

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STATE FARM FLORIDA
INSURANCE COMPANY,

Petitioner,

vs.

CASE NO.: SC09-401

CHAD GOFF and CAROL GOFF,

Respondents,

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

State Farm's brief strays from the rule that a jurisdictional brief should refer only to facts that appear in the appellate opinion. *E.g., Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

For example, State Farm asserts at page 5 of its brief that it was "in the process of working with the insured's public adjuster on the amount of the loss." That is neither correct, nor supported by the opinion. What the *Goff* opinion says is that, after State Farm's initial payment, the Goffs retained a public adjuster who estimated their loss at \$66,708 (A 2-3). State Farm then paid an additional \$3,109 (A 3). The opinion does not say or suggest that State Farm was still "in the process of working with the insureds' public adjuster on the amount of the loss" (A 3).

The opinion does not reflect any attempt by State Farm to offer more money after the suit to try to resolve it -- rather State Farm waited until the appraisal award ordered it to pay another \$43,000 (A 3). In sum, when State Farm made a \$3,000 additional payment in response to the Goffs' request, the Goffs were entitled to assume State Farm had made its final payment, and file suit.

State Farm says at page 10 of its brief that attorneys who handle first-party cases get the fee award "usually plus a percentage of the claim payment, thereby *lessening* the insured's recovery" (original emphasis). State Farm cites to no place in the *Goff* opinion for this statement, nor to any authority for this statement. This

statement is contrary to both the arrangement the Goffs had with their attorneys here and to the way the Goffs' counsel handle these cases (where the insureds benefit by a fee award so that they do *not* have to diminish their recovery).

As the Second District observed, State Farm's policy did not make engaging in the appraisal process a prerequisite to filing a lawsuit (A 3, n.2). Had it wished to do so, State Farm could have included this requirement in its policy. It did not.

ISSUE ON APPEAL

Goff does not conflict with this Court's decision in *Wollard*¹, or any of the cited DCA cases.

SUMMARY OF ARGUMENT

Goff does not conflict with any of the cases State Farm cites, much less expressly and directly conflict with them. The only thing the *Goff* opinion conflicts with is the way State Farm wishes the law would be changed to disadvantage Florida insureds -- perhaps a parting shot as State Farm stops writing property coverage insurance in Florida and withdraws from the market. As the Second District noted, State Farm did not make appraisal a prerequisite to filing suit in its policy. As a result, the Goffs were entitled to sue State Farm when it grossly underpaid their claim and breached the policy.

State Farm's claim of conflict with this Court's opinion in *Wollard* is based on a misreading of *Wollard*. The DCA cases State Farm cites do not conflict, as the Second District observed (A 7).

¹ *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217 (Fla. 1983).

ARGUMENT

A. *Goff* does not conflict with this Court's decision in *Wollard*, or any of the cited DCA cases.

State Farm bases its argument on a misreading of *Wollard* and the DCA cases, and a failure to appreciate that State Farm chose *not* to make appraisal a prerequisite to filing suit. Because appraisal was not a prerequisite, when State Farm paid only an additional \$3,000 in response to the Goffs' estimated loss, the Goffs were within their rights to chose to file suit. The appraisal award of \$43,000 -- six times the amount that State Farm had already paid -- meant that State Farm acted unreasonably when it withheld payment under the policy (A 3). Thus, the Goffs' action, and the Second District's opinion, conform completely with the footnote State Farm cites from *Wollard*.²

Once State Farm made the second payment of \$3,000 -- when it should have paid another \$43,000 -- that constituted a refusal to properly pay the claim and the Goffs were entitled to sue. The Second District decision gives no hint that State

² When one reads the underlying *Gibson* opinion cited in *Wollard*, it is also clear the reference to the trial court inquiring into the necessity of legal services rendered as well as reasonable value was in the context of making new findings for the services by the insured's attorney in the prosecution of that suit from its inception through final judgment. *Gibson v. Walker*, 380 So. 2d 531, 533 (Fla. 5th DCA 1980). The Fifth District then went on to order an appellate attorney's fee to the insured, based on §627.428, Florida Statutes. 380 So. 2d at 534.

