

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JACQUELINE HILL,

Petitioner,

CASE NO.: SC10-1276

vs.

L.T. CASE NO.: 2D07-2311

STATE FARM FLORIDA
INSURANCE COMPANY,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
The Second District’s new conditions for an insured to be entitled to recover statutory attorney’s fees conflict with decisions of other district courts of appeal and this Court.....	3
A. Standard of Review	3
B. The Second District’s new requirements for an insured to seek statutory fees conflict with decisions of the Third and Fifth District Courts of Appeal.....	4
C. <i>Hill</i> conflicts with this Court’s decision in <i>Auto-Owners</i> <i>v. Anderson</i>	7
D. The Second District’s holding will cause a significant expenditure of judicial resources while insurers contest the insureds’ entitlement to attorney’s fees.....	8
CONCLUSION	10
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

CASES

<i>Auto Owners Ins. Co. v. Anderson</i> , 756 So. 2d 29 (Fla. 2000)	3, 8
<i>Beverly v. State Farm Florida Ins. Co.</i> , Second DCA Case No. 2D09-2317	9
<i>Clifton v. United Casualty Ins. Co.</i> , 31 So. 3d 826 (Fla. 2d DCA 2010).....	1, 4, 6, 7
<i>Ford Motor Co. v. Kikas</i> , 401 So. 2d 1341 (Fla. 1981)	4
<i>Goff v. State Farm Florida Ins. Co.</i> , 999 So. 2d 684 (Fla. 2d DCA 2008), <i>review denied</i> , 21 So. 3d 813 (Fla. 2009)	2
<i>Holder v. State Farm Ins. Co.</i> , 994 So. 2d 521 (Fla. 3d DCA 2008).....	3, 5, 7
<i>Ivey v. Allstate Ins. Co.</i> , 774 So. 2d 679 (Fla. 2000)	8
<i>Jerkins v. USF&G Specialty Ins. Co.</i> , 982 So. 2d 15 (Fla. 5th DCA 2008).....	3, 6
<i>Lewis v. Universal Property and Casualty Ins. Co.</i> , 13 So. 3d 1079 (Fla. 4th DCA 2009).....	6
<i>Rittweger v. State Farm Florida Ins. Co.</i> , Fifth DCA Case No. 5D09-4249	9
<i>State Farm Florida Ins. Co. v. DeIrish</i> , Second DCA Case No. 2D09-1721	9
<i>State Farm Florida Ins. Co. v. Lorenzo</i> , 969 So. 2d 393 (Fla. 5th DCA 2007).....	6

OTHER AUTHORITIES

§ 627.428(1), Florida Statutes.....5, 7

§ 627.428, Florida Statutes passim

STATEMENT OF THE CASE AND FACTS

The Second District's decision in this case presents the same issue as, and relies on, the opinion in *Clifton v. United Casualty Ins. Co.*, 31 So. 3d 826 (Fla. 2d DCA 2010).

Jacqueline Hill's home suffered damage from a fire in February 2005, and she promptly contacted her insurer, State Farm Florida Insurance Company (A 2). The Second District's opinion details disagreements Ms. Hill and State Farm had during the adjusting process, before suit (A 2-3). Hill filed suit in September and State Farm responded, seeking appraisal (A 3).

The *Hill* opinion recites that the parties had a disagreement about damage to a chain link fence, and that the trial court granted Ms. Hill's motion to compel appraisal of the chain link fence (A 3). The appraisers returned an award of approximately \$40,000 more than State Farm had voluntarily paid before appraisal (A 4). State Farm paid the full appraisal award (A 4). The opinion does not suggest that State Farm continued to refuse to pay for the chain link fence damage and, if the Court accepts the case, the full record will confirm this was among the sums State Farm originally denied and then paid (A 4).

Hill then recites what it describes as the procedurally complex aspects of the suit, leading to a summary judgment in State Farm's favor — despite the fact that State Farm had been required to pay \$40,000 more after suit and appraisal, and had

been ordered in the lawsuit to engage in appraisal on specific parts of the claim (the chain link fence) (A 1, 4-6).

The Second District reversed the summary judgment and remanded to the trial court (A 7-8). *Hill* held that — despite the additional recovery after suit (which included discrete disputed items on which the trial court had to order appraisal) — a “fact intensive” determination was required to find if the lawsuit was filed to force State Farm to conduct an appraisal, or whether it was a preemptive lawsuit intended to obtain fees for the usual efforts in negotiating an insurance claim (A 7-8). The opinion did not comment on the fact that State Farm’s contract does not make appraisal a precondition to filing suit. *See Goff v. State Farm Florida Ins. Co.*, 999 So. 2d 684, 686, n.2 (Fla. 2d DCA 2008), *review denied*, 21 So. 3d 813 (Fla. 2009).¹

The Second District denied Hill’s motion for certification. Hill has invoked this Court’s discretionary review and argues that the new Second District conditions for an insured to recover fees under § 627.428 conflict with prior rulings of other district courts of appeal and this Court.

