johnson rejected the non-litigation remedies available to her. And that is why she cannot show an essential element of her fee claim – that Omega wrongfully forced her to file suit to recover her benefits.

Issue II. The district court correctly analyzed Johnson's entitlement to 627.428 fees. First, the district court observed that a line of cases from the past forty years recognize the purpose of 627.428 is to penalize carriers who wrongfully cause their policyholders to resort to litigation to resolve a conflict when it was reasonably within the carrier's power to do so." (SC.150.) The district court then observed that this element of wrongfulness exists in "the confession of judgment doctrine [which] turns on the policy underlying section 627.428 . . . that, like the

statute, the doctrine is intended to penalize insurance companies for wrongfully causing an insured to resort to litigation. “ (SC. 152.) The district court rejected Johnson’s argument that 627.428 fees must be awarded mechanically, in strict-liability fashion, simply because Omega made a payment after Johnson filed her unnecessary suit.

Instead, the district court determined Omega’s pre-litigation investigation and claims decision was not wrongful or unreasonable in light of its duties in this case. The district court noted that a statutory presumption of correctness attaches to the engineer’s report that guided Omega’s claim decision. The district court did not apply this presumption to resolve a coverage or contract issue, as was disapproved in *Warfel*. Rather, the district court found the presumption meant Omega had the *right to rely* on that report in its initial claims process, and that it had abided its duties in handling Johnson’s claim. The district court saw no reason that Johnson was forced to sue Omega to obtain her policy benefits.

Issue III. Johnson never raised, and so has waived, a claim for pre-judgment interest on any ground other than confession of judgment.

Issue IV. Johnson should seek an award of fees in a fee motion, and not in her merits brief. Johnson’s right to fees rises and falls with her merits appeal and the adjudication on remand, if any further proceedings are ordered.

ARGUMENT

I

The district court correctly applied the long-standing rule that 627.428 fee sanctions are imposed only where the insurer has wrongfully caused the policyholder to resort to litigation to obtain his or her benefits.[5]

A. The dispute in this case is whether the court should have awarded 627.428 fees; not whether the statutory presumption was applied to a disputed coverage issue at trial.

This case is a dispute over the standard to be applied by a court when a policyholder seeks an award of fees under 627.428, and whether Johnson was entitled to fees using that standard. On the law, the district court applied decades of Florida case law that impose a 627.428 fee sanction only where the insurer has wrongfully denied or delayed resolution of a claim, thereby forcing the policyholder to resort to litigation to obtain their benefits. (See decades of cases cited at SC. 150-151.)

On the facts, the district court saw no facts or circumstances establishing Johnson was forced to sue Omega to obtain her policy benefits. She had options to litigation, but she chose to sue. To escape her evidentiary burden to show that she

[5] **Standard of review:** This Court reviews a district court's interpretation of section 627.428 *de novo*. *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 253 (Fla. 2006). The district court's application of the proper law is also reviewed *de novo*. *See Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 193-94 (Fla. 2011). This Court reviews the interpretation of the statutory sinkhole scheme *de novo*. *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 57 (Fla. 2012).

was forced to sue Omega, she argues for a strict liability theory of fees, where the insurer would pay fees automatically once a suit is filed, if suit is followed by any payment of policy proceeds. This strict liability theory is a radical theory alien to Florida law (with the possible exception of PIP cases, because of the statutory scheme for those benefits). But Johnson convinced the trial court to apply this strict-liability standard. In the trial court, Johnson (successfully) argued

> that it does not matter whether Omega wrongfully withheld the policy benefits and forced her to file suit. The simple facts asserted by Johnson are that Omega denied her claim, she filed suit, and Omega paid the policy benefits thereafter. Johnson argues that is all she must show to entitle her to fees under the statute.

(SC.149.)

Omega appealed the trial court's strict-liability fee order, and the district court identified the issue for its decision as follows:

> Specifically, we must determine whether Omega wrongfully withheld policy benefits to its insured, Kathy Johnson, after she filed a claim for sinkhole damage under the policy Omega issued to her, thereby forcing her to file suit to collect her policy benefits. If that is what Omega did, then the order under review should be affirmed. If it did not, reversal of the order is required.

(SC.145-146.) The district court analyzed this issue in two steps. First, the district court implicitly rejected the strict-liability standard, recognizing decades of Florida law that describe section 627.428 as a penalty to be applied where the carrier has wrongfully caused its insured to resort to litigation to resolve a conflict. (SC. 150-151.) The district court's second step was to assess Omega's pre-litigation conduct

in light of section 627.707(2), which establishes a statutory presumption of correctness for sinkhole reports that are issued pursuant to section 627.7073(1)(c). (SC. 153-154.) The district court considered this statutory presumption in the context of "the initial claims process and investigation that insurance companies are required to follow in accepting or denying claims." *Warfel* at 58. The district court resolved the issue it had defined as follows:

> 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.

(SC. 154.) Johnson's argument to this Court, stated in her brief at p. 13, is expressly based on a false premise that the district court applied the statutory presumption in section 627.7073(1)(c) to "coverage litigation" and to "whether Omega breached the policy." Johnson is patently mistaken.

The district court applied the statutory presumption to assess Omega's actions in the initial investigation and determination of Johnson's claim. The district court did so to determine whether Omega had acted wrongfully. The district court did not apply the statutory presumption to any coverage or breach of contract litigation because there were no contract or coverage rulings for the district court to review. The trial court issued only one order - granting Johnson

her entitlement to fees. Coverage had been resolved in neutral evaluation, when both Omega and Johnson accepted its result, and Omega paid the claim. And Johnson never sought a ruling that Omega had breached the contract, and the trial court never issued one. The only ruling that she sought, the only order that she obtained, and so the only order that the district court could review, regarded Johnson's entitlement to fees. The district court did not apply the presumption to a coverage or contract issue; it was applied to determine wrongfulness in the context of a motion for 627.428 fees.

B. Section 627.428 fees are not awarded mechanically, on a strict-liability basis.

1. Section 627.428 is a penalty imposed on insurers that "wrongfully" refuse to pay insurance claims.

The trial court's fee award was based on section 627.428(1). This statute was enacted in 1959. Ch. 59-205, § 477, Laws of Fla; § 627.0127, Fla. Stat. (1961). But the substance of this statute has existed in Florida since at least 1893. *See Tillis v. Liverpool & London & Globe Ins. Co.*, 35 So. 171, 174 (Fla. 1903) (quoting Ch. 4173, § 1, Laws of Fla. (1893)). The purpose of section 627.428 "is to discourage insurers from contesting valid claims and to reimburse successful policyholders forced to [litigate] to enforce their policies." *Danis Indus. Corp. v. Ground Improvement Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994). Thus section 627.428 is viewed as a penalty on insurers that wrongfully refused to pay

insurance benefits.[6] This Court long ago recognized that the predecessors to section 627.428 imposed fees as a penalty. *Pendas*, 176 So. at 111-12 (quoting *U.S. Fire Ins. Co. v. Dickerson*, 90 So. 613 (Fla. 1921)).

