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 REPLY BRIEF ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEALS JUDGES SAWAYA, EVANDER AND BERGER, PRESIDING

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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

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*

A. Omega's claim to avoid fees under section 627.428 is based solely on its argument that the presumption of correctness attaching to its engineer's report precludes entry of a confessed judgment for breach of contract.

This Court's opinion in *Warfel* unequivocally established that the presumption of correctness attaching to the insurer's engineering report had no bearing on whether a judgment for breach of contract should be entered against an insurer. Thus, in a fully litigated case such as *Warfel*, the presumption would *never* be relevant to the issue of attorneys' fees since fees would automatically and necessarily follow a judgment on the jury's verdict in favor of the insured for breach of contract. § 627.428, Fla. Stat. However, in the instant case, Omega argues that a different result should attain solely because it admitted being wrong and paid the claim before trial.

Omega cobbles together the presumption, the neutral evaluation statute, and a misreading of Florida law regarding § 627.428 to argue that the presumption prohibits an award of fees for conduct which would otherwise constitute a clear breach of contract, i.e., the insurer's denial of coverage which existed under the policy after conducting its own investigation. Omega even denies that the issue of breach of contract was litigated in this case or decided by the district court. Omega's reasoning requires a remarkable view of the facts and the law.

Johnson initiated this lawsuit by filing a single-count complaint alleging that Omega breached its insurance policy by failing to timely pay benefits which were due under a policy of insurance. (R. 16-22) To avoid express and direct conflict with *Warfel*, Omega argues that "[t]he district court did not apply the presumption to any coverage or breach of contract litigation because there were no contract or coverage rulings for the district court to review." Ans. Br., at 12. Omega accuses Johnson of advancing the false premise that the district court applied the presumption to "coverage litigation" or the issue of "whether Omega breached the policy," asserting that Johnson is "plainly mistaken." Ans. Br. at 12. To be kind, Omega's argument is simply belied by the record.

Omega suggests that because the Final Judgment itself only contained the amount of attorney's fees awarded, the trial court never ruled that Omega breached the contract. The Answer Brief states:

> **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.**

Ans. Br. at 12-13 (emphasis added). It is Omega that is "plainly mistaken." The record reveals that, as a predicate to the Final Judgment, Johnson filed "Plaintiff's Motion for Confession of Judgment and Motion for Attorney's Fees, Costs, and

Interest" in which she sought two determinations: (1) a determination that Omega's post-suit payments and decision not to defend its coverage position was a "'confessed judgment' as to Plaintiff's claim for breach of contract."; and (2) a determination that Johnson was entitled to fees, costs and interest as a result. (DR. 44) Johnson's motion specifically alleged that Omega's "breach of the policy," "failure to provide coverage," and "failure to promptly pay the full amount of the damages" was the "functional equivalent" of a confessed judgment or verdict in favor of the insured. (R. 44-45) Plainly, Omega's statement that Johnson never sought a ruling that Omega had breached the contract is "mistaken."

The trial court orally explained its ruling on the motion, observing:

> Of course there was a real dispute. The policyholder made a claim, the claim was denied. They think that their property was damaged. The insurance company hired somebody of their own choosing, and, based on that, they said [a]ny damage you may have is excluded, and we don't owe you a nickel. And it wasn't until after suit was brought that it turned out that, yes, we do owe you some money, and they agreed to pay it. That amounts to a confession of judgment and you didn't have to race to the courthouse. There's no indication that you were doing that. What you were doing was exercising your right and, indeed, your responsibility to prove that the insurance company was incorrect, and it now puts the onus on the insurance carriers to hire companies that are going to perform comprehensive investigations before they issue notices of denial.

(DR. 609-610). The trial court subsequently entered its December 19, 2012 Order adjudging that (1) "Plaintiff's Motion for Confession of Judgment against Defendant is GRANTED"; and (2) Johnson was entitled to an award of fees, costs, and interest

in an amount to be determined. (R. 253) Plainly, Omega's argument that the trial court never issued a ruling finding that it breached the contract is also "mistaken."

Finally, Omega's statement in its brief that there was only one order — the order granting her entitlement to fees — likewise was "plainly mistaken." (DR. 253 (granting motion for confession of judgment); and DR. 545 (final judgment reciting prior order)). There can be no "mistake" that Johnson's motion for confession of judgment alleging that Omega breached the contract, and the trial court's ruling granting that motion, was the sole predicate for the entry of the Final Judgment awarding fees. (DR. 545) (reciting the trial court's December 19, 2012 Order on Plaintiff's Motion for Confession of Judgment).

It is equally unmistakable that the district court's opinion reversing the Final Judgment turned on its conclusion that Omega's post-suit payments and refusal to defend its coverage denial was not a confession of judgment for breach of contract due to the presumption. The court held:

> 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.

