

# In the Supreme Court of Florida

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CASE NO.: SC09-401

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STATE FARM FLORIDA INSURANCE COMPANY,

Petitioner,

v.

CHAD GOFF and CAROL GOFF,

Respondents.

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ON DISCRETIONARY REVIEW FROM THE  
SECOND DISTRICT COURT OF APPEAL

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## **PETITIONER'S BRIEF ON JURISDICTION**

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## STATEMENT OF THE CASE AND FACTS

This case arises from a property insurance claim of Respondents Chad Goff and Carol Goff (“the insureds”) for hurricane damage to their home in 2004. (A 2).<sup>1</sup> Petitioner State Farm Florida Insurance Company (“State Farm”) made payments on the loss based on its inspections. (A 2-3). Some considerable time later, the insureds hired a public adjuster who submitted his own estimate of the damage at \$66,708.44, a number that was \$23,648.61 in excess of the insureds’ actual loss as later determined in appraisal. (A 2-3). State Farm had an adjuster go out to reinspect the property, and issued an additional payment. (A 3).

The insurance contract between the parties contained an appraisal clause which provides, in pertinent portion, as follows:

**Appraisal.** If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser.

(A 3, n 2). Although the only issue about the hurricane claim was the amount of loss, the insureds did not invoke the appraisal clause but rather chose to file a lawsuit against State Farm. (A 3). The suit alleged breach of contract. (A 3).<sup>2</sup> As

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<sup>1</sup> The Second District’s decision is attached as an Appendix under Fla. R. App. P. 9.120(d). References to the Appendix appear as (A \_\_). Unless otherwise indicated, emphasis in this brief has been supplied by undersigned counsel.

<sup>2</sup> The insureds’ suit also sought declaratory relief as to an issue about the

the Second District's opinion accurately reflects, prior to their instigation of litigation, there was no communication by the insureds to State Farm that they disagreed with its total payments and that there was accordingly a dispute as to the amount of loss that would make invoking the appraisal clause appropriate. (A 3).

Upon learning, through receipt of the lawsuit papers, that the insureds disagreed with State Farm's assessment of the amount of loss, State Farm moved to compel appraisal. (A 3). The motion was granted (A 3), and the insureds' lawsuit was stayed pending completion of the appraisal process. (A 4). The appraisal process then went forward, and State Farm promptly paid the appraisal award when issued in accordance with the policy terms. (A 3-4).

The insureds went back to court and sought an order 'confirming' the appraisal award, which the trial court declined to enter because the appraisal award had already been paid by State Farm. (A 4). The insureds then sought to have State Farm's payment of the appraisal award resulting from completion of the contractual appraisal process characterized as a 'confession of judgment' that would entitle the insureds to attorney's fees under § 627.428, Fla. Stat. (A 4). The trial court also declined to make that ruling. (A 4).

State Farm moved for final summary judgment asserting that the insureds' timing of payment of overhead and profit, an issue they were to lose at the trial and appellate court levels. (A 4, 7-10).

lawsuit was unnecessary, that State Farm had complied with all of the policy terms, and that the contractual appraisal process, not the lawsuit, had resolved the only issue between the parties as to the amount of loss. (A 4). The trial court granted State Farm's motion, finding that State Farm had not breached the insurance contract. (A 4).<sup>3</sup>

The insureds appealed, and the Second District Court of Appeal reversed, stating, in pertinent portion for these review proceedings:

[T]he Goffs wanted a judgment against State Farm in order to secure attorney's fees under section 627.428. [fn omitted]. After all, according to the Goffs, their lawsuit was the impetus for payment. State Farm disputes this. What the parties ignore, however, is that "[a]ctual rendition of an order or decree is not an absolute prerequisite to an insured's entitlement to attorney's fees under the statute." [cites omitted]. \* \* \*

... State Farm requested an appraisal only after the Goffs sued. The Goffs are entitled to section 627.428 attorney's fees because their lawsuit forced State Farm to request an appraisal and to pay significant additional amounts. .... State Farm's payment of the appraisal award entitled the Goffs to section 627.428 attorney's fees.

(A 4-5).

### **SUMMARY OF ARGUMENT**

The Second District's decision expressly and directly conflicts with this Court's decision in *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217,

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<sup>3</sup> The trial court also found in favor of State Farm as to the question of timing on payment for contractor overhead and profit. (A 4). That ruling was affirmed, and Petitioner does not seek discretionary review as to that issue.

219 n. 2 (Fla. 1983) and with the district court decisions in *Federated Nat'l Ins. Co. v. Esposito*, 937 So. 2d 199, 201-02 (Fla. 4th DCA 2006); *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 397 (Fla. 5th DCA 2007); and *Nationwide Prop. and Cas. Ins. v. Bobinski*, 776 So. 2d 1047 (Fla. 5th DCA 2001). The conflict is that the Second District is holding that an insured's entitlement to attorney's fees under § 627.428, Fla. Stat. is triggered solely by the *timing* of the insured's filing a lawsuit without regard to whether there was any *necessity* for filing a lawsuit in order to obtain the insurance benefits in question.