Because section 627.428(1) attorneys' fees are a penalty, the statute "must be strictly construed in favor of the one against whom the penalty is imposed and is never extended by construction." *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 223 (Fla. 2003); *Nationwide Mut. Ins. Co. v. Nu-Best Diagnostic Labs, Inc.*, 810 So. 2d 514, 516 (Fla. 5th DCA 2002). Also, strict construction of the statute is required because it authorizes an award of attorneys' fees in derogation of common law. *Brass & Singer*, 944 So. 2d at 254; *Pepper's Steel & Alloys, Inc. v. U.S.*, 850 So. 2d 462, 465 (Fla. 2003).

2. If there is no wrongful refusal to pay policy benefits, then there is no statutory liability to pay the policyholder's attorneys' fees.

Over 75 years ago, this Court construed an early predecessor of section 627.428(1) as imposing liability upon an insurer as an incident of the insurer's wrongful refusal to pay. *Pendas*, 176 So. at 112. This Court explained that "the

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[6] *E.g.*, *Time Ins. Co. v. Arnold*, 319 So. 2d 638, 640 (Fla. 1st DCA 1975) (holding that section 627.428 "is in the nature of a penalty"); *Liberty Nat'l Life Ins. Co. v. Bailey ex rel. Bailey*, 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006) ("[W]e recognize that section 627.428 is a penalty in derogation of the common law."); *Mercury Ins. Co. of Fla. v. Anatkov*, 929 So. 2d 624,627 (Fla. 3d DCA 2006) (holding that section 627.428 was intended to penalize insurers); *Leaf v. State Farm Mut. Auto. Ins. Co.*, 544 So. 2d 1049, 1050 (Fla. 4th DCA 1989) (same); *Gov't Emps. Ins. Co. v. Battaglia*, 503 So. 2d 358, 360 (Fla. 5th DCA 1987) (same).

insurance company should not be required to pay fees for complainant's attorneys in cases where there was no delinquency or wrongful refusal to pay on the part of the insurance company." *Id.* In other words, "if there is no wrongful refusal to pay [benefits], then there is no statutory liability to pay" attorneys' fees. *Id.* This Court similarly interpreted a later predecessor to section 627.428 "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." *Equitable Life Assurance Soc'y of U.S. v. Nichols*, 84 So. 2d 500, 502 (Fla. 1956). This Court has since held that this interpretation in *Nichols* applies to section 627.428. *Mfs. Life Ins. Co. v. Cave*, 295 So. 2d 103, 106 (Fla. 1974). Every Florida appellate court has likewise held that a policyholder is entitled to attorneys' fees under section 627.428 only where the insurer has wrongfully forced the policyholder to litigate.[7]

[7] *E.g.*, *Great Sw. Fire Ins. Co. v. DeWitt*, 458 So. 2d 398, 400 (Fla. 1st DCA 1984) ("Section 627.428 is in the nature of a penalty against an insurer who wrongfully refuses to pay a legitimate claim . . . ."); *Beverly v. State Farm Fla. Ins. Co.*, 50 So. 3d 628, 633 (Fla. 2d DCA 2010) (holding that a policyholder is entitled to section 627.428 attorneys' fees where the insurer wrongfully caused the policyholder to resort to litigation); *Vivas v. State Farm Fla. Ins. Co.*, 138 So. 3d 479, 479 (Fla. 3d DCA 2014) (mem.) ("Because we agree with the trial court that the insurer did not wrongfully cause the insureds to resort to litigation, we affirm the trial court's denial of attorney's fees and costs."); *Logue v. Clarendon Nat'l Ins. Co.*, 777 So. 2d 1122, 1124 (Fla. 4th DCA 2001) ("[A]n insurer is liable for attorney's fees only when it has wrongfully withheld the proceeds of the policy."); *Ray v. Travelers Ins. Co.*, 477 So. 2d 634, 636 (Fla. 5th DCA 1985) ("[Section 627.428], and its predecessors, has consistently been interpreted to authorize recovery of attorney's fees from an insurer only when the insurer has *wrongfully* withheld payment of the proceeds of the policy.").

An incorrect refusal to pay benefits – standing alone – is insufficient to establish entitlement to attorneys' fees under the statute.

3. Florida courts have applied the "wrongfulness" standard where the policyholder is forced to litigate to obtain policy benefits.

Attorneys' fees have been awarded where the insurer's behavior forced the policyholder to sue, and the policyholder obtained a judgment. *E.g.*, *Pawtucket Mut. Ins. Co. v. Manganelli*, 3 So. 3d 421, 422-23 (Fla. 4th DCA 2009) (insurer insisted arbitration take place in New Hampshire); *Stonewall Ins. Co. v. W.W. Gay Mech. Contractor, Inc.*, 351 So. 2d 403, 403-04 (Fla. 1st DCA 1977) (insurer refused to indemnify policyholder in underlying case); *Williams v. Peninsular Life Ins. Co.*, 306 So. 2d 144, 146-47 (Fla. 1st DCA 1975) (insurer refused to pay life insurance benefits to beneficiary's children despite beneficiary's assignment to his children).

Courts also have awarded 627.428 fees where the insurer sued the policyholder, and the policyholder successfully defended the action or recovered insurance benefits. *E.g., Old Republic Ins. Co. v. Monsees*, 188 So. 2d 893, 894-95 (Fla. 4th DCA 1966) (policyholder obtained dismissal of insurer's case); *James Furniture Mfg. Co. v. Md. Cas. Co.*, 114 So. 2d 722, 723 (Fla. 3d DCA 1959) (trial court ruled that insurer was obligated to pay judgment against policyholder in underlying negligence case).

However, a policyholder is not entitled to attorneys' fees under section 627.428 where the policyholder obtained a judgment but the insurer did not wrongfully force the policyholder to litigate. *E.g.*, *Gov't Emps. Ins. Co. v. Battaglia*, 503 So. 2d 358, 360 (Fla. 5th DCA 1987) (reversing award of attorneys' fees where insurer filed suit at time when there was no coverage); *Crotts v. Bankers & Shippers Ins. Co. of N.Y.*, 476 So. 2d 1357, 1358 (Fla. 2d DCA 1985) (affirming denial of attorneys' fees where insurer tendered remaining insurance benefits payable to policyholder and hospital before policyholder sued); *Waters v. State Farm Mut. Auto. Ins. Co.*, 393 So. 2d 1203, 1204 (Fla. 2d DCA 1981) (reversing fee award where insurer offered all insurance benefits due but the policyholder rejected the payment and sued instead).

4. The "wrongfulness" standard applies in confession-of-judgment cases – a post-suit payment alone does not trigger a right to fees.