Omega Ins. Co. v. Johnson, 39 Fla. L. Weekly D1911 (Fla. 5th DCA Sept. 5, 2014) *review granted*, 171 So. 3d 117 (Fla. 2015). In its Answer Brief, Omega posited that

"[t]he 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." Ans. Br. at 35.

Omega simply cannot separate Johnson's entitlement to fees from Johnson's entitlement to a judgment, confessed or otherwise, for breach of contract. Lest there be no mistake, Omega's argument is and always has been that it cannot be liable for fees because its reliance on the engineer's report to deny benefits under the policy insulates it from a finding of breach of contract. (SC. 149; A. 18-20). The district court accepted this argument, notwithstanding this Court's opinion in *Warfel* that the presumption was neither controlling, applicable, nor relevant to such a determination. The district court's opinion described this case as "strikingly similar" to *Collela* in which the Second District reversed a summary judgment in favor of the insured for breach of contract based upon the presumption. *State Farm Florida Ins. Co. v. Colella*, 95 So. 3d 891, 895-896 (Fla. 2d DCA 2012). In order to deny Johnson a confessed judgment for breach of contract, this Court must conclude that the presumption insulates Omega from a finding of breach of contract, even after two engineers have disagreed with the Rimkus report and Omega has admitted that Johnson's damages were due to sinkhole activity. (DR. 16-22).

B. A breach of contract has always been a sufficient predicate for an award of fees under Section 627.428

Omega (inaccurately) characterizes Johnson's argument as a "strict-liability" theory of fees under section 627.428 and then mounts a full-throated attack on why strict-liability is contrary to Florida law. Omega has simply assaulted a straw-man of its own creation. Not only are the words strict liability nowhere found in any of Johnson's briefs, Johnson has not argued that fees under section 627.428 are strictly awarded if suit is followed by payment of policy proceeds. Indeed, Johnson agrees that Florida courts have denied confessed judgments where an insurer was sued before it breached the contract. *See Gov't Employees Ins. Co. v. Battaglia*, 503 So. 2d 358, 360-36 (Fla. 5th DCA 1987) (no fees awarded where UM insurer was not required to pay benefits under the policy until tortfeasor's coverage was exhausted); *Crotts v. Bankers & Shippers Ins. Co. of New York*, 476 So. 2d 1357, 1358 (Fla. 2d DCA 1985*)* (no fees awarded because insurer accepted coverage but filed interpleader action to resolve competing claims between insured and hospital); *Waters v. State Farm Mut. Auto. Ins. Co.*, 393 So.2d 1203 (Fla. 2d DCA 1981), quashed on other grounds, 408 So.2d 1044 (Fla.1982) (fees not awarded because insurer had at all times offered full benefits due under the policy).

However, Omega has not cited to this Court *any* authority which would authorize denial of a confessed judgment after an insurer completely denied coverage under the policy after conducting its own investigation. The only authority

now advanced for that result by Omega is the presumption, which this Court has held was not intended for that purpose. Not even the Second District's opinion in *Colella* goes so far. *Id.* (reversing summary judgment in favor of the insured).

Omega's reliance on *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826 (Fla. 2d DCA 2010), *State Farm Florida Ins. Co. v. Lorenzo*, 969 So. 2d 393, 396 (Fla. 5th DCA 2007), and *Tristar Lodging, Inc. v. Arch Specialty Ins. Co.*, 434 F. Supp. 2d 1286, 1288 (M.D. Fla. 2006), misses the mark as none of these cases involved an insurer's denial of coverage based upon its own investigation. In *Clifton,* the insurer initially paid the claim; however, there was a dispute of fact as to whether the insured made the insurer aware that the amount paid was insufficient before filing suit. *Clifton,* 31 So. 3d at 827. The district court reversed the trial court's entry of summary judgment in favor of the insurer and remanded the case for a trial on the disputed issue. *Id.* In contrast to *Clifton*, in the instant case Omega entirely denied coverage based upon its own investigation.

Similarly, the insurer in *Lorenzo* accepted coverage and paid all amounts due under the terms of the policy. The district court held that the confession of judgment doctrine did not apply because the insurer was complying with its contractual obligations when the insured filed a premature suit. *Lorenzo*, 969 So. 2d at 398. Likewise, the insurer in *Tristar Lodging, Inc.* fully accepted coverage and paid out well over a million dollars to the insured before the insured prematurely filed suit.

Tristar Lodging, Inc., 434 F. Supp. 2d at 1295. The court determined that the insured was not entitled to attorneys' fees under section 627.428 because the carrier never withheld payments. *Id.* at 1298-1299 (noting that the plaintiff "failed to show that the insurer breached any duty to investigate, adjust and timely pay under the Policy").