¹ Ms. Hill did not seek fees for the appraisal process itself, an issue the opinion addresses at A 8.

SUMMARY OF ARGUMENT

The Second District's new conditions for an insured to recover fees under § 627.428 conflict with the decisions of the Third and Fifth District Court of Appeal, respectively, in *Holder v. State Farm Ins. Co.*, 994 So. 2d 521 (Fla. 3d DCA 2008) and *Jerkins v. USF & G Specialty Ins. Co.*, 982 So. 2d 15 (Fla. 5th DCA 2008). *Hill* also, in effect, rewrites the insurance policy here to make appraisal a precondition to the insured filing a suit when the insured believes the carrier is breaching the contract. Such a rewriting of the insurance policy conflicts with this Court's decision in *Auto Owners Ins. Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000).

ARGUMENT

The Second District's new conditions for an insured to be entitled to recover statutory attorney's fees conflict with decisions of other district courts of appeal and this Court.

A. Standard of Review.

Because this Court makes the initial decision on whether it will accept this case based on conflict jurisdiction, it is not reviewing the decision of an underlying court on the merits. This Court determines as a matter of law if there is conflict between the decisions.

The district court opinion need not identify the conflict to create jurisdiction based on expenses and direct conflict. *Ford Motor Co. v. Kikas*, 401 So. 2d 1341, 1342 (Fla. 1981).

B. The Second District's new requirements for an insured to seek statutory fees conflict with decisions of the Third and Fifth District Courts of Appeal.

In *Clifton*, the Second District said it was imposing a new requirement that the insured in a first-party property case notify the carrier that the insured was dissatisfied with payments made to date before filing suit. *Hill* cites *Clifton*, but apparently requires something other than notifying the carrier of a disagreement, as *Hill* recites instances of clear disagreements before suit between Ms. Hill and State Farm (A 2-3). Indeed, the opinion recites that Ms. Hill successfully compelled a broader appraisal through her motion in the suit — thereby, showing the suit served to “force” the carrier to appraisal on that issue (A 3).

Hill requires a fact-intensive determination of whether a suit was filed to force the insurer to conduct appraisal or was merely intended to obtain fees (A 7-8). Whatever the new conditions may be, they conflict with the decisions of other district courts awarding fees in first-party appraisal cases.

Florida's other district courts of appeal have recognized that (1) when an insured files suit, (2) the insurer invokes appraisal, and (3) the insured recovers an award the insurer pays, (4) then the insured is entitled to statutory attorney's fees.

Those decisions impose no condition the insured first notify the insurance company that he disagrees with the payment, or believes the insurance company is breaching the contract. Indeed, such a notice is not imposed in general for breach of contract suits, absent some provision in a contract requiring an opportunity to cure a claimed breach.

The Third District held the insured was entitled to fees under indistinguishable facts in *Holder v. State Farm Ins. Co.*, 994 So. 2d 521 (Fla. 3d DCA 2008). There, the insured also suffered hurricane damage and the insurance company paid what it determined was the loss. A year later, the insured filed suit and the insurer invoked the appraisal clause, resulting in an appraisal award of \$50,178, which the insured paid. The Third District stated that “although it is obvious that the filing of the action directly resulted in the payment of over 500 times the amount previously offered, the trial judge denied a claim for attorney’s fees under § 627.428(1).” The Third District reversed for an award of fees pursuant to the statute. The Third District did so without any requirement that the trial court consider whether the insured had first notified the insurer of his dissatisfaction with the initial payment, or make any fact-intensive determination.

The Fifth District held the insured was entitled to fees in *Jerkins v. USF & G Specialty Ins. Co.*, 982 So. 2d 15 (Fla. 5th DCA 2008). There the insurer adjusted the claim, concluded the damage was less than the policy deductible, and so made

no payment. Six months later, the insureds sued for breach of contract and the insurer invoked the appraisal clause in the policy. The appraisal determined the loss to be \$9,084, which the insurer paid minus the deductible. The trial court denied § 627.428 attorney's fees to the insureds and they appealed. The Fifth District held the payment of the appraisal award was a confession of judgment entitling the insureds to fees.²

The *Hill* opinion observes that State Farm disagreed with Ms. Hill about damage to a chain link fence and that the trial court granted Ms. Hill's motion to compel appraisal of the chain link fence (A 3). When State Farm later paid the full appraisal award (including the chain link fence claim), that was a classic

² *Hill* and *Clifton* cited *Lewis v. Universal Property and Casualty Ins. Co.*, 13 So. 3d 1079 (Fla. 4th DCA 2009), which addressed an insured's entitlement to fees when the insured filed suit *after* the insurer had invoked the appraisal process, noting such cases reach different results depending on the facts. *Lewis* earlier noted that Florida cases had uniformly recognized an insured's entitlement to § 627.428 fees when the insured filed suit and the insurer thereafter invoked its right to an appraisal. Ms. Hill recognizes, as *Lewis* did, that there are different considerations when an insured files suit after one of the parties has already invoked appraisal. However, those are not the facts here.