The plain language of section 627.428 requires the "rendition of a judgment or decree" against an insurer as a prerequisite for an award of statutory attorneys' fees. § 627.428(1). Since 1983, however, courts have deemed an insurer's post-suit payment of a claim to be "the functional equivalent of a confession of judgment or a verdict in favor of the insured." *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218-19 (Fla. 1983). The post-suit payment, in essence, satisfies the prerequisite of a judgment against the insurer. An award of fees based on a confession of judgment is still an award of fees based on section 627.428.

But *Wollard* established that an insurer "unreasonably withhold[ing] payment under the policy" is both a "threshold issue" and "a condition precedent to the award of attorney's fees." 439 So. 2d at 219, n.2. This means that a post-suit payment, by itself, is insufficient to trigger entitlement to attorneys' fees under section 627.428. *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826, 829 (Fla. 2d DCA 2010); *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 397-98 (Fla. 5th DCA 2007); *Tristar Lodging, Inc. v. Arch Specialty Ins. Co.*, 434 F. Supp. 2d 1286, 1298 (M.D. Fla. 2006), *aff'd*, 215 F. App'x 879 (11th Cir. 2007). Section 627.428 is triggered in confession-of-judgment cases only where the insurer wrongfully forced its policyholder to litigate. *Clifton*, 31 So. 3d at 829; *Tristar Lodging, Inc.*, 434 F. Supp. 2d at 1295.

The confession-of-judgment cases where courts have held that a policyholder is entitled to section 627.428 fees fall into three general categories:

1. the insurer failed to make a payment as required by statute,[8]

[8] "Statutory failure to pay" cases include *Tampa Chiropractic Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 141 So. 3d 1256, 1259 (Fla. 5th DCA 2014) (finding beneficiary was forced to sue where insurer refused to pay PIP benefits until beneficiary complied with request for documents outside the scope of section 627.736(6)(b)); *Stewart v. Midland Life Ins. Co.*, 899 So. 2d 331, 333 (Fla. 2d DCA 2005) (finding that "it was appropriate to file suit and seek attorney's fees after the applicable sixty-day period [from section 627.428(2)] had passed" without payment of life insurance benefits); *Superior Ins. Co. v. Libert*, 776 So. 2d 360, 364 (Fla. 5th DCA 2001) (affirming fee award where insurer did not pay insurance benefits within 30 days as required by PIP statute); *Gov't Emps. Ins. Co. v. Gonzalez*, 512 So. 2d 269, 271 (Fla. 3d DCA 1987) (holding that insurer

2. the insurer failed to make a payment as required by the policy,[9] or

3. the claims adjusting process breaks down because the insurer is no longer working to resolve the claim within the policy.[10]

By contrast, courts have held that a policyholder is not entitled to section 627.428 attorneys' fees where:

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wrongfully withheld PIP benefits that were not paid within the 30-day period provided by the PIP statutes).

[9] "Contractual failure to pay" cases include *Barreau v. Peachtree Cas. Ins. Co.*, 79 So. 3d 843, 844-45 (Fla. 5th DCA 2012) (finding policyholder was forced to sue where insurer delayed payment under the terms of the policy for nine months based on unfounded suspicions of a staged accident); *Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 98 (Fla. 4th DCA 1974) (holding policyholder was entitled to fees where insurer did not pay after admitting liability for the loss); *Kurz v. N.Y. Life Ins. Co.*, 168 So. 2d 564, 568 (Fla. 1st DCA 1964) (reversing denial of attorneys' fees where insurer wrongfully delayed payment to rightful beneficiary under life insurance policy); *Salter v. Nat'l Indem. Co.*, 160 So. 2d 147,150 (Fla. 1st DCA 1964) (finding insurer wrongfully withheld payment it paid policyholder 19 months after proof of loss and policy required payment within 30 days).

[10] "Adjustment breakdown" cases include *Barreto v. United Servs. Auto. Ass'n*, 82 So. 3d 159, 162 (Fla. 4th DCA 2012) (reversing order denying attorneys' fees where insurer had abated pre-suit appraisal process); *De Leon v. Great Am. Assur. Co.*, 78 So. 3d 585, 591 (Fla. 3d DCA 2011) (reversing order denying attorneys' fees where policyholder sued insurer after insurer insisted that policyholder respond to impertinent and improper questions during examination under oath); *First Floridian Auto & Home Ins. Co. v. Myrick*, 969 So. 2d 1121, 1124 (Fla. 2d DCA 2007) (affirming fee award where policyholder objected to insurer's proposed subsurface remediation plan but insurer did not respond, request additional information, or seek appraisal); *Leaf*, 544 So. 2d at 1050-51 (reversing order striking claim for attorneys' fees where insurer had ignored policyholder's letter stating her selection of an arbitrator).

1. the policyholder filed an unnecessary lawsuit after the insurer paid or agreed to pay benefits under the policy,[11] or

2. the policyholder filed suit after withholding information from the insurer.[12]

The "wrongfulness" standard must be applied to confession-of-judgment cases because the penal nature of section 627.428 is not dissipated by application of the confession-of-judgment doctrine.

C. The trial court erred when it refused to consider whether Omega acted "wrongfully" before awarding fees.

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[11] *See Federated Nat'l Ins. Co. v. Esposito*, 937 So. 2d 199, 201-02 (Fla. 4th DCA 2006) (insurer timely paid appraisal award before policyholder sued); *Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047, 1048 (Fla. 5th DCA 2001) (same); *Basik*, 911 So. 2d at 294 (insurer provided defense before policyholder filed declaratory judgment action); *Fla. Life Ins. Co. v. Fickes*, 613 So. 2d 501, 502-03 (Fla. 5th DCA 1993) (insurer paid all amounts due before policyholder sued); *Obando v. Fortune Ins. Co.*, 563 So. 2d 116, 117 (Fla. 3d DCA 1990) (insurer had paid all medical bills within 30 days before the policyholder sued); *Morris v. Conn. Gen. Life Ins. Co.*, 346 So. 2d 589, 590-91 (Fla. 3d DCA 1977) (insurer had agreed to pay policy proceeds upon execution of release before policyholder filed suit).

[12] *See Travelers of Fla. v. Stormont*, 43 So. 3d 941, 945 (Fla. 3d DCA 2010) (policyholder did not alert insurer of dispute regarding appraiser's competency or demand that insurer replace appraiser); *Lorenzo*, 969 So. 2d at 396, 398-99 (policyholder concealed repair contract that would have triggered payment under policy); *Bailey*, 944 So. 2d at 1029 (policyholder did not contact insurer to explain that claim form contained an error); *Time Ins. Co. v. Arnold*, 319 So. 2d 638, (Fla. 1st DCA 1975) (policyholder responded to insurer's questions about doctor's entry by stating that "I would send you a corrected copy, but do not feel inclined to investigate your case for you").