Omega does not, and indeed cannot, cite to a single case where an insurer has denied a valid claim based upon its own investigation and the court did not award attorneys' fees after it admitted to be incorrect. This is precisely because Florida law has consistently held that the purpose of section 627.428 is to discourage[1] insurance companies from denying valid claims. *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992). Florida courts have recognized that any denial or refusal to pay benefits actually due under the policy, even if done in good faith or on reasonable grounds, constitutes a breach of contract and will result in an award of fees under section 627.428. *See Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 98 (Fla. 4th DCA 1974) ("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"). Omega's invocation of the presumption is

[1] Johnsons suggests that this aspect of the statute's dual purpose serves more as a general deterrent rather than as a penalty for specific misconduct.

merely an argument that it acted in good faith and on reasonable grounds in incorrectly denying coverage.

Omega's incorrect denial of Johnson's claim, even if based upon the "presumptively correct" report of its engineering firm, constituted a breach of its policy and triggered Johnson's entitlement to attorneys' fees under section 627.428. The failure to pay benefits it agreed to pay, based solely on its own investigation, constitutes the breach of contract and wrongfulness required to award fees. *Id.*

C. The district court unconstitutionally gave the presumption conclusive effect in conflict with *Warfel*.

The district court's opinion unconstitutionally gave the presumption conclusive effect in direct conflict with *Warfel.* Omega repeatedly argues that an insurer *ipso facto* fulfills its contractual and statutory obligations when it hires an engineer to investigate a claim and relies upon its report to deny the claim. (AB pp. 34-35) Under Omega's interpretation, an insurer could never breach its policy of insurance if it denied coverage based upon its own engineering report.[2] Thus, if an insurer's denial of coverage based upon its engineering report was not a breach, even if erroneous, the insured would forever be bound by the insurer's determination. There would be no need to have courts, attorneys, countervailing experts, or neutral evaluators. Put another way, Omega's position is that its only obligation under the

[2] Omega makes no attempt to reconcile this argument with the neutral evaluation statute, which provides that an insured may dispute such a determination.

policy of insurance was to hire an engineering firm and follow its advice. According to Omega, the quality of that engineer's decision or the actual coverage under the policy is wholly irrelevant. This is the type of conclusive presumption that this Court said in *Warfel* would be unconstitutional.

D. The district court's decision undermines public policy

Omega argues that the public policy behind section 627.428 is to discourage unnecessary litigation and encourage prompt disposition of claims without litigation. (AB. 28) Omega is half right. The public policy behind 627.428 is to discourage insurance companies from contesting valid claims and to reimburse successful insureds who are forced to sue to enforce their contracts. *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992). This is achieved by "level[ing] 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. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000). No court has ever interpreted this statute as serving the purpose of discouraging insureds from filing suit when coverage is denied. Omega seeks to turn the statute's purpose on its head by creating obstacles and financial barriers that would discourage insureds from filing suit when coverage is denied.

Rather than maintaining pressure on insurers to pay valid insurance claims, the district court's decision provides a consequence-free denial zone for Omega. Had

Johnson been unable to retain a lawyer to advance the cost of an engineering expert to contest Omega's determination, Johnson would never have received the $325,000 or more in benefits she received in this case. That is the result ultimately promoted by Omega's arguments. Following Omega's logic, insurance carriers have every incentive to seek out and retain those engineers least likely to attribute property damage to sinkhole activity. Armed with engineering reports clothed in a "presumption of correctness," insurers will deny coverage, place the onus on ill-equipped and unrepresented insureds to dispute it, and be no worse off than if it had paid the claim from the outset.

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.

A. There was a bona fide dispute which forced Johnson to sue; Omega denied coverage

The trial court found that Omega's denial of Johnson's sinkhole claim created a bona fide dispute, entitling her to sue for breach of contract. This was based upon the undisputed facts that (1) Johnson made a claim for benefits under her policy asserting that she suffered damage due to sinkhole activity; and (2) Omega denied her claim asserting that the damage was not due to sinkhole activity. To challenge the denial, Johnson had every right to file suit against Omega.

Omega argues that there was no bona fide dispute unless and until Johnson again told Omega that she disagreed with it. Notably, the district court's ruling in Omega's favor did not even accept this argument. The Second District has recognized that denial of a sinkhole claim based upon an engineer's report creates a bona fide dispute which entitles the insured to sue for coverage. *See Herrera v. Tower Hill Preferred Ins. Co.*, 161 So.3d 565, 567 n.1 (Fla. 2d DCA 2015) (quoting *Tower Hill Select Ins. Co. v. McKee*, 151 So. 3d 2, 3 (Fla. 2d DCA 2014), reh'g granted (Oct. 27, 2014), *review* denied, 163 So. 3d 511 (Fla. 2015) ("When Tower Hill denied coverage a valid dispute as to the existence of a covered loss under the insurance policy arose.")). This Court should likewise reject Omega's argument.