Jerkins discussed the court's decision in *State Farm Florida Ins. Co. v. Lorenzo*, 969 So. 2d 393 (Fla. 5th DCA 2007). *Clifton* cited *Lorenzo* as support, but did not address *Jerkins*. As the *Clifton* opinion characterized *Lorenzo*, it involved an insured who filed suit *after* the insurer had fully paid all amounts due, pursuant to a pre-suit appraisal.

confession of judgment. And *Hill* ignores that Ms. Hill successfully forced a broader appraisal through her motion in the suit (A 3).

When the insured has filed suit against an insurer that has refused to pay what the insured believes is owed — and only then does the insurer invoke appraisal — if appraisal results in an award of a greater amount to the insured, *Holder* and *Jenkins* hold the insured is entitled to fees. No case from the other district courts of appeal, nor any case from this Court, imposes additional requirements. Neither *Hill* nor *Clifton* cited to language requiring more in the policy, or in § 627.428 — because there are no such requirements. The Second District’s newly announced approaches conflict with the plain wording of § 627.428(1), and would usher in a new era of fee entitlement litigation.

State Farm may argue that neither *Holder* nor *Jenkins* established or discussed a rule requiring that an insured inform the insurer that a dispute exists (an argument its law firm made in the jurisdictional answer brief in *Clifton*). That is exactly the point. Those cases do not establish such a rule, and that is why there is a conflict with the Second District decisions that do.

C. *Hill* conflicts with this Court’s decision in *Auto-Owners v. Anderson*.

The Second District opinions, in effect, have rewritten the appraisal language in the insurers’ policies to make it a precondition to suit. This conflicts

with another established principle from this Court: that it will construe a policy according to the plain language, and not revise it as the insurer could have drafted it. *See, e.g., Auto Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 33 (Fla. 2000).

D. The Second District’s holding will cause a significant expenditure of judicial resources while insurers contest the insureds’ entitlement to attorney’s fees.

This Court has addressed the purpose of § 627.428’s entitlement to fees: “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.” *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000).³

This Court should exercise its discretion to accept jurisdiction because *Hill* and *Clifton* will usher in a new era of fee entitlement litigation. *Hill* and *Clifton* both remanded to the trial court for further proceedings, which *Hill* observed will require “a determination that is fact intensive” (A 7).

In other words, *Hill* and *Clifton* will usher in a new era of trials on whether the insured should have done something else — not required as a precondition to

³ *Ivey* also held: “[I]f 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.” 774 So. 2d at 684.

suit in the policy — before filing suit. That property and casualty insurer State Farm advances this position, along with others such as Clifton’s insurer, portends for an onslaught of fee entitlement litigation.⁴ Given the opportunity to brief the merits, Ms. Hill will also argue that so empowering insurers to litigate entitlement in this manner would have a chilling effect on insureds exercising their policy rights. This would “unlevel” the playing field that § 627.428 is intended — and this Court has long sought — to balance.

⁴ Additional appeals involving State Farm that present this or a variation of this issue include *Beverly v. State Farm Florida Ins. Co.*, Second DCA Case No. 2D09-2317 (oral argument June 1, 2010); *State Farm Florida Ins. Co. v. DeIrish*, Second DCA Case No. 2D09-1721(oral argument set for August 10, 2010); *Rittweger v. State Farm Florida Ins. Co.*, Fifth DCA Case No. 5D09-4249.

CONCLUSION

The Second District's interjection of new requirements for an insured to exercise its right to recover statutorily mandated fees conflicts with the cited decisions of the Third and Fifth District courts of appeal, and with this Court's decision in *Auto Owners v. Anderson*. Ms. Hill respectfully requests this Court accept jurisdiction to consider on the merits the scope of an insured's entitlement to fees when an insurer has refused to pay benefits that are owing, which the insured later recovers.

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: ANTHONY J. RUSSO, ESQ. and CURT ALLEN, ESQ., Butler, Pappas, One Harbour Place, Suite 500, 777 S. Harbour Island Boulevard, Tampa, Florida 33602, Attorneys for Respondent, on July 12, 2010.

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

INDEX TO APPENDIX

<i>Hill v. State Farm Florida Insurance Company</i> , Second DCA Case No. 2D07-2311 (Fla. 2d DCA May 7, 2010)	A 1-9
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