The circuit court, at Johnson's urging, refused to determine whether Omega had acted "wrongfully." The trial judge, in accepting Johnson's argument, said the case "boils down to this: The Court doesn't have to get involved in a discussion about penalizing an insurance carrier." (R4. 608.) "There's no punishment here. It is simply a confession of judgment, which I find exists as a matter of law. And because of that, [Omega is] required to pay reasonable attorneys' fees and costs. That's all." (R4. 611.) The circuit court explained its understanding of the statute:

> I think the purpose of this [section 627.428] is to level the playing field. I don't have to go to punishment. That should be used sparingly anyway. The last thing any judge wants to do is to punish when compensation is all that's required. Any bright-minded trial judge looks first at what is the least amount of judicial authority necessary in order to accomplish a lawful and correct result. To do otherwise is frightening.

(R4. 612.) Respectfully, this was serious legal error. The imposition of a 627.428 fee award is always a penalty, whether the judge describes it as one or not.[13] And since a fee award is always a penalty, the trial judge must always consider whether the insurer acted wrongfully before applying it. Here, the trial court did not do so: It did not determine whether Omega had failed to abide a statutory or contractual requirement, or if it had failed to resolve a breakdown of the adjustment process when it was within its power to do so. The trial court was bound to follow cases

[13] "Because the confession of judgment doctrine turns on the policy underlying section 627.428 . . . the courts have explained that, like the statute, the doctrine is intended to penalize insurance companies for 'wrongfully' causing an insured to resort to litigation." (SC.152.) (internal citations and quotation marks omitted.)

applying this "wrongfulness" analysis, like *Clifton*, *Lorenzo*, and *Myrick*, that Omega argued below (R1. 81-84). *See Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992).

Moreover, the trial court's refusal to consider whether Omega had acted wrongfully was error because it liberally construed section 627.428. By foregoing any consideration of whether Omega had acted wrongfully, the court awarded fees more freely, simply to compensate the policyholder. But "a statute imposing a penalty [like section 627.428] must be strictly construed in favor of the one against whom the penalty is imposed and is never extended by construction." *Sarkis*, 863 So. 2d at 223.

D. Johnson misstates the district court's holdings in her attempt to show error and conflict with *Warfel*.

1. The district court did not hold that her entitlement to fees turns on whether Omega denied the claim in "good faith" or "bad faith."

Johnson theorizes that the district court now "requires proof of subjectively wrongful conduct rather than a mere incorrect coverage determination" before fees may be awarded." (IB 21-22, 26.) Based on this misconception, she means to invoke those cases that say 627.428 fees may be awarded even though the insurer contested payment under the policy in good faith and on reasonable grounds. *See, e.g.*, *Lecks*, 165 So. at 55. But the district court imposed no requirement that a policyholder show the insurer has acted in a subjectively sinister fashion, with ill-

will or malice, in handling the claim. The words "good faith," "bad faith," and "subjective" do not even appear in the opinion. The district court only imposed the long-standing rule, applied in all insurance cases, "that [a] wrongful or unreasonable denial of benefits that forces the insured to file suit is necessary to apply the [confession-of-judgment] doctrine and award fees under the statute." (SC. 152.)

A trial court determines "wrongfulness" based on objective evidence as to whether the insurer has complied with the statutory and contractual requirements (see footnotes 8, 9 and 10 above) governing its behavior, and whether the policyholder was forced to file suit (see footnotes 11 and 12 above). The policyholder, as the party seeking fees, must show that he or she was forced to file a lawsuit to resolve a bona fide dispute with his or her insurer. *Lorenzo*, 969 So. 2d at 398; *Beverly*, 50 So. 3d at 633. This means that the court must determine, from objective evidence, whether it was reasonably necessary for the policyholder to file a lawsuit based on communications with the insurer as to the claim. *Stormont*, 43 So. 3d at 944-45.

Johnson bases her argument on two cases cited at pages 23-24 of her brief. In the first case, *Palmer,* 297 So. 2d 96, the insurer, for over three months, refused to pay proceeds that the insurer acknowledged were owed, a delay that forced the policyholder to file suit. In the second case, *Salter v. Nat'l Indem. Co.*, 160 So. 2d

147 (Fla. 1st DCA 1964), the insurer "wrongfully withheld from [the policyholder] the amount due him under the insurance policy sued upon." *Id.* at 150. Both *Palmer* and *Salter* applied the same "wrongfulness" standard that has been part of Florida law since this Court decided *Pendas* in 1937, and cited by this Court in the recent *Petty* decision. These cases are two drops in the sea of Florida cases where the insurer unsuccessfully asserts a defense that it subjectively believes to be a good-faith defense to coverage, and thereby forces the policyholder to sue, and thereafter is assessed a fee penalty.

The district court did not invent a subjective "bad faith" requirement for an award of fees. What the district court did was reject Johnson's argument for a strict-liability standard that would mechanically impose the penalty of attorneys' fees whenever a policyholder sues and then recovers some policy benefits, without regard to whether the suit was ever necessary. (SC. 150-151.) *Accord Bailey*, 944 So. 2d at 1030 (rejecting argument that section 627.428 imposes strict liability).

2. The district court's decision comports with this Court's Ivey decision.

Johnson claims this Court rejected the "wrongfulness" standard, and imposed a strict liability standard, in its decision, *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000). (IB 21, 24-26.) Johnson is wrong for three reasons. The first reason is that this Court did not say it was creating a strict liability standard, and this Court does not overrule its precedents *sub silentio*. *Arsali v. Chase Home Fin.*

LLC, 121 So. 3d 511, 516 (Fla. 2013). *Ivey* did not overrule or recede from *Pendas*, *Nichols*, *Cave*, or any other of this Court's cases applying the "wrongfulness" standard to section 627.428 and its predecessors. This fact is evident in post-*Ivey* decisions where this Court has restated the rule that "[s]ection 627.428(1) imposes the obligation to pay a fee award upon an insurer that has wrongfully contested an insured's valid claim." *Petty*, 80 So. 3d at 316.

The second reason Johnson is wrong is that the result in *Ivey* is consistent with the result in other cases applying the "wrongfulness" analysis. In *Ivey*, the insurer failed to make a PIP payment as required by statute, and so is just like all the other "failure to pay according to statute" cases identified in footnote 8 above. The insurer in *Ivey* was required to investigate and pay PIP benefits within 30 days. 774 So. 2d at 684. It failed to do so. *Id.* at 681. The insurer's failure to investigate and pay in accordance with the PIP statutes was the "wrongful" conduct that forced the policyholder to sue. That was also the result in *Gonzalez*, 512 So. 2d at 271, where the insurer failed to pay PIP benefits for lost wages to its policyholder within 30 days. The *Gonzalez* court recognized that "an insurer is liable for attorney's fees when, but only when, it has *wrongfully* withheld the proceeds of the policy." *Id.* at 270. The *Gonzalez* court held that the insurer's failure to pay PIP benefits within the statutory 30-day period satisfied the "wrongfulness" requirement, and so the policyholder was entitled to fees under

section 627.428. *Ivey* is a link in the chain of cases that apply the "wrongfulness" standard to 627.428 fee awards.