B. There was no contractual or statutory requirement for Johnson to provide the BASIC report or invoke neutral evaluation before filing suit

Omega makes a second argument inconsistent with its supposed right to deny coverage based upon its own report. Omega argues that Johnson was required to provide any contradictory opinion evidence she may have before filing suit.[3] Omega suggests that only if it *then* still refused to accept coverage would Johnson be justified in filing suit. (AB. 36-38) Omega cannot point to a single provision of its insurance policy imposing this post-denial duty on the insured nor any contractual

[3] Omega did not specifically plead that neutral evaluation or provision of the BASIC report was a condition precedent to suit in her Answer and Affirmative Defenses. (DR. 16-22)

or statutory requirement to tender a countervailing expert opinion. The Second District has expressly rejected any such requirement, *see Herrera v. Tower Hill Preferred Ins. Co.*, 161 So.3d 565, 567 (Fla. 2d DCA 2015) ("Duties After Loss" provision of policy does not require production of countervailing expert report obtained after denial of claim). Omega does not argue that these were conditions precedent to suit; instead, it merely suggests that these were "options" available to Johnson in lieu of litigation.

Omega makes a similar argument about neutral evaluation, an "alternative" dispute resolution process. § 627.7074, Fla. Stat. However, the neutral evaluation statute makes clear that neutral evaluation was entirely optional and not intended to impair Johnson's access to the courts. § 627.428, Fla. Stat. (2015) ("the parties retain access to court"). It is a voluntary process that becomes mandatory only when requested by either party. § 627.7074(4), Fla. Stat. To hold that Johnson should have invoked neutral evaluation in the face of a denial letter would create a judicial requirement that was contrary to the statute and the policy of insurance.

This Court is left to wonder by Omega how any of these "options" available to Johnson are even relevant if Omega had the right to stand on its own report. This Court is further left to wonder how Johnson's failure to explore these "options" was prejudicial to Omega where, as here, it steadfastly stood on its denial of coverage even after Johnson filed suit (indicating disagreement) and even after she produced

a countervailing expert report in discovery. After being told of the disagreement and being provided the insured's expert report, Omega made no offers to pay and demanded neutral evaluation. It was only after the neutral evaluator agreed with Johnson's report and rejected Omega's report that Omega finally relented and accepted coverage. Even then, Omega did not tender full payment and filed an answer asserting 11 affirmative defenses. (DR. 16-22)

This Court should not rewrite the parties' contractual obligations.

C. Omega admitted all of the material facts entitling Johnson to judgment

Omega argues, as it did in the district court, that the trial court's ruling was unsupported by competent substantial evidence. The district court did not accept this argument either as there has never been any dispute regarding the facts of the case.[4] In trying to create a paper issue, Omega overlooks that it *admitted* in its Answer and Affirmative Defenses that Johnson made a claim under her policy, that sinkhole activity is causing damage to the dwelling, and that Johnson is entitled to payment under her policy for damages cause by sinkhole activity. (DR. 16-17) Omega also overlooks that its responses to Johnson's First Request for Admissions admitted that Johnson had maintained an insurance policy that was in effect and that it denied Johnson's claim as being excluded from coverage. (DR. 11-13) Under the rules, any

[4] Omega failed to lodge a contemporaneous objection to the unsworn statements of counsel of which it now complains.

matter admitted in response to a request for admissions is conclusively established. Fla.R.Civ.P. 1.370(b).

The facts are simply undisputed and admitted by Omega. Johnson bought an insurance policy, paid all of the premiums, suffered damages due to sinkhole activity, made a claim, Omega hired an engineer to investigate the claim and denied coverage based upon its report, Johnson sued and presented countervailing opinion evidence, Omega demanded neutral evaluation, the neutral evaluator agreed with Johnson, and Omega paid the claim after admitting its expert was incorrect.

D. Omega stretches the district court's decision in *Colella* too far

Omega's reliance on *Colella* is unavailing. In *Colella*, after being sued for breach of contract, the insurer tendered policy limits, attorneys' fees, interest and costs without admitting or having the neutral evaluator determine that its engineer was incorrect. *Colella*, 95 So. 3d at 895. The Second District reversed a summary judgment on liability for breach of contract, citing both the presumption and the absence of any determination that State Farm's engineer was incorrect. *Id.* at 95 So. 3d at 895–896.

In the instant case, Omega admitted in its answer that its engineer was incorrect. Furthermore, to the extent *Colella* may be read as insulating insurers from liability for breach of contract based upon the presumption, this Court should disapprove it as being in conflict with *Warfel*.

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., Ezequiel Lugo, Esq., and Jared Krukar, Esq. (arusso@butlerpappas.com, jkrukar@butlerpappas.com, elugo@butler.legal, and eservice@butlerpappas.com) this 2nd day of November, 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/ Timothy W. Weber

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