Further, the Second District's decision on its face recites a factual dispute between the insurer and the insured as to whether there was any necessity for the suit, and then goes on - in an *appellate decision* - to resolve the factual dispute in the insured's favor. In *Wollard*, this Court indicated not only that the issue of necessity is significant, but also that any factual dispute over the issue is to be resolved in the trial court.

The conflict is important because it reflects a general confusion generated by the current state of the § 627.428 attorney's fee decisions. The statute was intended to *discourage* insurers from creating unnecessary litigation, as *Wollard* made clear. Some of the more recent decisions from the district courts, however, including the subject *Goff* decision, now *encourage* insureds to create unnecessary litigation for the sole purpose of getting fee awards. The conflict needs resolution.

## ARGUMENT

Although the Second District's decision does not reflect all of the material facts, just that facts that do appear on the face of the decision show the following. The trial court ruled that State Farm had not breached the policy. State Farm was in the process of working with the insureds' public adjuster on the amount of loss. Instead of either invoking appraisal (the *non-litigation* means for resolving any amount of loss disputes) or responding to State Farm's most recent assessment by advising of a disagreement, which would allow State Farm to invoke appraisal, the insureds filed a *lawsuit*. State Farm then immediately moved to compel appraisal, and the amount of loss dispute was resolved and paid pursuant to this contractual process.

On those facts, the trial court ruled that the insureds' motion for § 627.428 attorney's fees should be denied because State Farm had never breached any of its policy obligations, had paid the loss pursuant to the policy and the appraisal clause, and no litigation had been necessary for the insureds to obtain their policy benefits. The Second District, however, indicated that it did not matter whether it was necessary for the insureds to file suit to obtain policy benefits, as they could get a fee award simply because their filing of the lawsuit predated the payment of the appraisal award:

[T]he Goffs wanted a judgment against State Farm in order to secure

attorney's fees under section 627.428. According to the Goffs, their lawsuit was the impetus for payment. State Farm disputes this. What the parties ignore, however, is that "[a]ctual rendition of an order or decree is not an absolute prerequisite to an insured's entitlement to attorney's fees under the statute."

(A 4-5). Under the Second District's decision, § 627.428 fees are available so long as the insured has managed to get a lawsuit filed before the insurer is able to complete the loss adjustment process, including through use of the parties' appraisal clause if the parties are unable to agree as to the amount of the loss. It is irrelevant, under the *Goff* decision, whether it was *necessary* for the insureds to resort to litigation to obtain payment of their policy benefits.

This Court's decision in *Wollard*, however, while dispensing with the requirement that an insured litigate a dispute all the way through to judgment in order to recover fees (saying that a payment of the claim by the insurer after the claim was in litigation would be deemed a 'confession of judgment'), did *not* dispense with the necessity of litigation requirement. The *Wollard* decision adopted the reasoning of *Gibson v. Walker*, 380 So. 2d 531 (Fla. 5th DCA 1980) as to why insureds should not be required to go through to judgment to get § 627.428 fees, but also noted that the *Gibson* Court had not expressly acknowledged the requirement that some misconduct of the insurer force the insured to resort to litigation in order for a right to the statutory fees to arise:

The Fifth District in *Gibson* does not expressly address *the requirement*

**that the insurance company unreasonably withhold payment under the policy as a condition precedent to the award of attorney's fees.**

Recognition of this threshold issue is implicit, however, in the district court's instruction on remand that the trial court inquire anew into the necessity of the legal services rendered as well as their reasonable value.

*Wollard, supra*, 439 So. 2d at 219, n. 2.

The Second District's decision is thus in conflict with *Wollard*, and with other district court decisions that have also emphasized the requirement that an insured have been forced into litigation before the right to fees under §627.428 can arise.

As the Fifth District stated in *Lorenzo, supra*:

The confession of judgment doctrine turns on the policy underlying section 627.428: discouraging insurers from contesting valid claims and reimbursing insureds for attorney's fees when they must sue to receive the benefits owed to them. [cite omitted]. ***This doctrine applies where the insurer has denied benefits the insured was entitled to, forcing the insured to file suit, resulting in the insurer's change of heart and payment before judgment.*** [cites omitted]. However, courts generally do not apply the doctrine where the insureds were not forced to sue to receive benefits; applying the doctrine would encourage unnecessary litigation by rewarding a race to the courthouse for attorney's fees even where the insurer was complying with its obligations under the policy. [cite omitted] The reasoning in *Tristar Lodging, Inc. v. Arch Specialty Insurance Co.*, 434 F. Supp. 2d 1286, 1297-98 (M.D. Fla. 2006)(citations and footnote omitted), is persuasive here:

Plaintiff ... cite[s] [cases applying the confession of judgment doctrine] for the proposition that the Court [must] ... award fees whenever a Plaintiff sues an insurer and money is later paid. The Court declines to read the statute so broadly.... If Plaintiff were correct, then it would behoove every policyholder to sue whenever a claim is contemplated, because, ... whether the claim is eventually adjusted downward or paid in full, attorney's fees would automatically result. This ... would be contrary to the stated

purpose of the statute: discouraging lawsuits and encouraging timely payments of claims. If the insurer knows it will eventually have to pay attorney's fees regardless, it loses the incentive to pay the claim timely, and this would raise the likelihood that the claim will be contested. Moreover, there is a fundamental due process concern in finding that an insurance company which appropriately pays a valid claim according to the Policy terms must still pay attorney's fees, because a claimant sued it to do what it was already in the process of doing.... [T]his statute ... ha[s] 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.

For similar reasons, the Court rejects Plaintiff's argument that payments made pursuant to the provisions of the Policy are somehow converted into a confession of judgment if done after suit is prematurely filed. The filing of a lawsuit does not extinguish the insurer's obligations under the Policy to adjust and pay the claim. While Florida law does hold that payments are treated as confessions of judgment where an insurer first disputes the claim and then settles, the existence of a bona fide dispute and not the mere possibility of a dispute, is a crucial condition precedent to such a holding.

*Lorenzo, supra*, 969 So. 2d at 397-399. The Fourth District in *Esposito, supra*, 937 So. 2d 199 (Fla. 4th DCA 2006) refused to award fees under § 627.428 where an appraisal had resolved the parties' dispute and there was no need for the insured to have filed anything in court:

To rule otherwise would encourage an insured to run to the courthouse rather than to participate in the alternative dispute resolution outlined by the agreement between the parties. This is contrary to the intent and purpose behind the appraisal process.

937 So. 2d at 201-02. *Bobinski, supra*, similarly refused to award fees where the

insured's claims were resolved by appraisal.<sup>4</sup>

The insurance attorney's fees statute is in the nature of a penalty. *Main v. Benjamin Foster Co.*, 192 So. 602, 604 (1939). Statutes awarding attorney fees in the nature of a penalty must be strictly construed. *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 615 (Fla. 1995). The *Goff* Court's decision to expand the *Wollard* 'confession of judgment' interpretation of the statute's word 'judgment' to include any payment made after an insured files suit without regard to whether the suit was necessary to recover policy benefits is not a strict construction of the statute, and it does not comport with the purpose of the statute.

The conflicting decisions are proliferating, both in other districts and within districts. For example, *Jenkins v. USF & G Specialty Ins. Co.*, 982 So. 2d 15 (Fla. 5th DCA 2008), like *Goff*, allows an award of fees based solely on payment of an appraisal award after the insured filed suit, with no showing that any misconduct by the insurer forced the insured to sue. In *Holder v. State Farm Ins. Co.*, 994 So. 2d 521 (Fla. 3d DCA 2008), as here, the district court reversed a trial court order denying fees based on an appellate court *assumption* that the insured was 'forced to

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<sup>4</sup> In *Esposito* and *Bobinski*, the insureds had filed lawsuits after appraisal had been invoked or concluded whereas here the insureds filed suit before giving State Farm a chance to invoke appraisal. But, that factual distinction is not significant for purposes of the conflict argument because the emphasis in *Esposito* and *Bobinski* was clearly on whether the subject lawsuit was *necessary*; whereas under the *Goff* only the *timing* of filing the suit has legal significance.

sue’, with no indication of any record evidence of breach on contract or other misconduct by the insurer.

Petitioner respectfully submits that the bench, bar, and the public would benefit if this Court were to accept this case for review and resolve the conflict one way or the other. Statutory attorney’s fees have their own lure. In insurance property disputes, particularly in cases like the instant case where the insureds’ claim is resolved in appraisal, the insureds have nothing to gain from unnecessary litigation filed ‘on their behalf’ solely to recover fees. The insureds still get only the payment on their claim; it is attorneys who get the fees (usually plus a percentage of the claim payment, thereby *lessening* the insured’s recovery). The mandated strict construction should be enforced to safeguard the original intent of the statute, which is to *discourage* litigation.

### **CONCLUSION**

Based on the foregoing facts and authorities, Petitioner respectfully prays that the Court accept the case for discretionary review.

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**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on Jurisdiction was sent by U.S. mail this 12th day of March, 2009 to: Matthew R. Danahy, Esquire, Danahy & Murray, P.A., 2304 West Cleveland Street, Suite 100, Tampa, Florida 33609; and Raymond T. Elligett, Jr., Esquire, Buell & Elligett, P.A., 3003 W. Azeele Street, Suite 100, Tampa, Florida 33609.

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**CERTIFICATE OF COMPLIANCE WITH FONT STANDARD**

Undersigned counsel hereby respectfully certifies that the foregoing Brief on Jurisdiction complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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