The third reason Johnson is wrong is that *Ivey* was a case involving PIP benefits under the no-fault statutory scheme. 774 So. 2d at 683. This Court said it was giving effect to the legislative intent behind the no-fault statutory scheme. The *Ivey* decision explained the purpose of the no-fault statutory scheme was "to provide swift and virtually automatic payment so that the injured insured may get on with his life without financial interruption." *Id.* at 683-84 (internal quotations omitted). *Ivey* went on to hold that:

> Florida law is clear that in "any dispute" which leads to judgment against the insurer and in favor of the insured, attorney's fees shall be awarded to the insured. *See* §§ 627.736(8), 627.428(1); *see also Dunmore*, 301 So. 2d at 503. That is, under PIP law, the focus is outcome oriented. If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees. 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. Thus, we find that the Third District's holding on this issue is patently in express and direct conflict with firmly grounded principles embedded in Florida's no-fault insurance scheme.

774 So. 2d at 684 (emphasis added). The underlined language of *Ivey* makes clear that this Court's reasoning – and a principal factor in its measuring "wrongfulness"

– was grounded in the legislative intent behind PIP law. Johnson's brief omits this key underlined language. (IB 25.)

Moreover, Johnson's counsel did not read this same critical, underlined language from the *Ivey* decision when he read this portion of *Ivey* decision to the trial judge at the evidentiary hearing. (R4. 573.) Perhaps this is the reason the trial court failed to consider that the *Ivey* decision measured wrongfulness in light of the strict payment requirements of the "result oriented" PIP statute.

No Florida case has applied *Ivey* to automatically award fees under the sinkhole statutory scheme, which is "unique in nature" in its own right. And in property insurance cases generally, this Court has continued to interpret section 627.428 as "impos[ing] the obligation to pay a fee award upon an insurer that has wrongfully contested an insured's valid claim." *Petty*, 80 So. 3d at 316. Because this is a property insurance case under the sinkhole statutory scheme, *Ivey* does not provide a useful measure of whether Omega acted in a wrongful fashion.

3. Lexow does not require an automatic award of 627.428 fees if the policyholder prevails.

Johnson relies heavily on the case of *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528 (Fla. 1992). (IB 23, 25-26.) But *Lexow*, too, is consistent with all of the "wrongfulness" cases cited in section I(B) above. The *Lexow* court explained that the dual purpose of section 627.428 "is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their

attorney's fees when they are compelled to defend or sue to enforce their insurance contracts." 602 So. 2d at 531. The *Lexow* court cited *Leaf,* one of the "wrongfulness" cases from footnotes 6 and 10 above, to support its interpretation of the statute. 602 So. 2d at 531. And then the *Lexow* Court noted that the lawsuit fell within the rationale behind the statute. *Id. Lexow* was a case where the insurer had forced the policyholder to litigate to enforce the insurance policy. This is the context for the statement 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.* The policyholder is "always" entitled to fees if the insurer has forced the policyholder to litigate to enforce the policy. Here, Johnson was not forced to litigate. Therefore, the district court's decision does not conflict with *Lexow*.

E. The district court's decision promotes the public policy of section 627.428.

Public policy favors "settlement of disputes without litigation where possible." *Wagner, et al. v. Kennedy Law Group,* 64 So. 3d 1187, 1192 (Fla. 2011). This Court invoked this public policy when it applied the confession-of-judgment doctrine in *Wollard*. 439 So. 2d at 218. *Wollard* states that section 627.428 was meant " 'to discourage litigation and encourage prompt disposition of valid insurance claims without litigation.' " *Id.* (quoting *Gibson v. Walker,* 380 So. 2d 531, 533 (Fla. 5th DCA 1980)). This Court then held that a confession of judgment would trigger section 627.428(1) because requiring a policyholder to

continue to litigate a case after a confession of judgment [in order to obtain a rendered judgment] would "discourage[ ] any attempt at settlement." *Id.*

The district court's opinion gives effect to this public policy because it provides an incentive to (but does not require) the policyholder to first notify the insurer of a disagreement before filing suit. *See Clifton*, 31 So. 3d at 831 (explaining that "the insured generally will be unable to show that he or she was 'forced' to file suit, and a subsequent post-suit payment by the insurer may not constitute a confession of judgment" if the policyholder does not "clearly notify his or her insurer in a timely fashion of his or her dissatisfaction"). Under the "wrongfulness" standard, "an insurer that knows of a dispute with its insured, takes no steps to resolve that dispute, and then makes a post-suit payment of additional policy proceeds confesses to judgment by that post-suit payment." *Id.* at 832. The "wrongfulness" standard, as applied by the district court, "encourage[s] insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention." *Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001).

By contrast, the strict liability standard that Johnson advocates would "simultaneously reward[ ] unnecessary litigation and discourag[e] insurers' prompt compliance with their obligations." *Lorenzo*, 969 So. 2d at 399. Policyholders would be discouraged from attempting to settle their claims because they would

know that insurers would be automatically penalized with attorneys' fees if they first filed suit, and then collected any post-suit payment. "[I]t would behoove every policyholder to sue whenever a claim is contemplated, because . . . whether the claim is eventually adjusted downward or paid in full, attorneys fees would automatically result." *Id.* at 398. A strict liability standard would encourage policyholders to rush to the courthouse to file a lawsuit.[14] *Basik*, 911 So. 2d at 294. Thus, a strict liability standard would result in increased litigation—the opposite of the public policy underlying *Wollard*.

II

The district court correctly applied Florida's statutory and common law to the record facts when it determined the trial court erred in awarding Johnson a 627.428 fee award.

A. Johnson had the burden to show Omega wrongfully forced her to sue to enforce the contract.

A policyholder seeking an award of 627.428 fees bears an evidentiary burden to show the insurer wrongfully forced him or her to sue. "[T]he one seeking an award of attorney's fees has the burden of proving entitlement." *Kirchner v. Interfirst Capital Corp.*, 732 So. 2d 482, 483 (Fla. 5th DCA 1999); *Serv. Ins. Co. v.*

[14] This is what happened in cases like *Esposito*, *Lorenzo*, *Tristar Lodging*, and *Beverly*. *Esposito*, 937 So. 2d at 201-02; *Lorenzo*, 398 So. 2d at 398-99; *Tristar Lodging*, 434 F. Supp. 2d at 1300; *Beverly v. State Farm Fla. Ins. Co.*, No. 14-2004-CA-000985, 2012 WL 12284882 (Fla. 12th Cir. Ct. Oct. 8, 2012) (finding policyholder filed suit "solely to perfect the right to seek attorneys fees and possibly file another lawsuit"), *aff'd*, 151 So. 3d 1241 (Fla. 2d DCA 2014) (unpublished table decision).