Farm's payment of the \$3,000 was accompanied by any suggestion from State Farm that more money might be forthcoming, or a suggestion that the parties should go to appraisal (A 3). The Goffs were well within their rights to sue at that point. *See, e.g., Allstate Insurance Company v. Kaklamanos*, 843 So. 2d 885, 892-893 (Fla. 2003); §627.428(2), Florida Statutes (limiting award of attorney's fees under the section if suit is commenced prior to 60 days after proof of claim was filed with the insurer for life insurance or annuity claims; there is no such statutory waiting period for a property loss claim).

This Court reaffirmed two important principles that protect Florida insureds in its decision in *Ivy v. Allstate Insurance Co.*, 774 So. 2d 679 (Fla. 2000). First, this Court held, "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." 774 So. 2d at 684. The Court then went on to cite *Wollard*, and reiterate its holding that the insurer's payment after suit operates as a confession of judgment entitling the insured to attorney's fees. 774 So. 2d at 684-685.

Goff does not conflict with the isolated footnote State Farm cites from *Wollard*, but is consistent with *Wollard*, *Ivy*, and the other Florida appellate decisions recognizing the insureds' right to a fee under §627.428 when the insureds sue their insurance company for nonpayment and the insurance company then pays.

As the Second District recognized, there is also no conflict with the DCA decisions State Farm cites (A 7). *Lorenzo*³ did not involve an appraisal issue. The Fifth District concluded the insured prematurely filed a class action where the insurer was ready to pay the claim, but was not provided documents it had requested. 969 So. 2d at 396. The Fifth District recognized in *Jerkins*⁴ that its decision there created no conflict with its decision in *Lorenzo*. As the *Goff* opinion and State Farm recognize, *Jerkins* is consistent with the result in *Goff* (A 6; State Farm jurisdictional brief at 9).

As the Second District also observed, and State Farm tacitly acknowledges, *Esposito*⁵ and *Bobinski*⁶ involve materially different factual circumstances because the appraisal process had already been invoked or concluded by the time the insureds filed suit. Conflict jurisdiction does not rest where the facts are not analytically the same. *See Department of Revenue v. Johnston*, 442 So. 2d 950

³ *State Farm Florida Insurance Company v. Lorenzo*, 969 So. 2d 393 (Fla. 5th DCA 2007).

⁴ *Jerkins v. USF&G Specialty Insurance Company*, 982 So. 2d 15 (Fla. 5th DCA 2008).

⁵ *Federated National Insurance Company v. Esposito*, 937 So. 2d 199 (Fla. 4th DCA 2006).

⁶ *Nationwide Property and Casualty Insurance v. Bobinski*, 776 So. 2d 1047 (Fla. 5th DCA 2001).

(Fla. 1983). The Fifth District in *Jerkins* observed that *Esposito* and its own decision in *Bobinski* addressed materially different facts.

State Farm's agenda is clear at page 9. It wants to change the law of Florida to require some "misconduct" that in its view would "force" an insured to sue. This would be contrary to this Court's holdings, as in *Ivy*, which permit a fee for "any dispute" that leads to a favorable resolution for the insured, and would conflict with §627.428, which imposes no subjective "misconduct" requirement. In *Goff* there was a bona fide dispute when the insureds sued, and the insureds had the option to file suit because State Farm's policy did not make appraisal a prerequisite to suit.

There is no conflict created by the refusal of the Second District, and the other district courts of appeal, to rewrite the Florida fee statute (or State Farm's policy) as State Farm wishes.

CONCLUSION

State Farm has failed to meet its burden to show that there is a conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: ELIZABETH K. RUSSO, ESQ., Russo Appellate Firm, P.A., 6101 Southwest 76th Street, Miami, Florida 33143 and CURT ALLEN, ESQ., Butler, Pappas, et al., One Harbour Island Place - Suite 500, 777 S. Harbour Island Boulevard, Tampa, Florida 33602, Attorneys for Petitioner, on March 26, 2009.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using 14-point Times New Roman type, a font that is proportionately spaced.

Attorney