Gulf Steel Corp., 412 So. 2d 967, 969 (Fla. 2d DCA 1982); *United Servs. Auto. Ass'n v. Kiibler*, 364 So. 2d 57, 59 (Fla. 3d DCA 1978). Johnson, as the party seeking attorneys' fees, had to prove she was entitled to 627.428 fees by showing that Omega had forced her to file suit.

The central issue under the "wrongfulness" standard—whether an insurer has forced a policyholder to file suit—presents a question of fact. *See Beverly*, 50 So. 3d at 633 (reversing summary judgment based on material question of fact as to whether policyholder had been forced to file suit). The trial court must determine "whether the suit was filed following a dispute with the insurer for the legitimate purpose of resolving that dispute." *Clifton*, 31 So. 3d at 830. For this reason, "'the existence of a bona fide dispute and not the mere possibility of a dispute, is a crucial condition precedent to such a holding'" that an insurer wrongfully forced a policyholder to sue. *Lorenzo*, 969 So. 2d at 398 (quoting *Tristar Lodging*, 434 F. Supp. 2d at 1297-98).

Here, the trial court ordered an evidentiary hearing to resolve the fact issue of whether Omega had forced Johnson to sue. (R1. 96-97.)

B. Johnson presented no evidence at the evidentiary hearing showing that Omega wrongfully forced her to sue.

The evidentiary hearing took place on November 20, 2012. (R4. 565.) At the hearing, Omega presented the only evidence before the circuit court: the affidavit of Sam Townsend. (R4. 603-04.) Mr. Townsend's affidavit set out the

facts regarding the timing of the BASIC report and its eventual post-suit disclosure to Omega. (R2. 248-51.)

Johnson, by contrast, presented no evidence at the evidentiary hearing—no testimony, no documentation, nothing—to meet her burden of proving that the lawsuit was necessary to resolve a bona fide dispute with Omega. (*See* R3. 567-615.) Johnson relied solely on her counsel's unsworn arguments, which are insufficient to establish facts. *Leon Shaffer Golnick Adver. Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982). Johnson's claim suffered a complete failure of proof. The trial court's ruling that Johnson "is clearly carrying its burden" (R4. 610) was obvious, reversible error.

"When a fee award is not supported by competent substantial evidence in the record, the appellate court will reverse the award without remand for further proceedings." *Pridgen v. Agoado*, 901 So. 2d 961, 962 (Fla. 2d DCA 2005); *see Wiley v. Wiley*, 485 So. 2d 2, 3 (Fla. 5th DCA 1986) ("Having failed to prove her entitlement to fees in the lower court, the wife is not entitled to a second hearing.") For this reason alone, the district court reached the correct result when it reversed the circuit court's award of attorneys' fees.

Johnson argued that Omega's discovery responses were sufficient to satisfy her burden of proof. (B. 8-10.) That argument is both unpreserved and wrong on the merits. The factual issue was whether Johnson was forced to file suit. That

issue can only be proven by facts predating the decision to file suit; it cannot be found in events that came after the suit was filed. So any "admissions" allegedly made by Omega after the lawsuit was filed have no bearing on what happened before she filed her lawsuit.

Moreover, Johnson did not raise this argument in the circuit court or in her initial brief to this Court, which vaguely mentions the discovery responses (IB 2-3). Thus, Johnson has waived or abandoned this argument. *See Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) (holding that appellant was barred from making argument that was not raised in the initial brief); *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So. 3d 866, 868-69 (Fla. 4th DCA 2012) ("An appellate court's reversal based on an unpreserved error, on a ground not argued in a brief, amounts to a denial of due process, which is a departure from a clearly established principle of law.").

Johnson had the burden to prove the existence of a bona fide dispute by showing that, at a minimum, she had notified Omega of her dissatisfaction with Omega's investigation and decision on her claim. *Clifton*, 31 So. 3d at 831. Johnson might have met her burden by showing that Omega knew of her dispute and took no steps to resolve that dispute, and then made a post-suit payment. *Id.* at 832. However, because Omega had no notice that Johnson disputed the claim, she would be never be able to show that she had been forced to file suit. *Id.* at 831.

C. The district court appropriately reviewed Omega's actions in investigating and deciding Johnson's claim in light of the statutes regulating Omega's behavior.

A Florida sinkhole claim is materially different from other property insurance claims. Every property insurance claim requires two basic determinations: (1) whether the loss was caused by a covered peril, and (2) if so, the amount of loss. In a Florida sinkhole claim, the first determination—whether the loss was caused by a covered peril —is taken out of the hands of the insurer.

An insurer's handling of a claim for sinkhole damage is heavily regulated by section 627.707, Florida Statutes (2008). Section 627.707 tells an insurance company exactly what it must do, shall do, and may do, when presented with a sinkhole claim: "The insurer must make an inspection of the insured's premises to determine if there has been physical damage to the structure which may be the result of sinkhole activity." § 627.707(1). If so, then "the insurer shall engage a professional engineer or a professional geologist to conduct testing as provided in s. 627.7072 to determine the cause of the loss within a reasonable professional probability and issue a report as provided in s. 627.7073[.] " § 627.707(2). Section 627.7073(1)(c), requires that "[t]he respective findings, opinions, and recommendations of the professional engineer or professional geologist as to the cause of distress to the property . . . shall be presumed correct." If the engineer finds sinkhole is the cause of loss, then the insurer is required to pay "to stabilize

the land and building and repair the foundation." 627.707(5)(a). Conversely, "[i]f the insurer determines there is no sinkhole loss, the insurer may deny the claim." § 627.707(4). An insurer that denies a sinkhole claim in this fashion abides Florida law. Here, the district court found no error in Omega's investigation and decision on Johnson's claim pursuant to this statutory rubric.

Johnson complains that application of the presumption gave Omega the "right to deny" her valid sinkhole claim. First, the phrase "right to deny" may be colorful, but it is meaningless and misleading. The coverage dispute that was unveiled when Johnson filed her suit was resolved, ultimately, in her favor in neutral evaluation. So, accurately stated, her coverage was initially denied – but it was ultimately accepted, and her claim was paid. (And her lawsuit was not necessary to get the coverage dispute resolved and to get her claim paid.) The question for the district court was whether the initial denial of coverage was wrongful. The answer is "No", in part because section 627.7073(1)(c) authorized Omega to presume the report that it was required to obtain, was correct, and because section 627.707(4) authorized Omega to deny the claim.

In *Warfel*, this Court held the presumption could not be applied at trial to determine the cause of loss. Rather, the presumption is applied only "to the initial claims process and investigation that insurance companies are required to follow in accepting or denying claims." *Warfel*, 82 So. 3d at 58. This presumption is only

marginally relevant to the ultimate determination of coverage or cause of loss. But it is precisely relevant when determining whether Omega wrongfully denied Johnson's claim. The district court here applied the presumption only to assess whether Omega wrongfully denied Johnson's claim. It did not apply the presumption to determine coverage or the cause of loss.

No authority limits the use of the presumption to extra-contractual claims under section 624.155, as Johnson claims.[15] If the Legislature had intended to restrict the presumption to extra-contractual claims, it would have said so. *See, e.g.*, 627.7074(15)(a) (2012) (modifying insurer's liability in extra-contractual claims when neutral evaluation is invoked).

Because Omega abided the statutory rubric and denied the claim as it may do under section 627.707(4), the denial of Johnson's claim was "lawful." "Lawful" is defined as "[n]ot contrary to law; permitted by law." *Black's Law Dictionary* 892 (7th ed. 1999). By definition, "lawful" is the opposite of "wrongful," which is defined, *inter alia*, as "[c]ontrary to law; unlawful." *Black's Law Dictionary* 1606 (7th ed. 1999). If a denial is "lawful," then, *a fortiori*, that denial cannot be "wrongful." One of the oldest principles in American

[15] Johnson refers to "tort suits" at IB15. But in Florida, a bad-faith claim is an action *ex contractu*. *Am. Vehicle Ins. Co. v. Goheagan*, 35 So. 3d 1001, 1003 (Fla. 4th DCA 2010). This Court has held that a statutory cause of action for first-party bad faith is not a tort. *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n.,* 164 So. 3d 663, 667 (Fla. 2015).

jurisprudence is that a State cannot penalize lawful conduct. *See Powhatan Steamboat Co. v. Appomattox R. Co.*, 65 U.S. 247, 252 (1860) ("[I]t cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act."); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 460 (Fla. 3d DCA 2003) ("A defendant cannot be punished for lawful conduct.")

If the State cannot penalize lawful conduct, then it cannot condone an act in one statute and punish the same act in another statute. Section 627.707(4) authorizes insurers to deny sinkhole claims where the statutorily-mandated adjustment process has resulted in a determination that there is no sinkhole loss. The imposition of section 627.428(1) fees as a penalty for conduct that is authorized by section 627.707(4) would be absurd, unfair, and contrary to the rule cited in the prior paragraph.

D. Johnson was not forced to file suit – Florida statutes establish an alternative to litigation to resolve disputed sinkhole claims.

Johnson was not forced to file suit. First, Johnson (or her attorney) could have responded to the denial by invoking neutral evaluation, the Legislature's alternative to litigation to resolve disputed sinkhole claims. § 627.7074. Second, Johnson or her attorney could have provided Omega her engineer's report (R3. 319-79) to Omega before suing. Third, Johnson could have simply brought the disagreement to Omega's attention before incurring the cost of a second opinion to explore what could be accomplished in the adjustment process without a

lawsuit. Florida courts expressly recognize and encourage the beneficial aspects of pre-suit communications. *See Bailey*, 944 So. 2d at 1030, n.2 ("Given Liberty's actions when it received the correct information from Ms. Bailey, we must wonder whether she could have achieved her objective more expeditiously and efficiently through presuit communications-a letter, perhaps a telephone call-between Liberty and Ms. Bailey's counsel.").

E. The district court's decision is consistent with *State Farm Florida Ins. Co. v. Colella*, 95 So. 3d 891 (Fla. 2d DCA 2012).

The Fifth District's decision is consistent with the only other case analyzing the confession of judgment doctrine in the context of the statutory sinkhole scheme: *State Farm Fla. Ins. Co. v. Colella*, 95 So. 3d 891 (Fla. 2d DCA 2012). The *Colella* court ruled that the insurer's payment was not a confession of judgment because the policyholder had not been forced to resort to litigation. In *Colella*, the policyholder made a sinkhole claim. *Id.* at 892. The insurer retained an engineer, who determined there was no evidence of sinkhole activity. *Id.* The insurer denied the claim based on the engineer's determination. *Id.* The policyholder sued the insurer and attached to the complaint a different engineering report finding sinkhole activity. *Id.* This conflicting report had not been provided to the insurer before suit. *Id.* After receiving the conflicting report, the insurer invoked neutral evaluation. *Id.* After neutral evaluation, the insurer paid policy limits and prejudgment interest. *Id.* at 894. The trial court ruled that this payment

was a confession of judgment, and granted summary judgment for the policyholder. *Id.* at 895. The insurer appealed. *Id.*

The Second District noted that the confession of judgment doctrine is not absolute. *Id.* at 896. This doctrine "is intended to penalize insurance companies for 'wrongfully' causing an insured to resort to litigation." *Id.* And, under the facts of *Colella*, the policyholder had not been forced to resort to litigation. *Id.* Instead, the policyholder "appears to have opted to pursue litigation without ever attempting to discuss the disagreement with the insurance company." *Id.* For this reason, the appellate court reversed. *Id.*

Like the insurer in *Colella*, Omega complied with the statutory sinkhole scheme, and that compliance "goes a long way toward fulfilling [its] obligations under its contract." 95 So. 3d at 895. Moreover, like the policyholder in *Colella*, Johnson did not notify Omega that she disputed Omega's decision on the claim before she sued. Johnson was not forced to sue, she opted to sue.

Colella and *Johnson* are consistent with the body of case law applying the confession of judgment doctrine discussed in Issue I. In particular, the insurers' compliance with the sinkhole statutes in *Colella* and *Johnson* makes these two cases distinguishable from the confession of judgment cases, cited in footnote 8 above, where the insurer failed to make a payment as required by statute. And the policyholders' failure to disclose their adverse reports or otherwise discuss their

disagreement with the insurers in *Colella* and *Johnson* makes both cases analogous to the confession of judgment cases, cited in footnote 12 above, where the policyholder files suit after withholding information from the insurer. This Court should approve *Johnson* and *Colella* because they are consistent with other confession-of-judgment cases.

F. The Second District has not receded from its holding in *Colella*.

Johnson claims the Fifth District's reliance on *Colella* was error because the Second District has receded from *Colella*. (IB 16-17.) This argument is wrong for two reasons. The first reason is that all six cases Johnson cites on page 17 were decided by three-judge panels, which could not recede from *Colella*. Only an *en banc* panel could recede from a prior opinion like *Colella*. *Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996).

The second reason is that, unlike *Colella*, none of the six cases Johnson cites on page 17 discusses the confession of judgment doctrine or analyze whether the insurer wrongfully caused the policyholder to sue. The first case concerned whether policyholders were required to obtain repair contracts based on the recommendations of the engineer retained by the insurer pursuant to section 627.707(2). *Roker v. Tower Hill Preferred Ins. Co.*, 164 So. 3d 690, 692-94 (Fla. 2d DCA 2015). The second case expressly distinguished *Colella* on the basis that *Colella* involved a post-suit payment and the issue of whether the insurer had

wrongfully forced the policyholder to sue. *Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671, 674 n.2 (Fla. 2d DCA 2014). The third and fourth cases analyzed whether the policyholders' failure to disclose an adverse report before suing their insurer precluded coverage. *Herrera v. Tower Hill Preferred Ins. Co.*, 161 So. 3d 565, 567-68 (Fla. 2d DCA 2014); *Diaz v. Tower Hill Prime Ins. Co.*, 152 So. 3d 835, 836 (Fla. 2d DCA 2014). The fifth case "did not reach the issue of attorney fees" in a case where (unlike in *Colella*) the policyholder had disclosed an adverse report pre-suit and the insurer did not respond before the policyholder sued. *Tower Hill Select Ins. Co. v. McKee*, 151 So. 3d 2, 3-4 (Fla. 2d DCA 2014), *rev. denied*, 163 So. 3d 511 (Fla. 2015). The sixth case concerned whether a policyholder could sue his insurer before neutral evaluation had concluded. *Cuevas v. Tower Hill Signature Ins. Co.*, 2015 WL 403927, (Fla. 2d DCA Jan. 30, 2015). Therefore, these six cases involved different issues and different facts, and did not alter the legal analysis or holding in *Colella*.

G. The district court did not create a "sinkhole exception" to the confession of judgment doctrine.

Johnson argues the fact that this case involves a sinkhole claim controlled by the sinkhole statutes is irrelevant. (*See* IB 19-21.) Citing *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003), Johnson argues that the only fact that matters is that Omega denied her claim. (IB 19.) But *Kaklamonos* was about a policyholder's standing in a PIP case. 843 So. 2d at 891. *Kaklamanos* says

nothing about attorneys' fees, section 627.428, the confession of judgment doctrine, or the sinkhole statutes. Thus, *Kaklamanos* provides no authority or logic to change the result in this case. Johnson also claims that there is no legal support for an insurer to deny a sinkhole claim after complying with the sinkhole statutes. (IB 19-20.) But the Legislature expressly provided that insurers may deny a sinkhole claim in specified circumstances, present here, when it enacted section 627.707(4)(a).

Johnson is also wrong because the two cases she cites on page 20 of her Initial Brief did not involve a similar statute authorizing an insurer to deny claims. One case relied on earlier cases[16] analyzing statutory fees against common carriers to reject an insurer's argument that it should not be liable for fees where it contested payment "in good faith and upon reasonable grounds." *N.Y. Life Ins. Co. v. Lecks*, 165 So. 50, 55 (Fla. 1935). The second case, *Lexow*, was a case where the insurer had forced the policyholder to litigate (as explained above).

Johnson describes a "parade of horribles" that she claims will flow from the district court's opinion. First, Johnson contends that the decision will encourage insurers to "deny claims as a matter of course so long as the denial could plausibly be maintained." (IB 20.) This worry is baseless. Having a plausible reason for denying a claim, standing alone, has never insulated insurers from 627.428 fee

[16] *Atl. Coast Line R.R. v. Connell*, 149 So. 596, 596 (Fla. 1933); *Atl. Coast Line R. Co. v. Wilson & Toomer Fertilizer Co.*, 104 So. 593, 594 (Fla. 1925).

liability, and it was not the reason articulated by the district court for reversing the fee order here. Here, the Fifth District could not find that there had been any wrongful or unreasonable denial of benefits that forced Johnson to file suit to obtain her policy benefits. The district court's reasoning is consistent with decades of Florida law that applies to all property insurance fee claims. Johnson's claim that the decision encourages insurers to "deny claims as a matter of course" does not make sense.

Second, Johnson claims that the opinion will require that policyholders "disprove their insurance company's engineering report before suit could even be brought[.]" (IB 20.) This is incorrect. Johnson was always free to file suit, and the district court did not say Johnson's suit should have been dismissed because she failed to "disprove" the report obtained by Omega. The district court relied on *Clifton*, which held that the policyholder only has to notify the insurer of his or her dissatisfaction. 31 So. 3d at 831. The undersigned is not aware of any case issued in the five years since *Clifton* that has required a policyholder to disprove the engineer's report as a condition of bringing suit. Johnson has cited no such case. Johnson's complaint of a heightened burden to file a suit is unfounded.

Third, Johnson complains that the Fifth District's decision "would defeat the dual purposes of [section] 627.428 to discourage denial of claims and make insureds whole." (IB 20.) Of course, Johnson overlooks that section 627.428 is

intended to discourage only the wrongful denial of claims. The Legislature expressly states that insurers may deny sinkhole claims where, as in this case, the insurer has complied with the statutory rubric and finds no basis for coverage. § 627.707(4). Omega raised this precise point below (*see* R4. 597; SC. 168, 172; C. 6), but Johnson does not address it. A ruling that imposes section 627.428 fees as a penalty for doing exactly what the Legislature authorized in section 627.707(4) would be unreasonable and unfair.

III

Johnson's prejudgment interest issue was not preserved. She never made this claim before, and so this Court should abstain from addressing it.

On this third point, Johnson argues only that she was entitled to prejudgment interest as an element of her damages pursuant to *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985). (IB 29-30.) However, Johnson's sole basis for requesting prejudgment interest in the circuit court was the confession of judgment doctrine. (R1. 43-48, 215-27.) Johnson never argued to the circuit court that she was entitled to prejudgment interest as an element of pecuniary damages. (*See* R1. 43-48, 214-27, 565-616.) She specifically stipulated to include it as one element of the fee judgment. Johnson did not raise this argument to the district court. (*See* SC. 157-63; B. 1-27.) Because Johnson did not raise this argument below, Johnson has waived her claim for prejudgment interest as an element of

damages. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (holding that appellant waived objection that was not raised in the trial court or the district court).

IV

Johnson should seek fees in a separate motion. In any event, she would be entitled to appellate attorney's fees only if she prevails on appeal and in proceedings on remand, if any.

"[U]nder the plain language of section 627.428(1), an appellate court may not award attorney's fees to an insured unless the insured prevails on appeal." *Brass & Singer*, 944 So. 2d at 254-55. Johnson did not prevail on appeal before the district court. Thus, under *Brass & Singer*, the district court correctly denied Johnson's motion for appellate attorneys' fees. If this Court quashes the district court's decision and remands for further proceedings on the issue of entitlement, then a determination of entitlement to appellate fees would have to be contingent upon Johnson's ultimate success on remand. *See Segelstrom v. Blue Shield of Fla., Inc.*, 233 So. 2d 645, 646 (Fla. 2d DCA 1970) ("While he has won a round in this bout, the cause is not yet concluded in his favor, and we think that he has not yet 'prevailed' in the statutory sense.").

CONCLUSION

The decision of the Fifth District Court of Appeal is correct, and does not conflict with any case from any other district court of appeal or this Court. If this Court should take jurisdiction to review the decision, then this Court should approve it in all respects.

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CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Brief is14 point Times New Roman.

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