

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1276

JACQUELINE HILL,

Petitioner,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

On Appeal from the Second District Circuit of Appeal
Case No. 2D07-2311

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP

LEE CRAIG, ESQ.
Florida Bar No. 485985
ANTHONY J. RUSSO, ESQ.
Florida Bar No. 0508608
777 S. Harbour Island Boulevard, Suite 500
Tampa, Florida 33602
(813) 281-1900

Attorneys for State Farm Florida Insurance Company

TABLE OF CONTENTS

TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
1. <i>Hill</i> does not conflict with <i>Holder v. State Farm Ins. Co.</i> , 994 So. 2d 521 (Fla. 3d DCA 2008) or <i>Jerkins v. USF&G Specialty Ins. Co.</i> , 982 So. 2d 15 (Fla. 5th DCA 2008).....	3
2. <i>Hill</i> does not conflict with <i>Auto-Owners v. Anderson</i> , 756 So. 2d 29, 33 (Fla. 2000).....	8
3. This Court should not exercise its jurisdiction, if any, to review this case. 9	
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF TYPE SIZE & STYLE.....	11

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<i>Auto-Owners v. Anderson</i> , 756 So. 2d 29 (Fla. 2000).....	8, 9
<i>Clifton v. United Casualty Ins. Co.</i> , 31 So. 3d 826 (Fla. 2d DCA 2010)	7
<i>Federated National Insurance Co. v. Esposito</i> , 937 So. 2d 199 (Fla. 4th DCA 2006)	2
<i>First Floridian Auto & Home Ins. Co. v. Myrick</i> , 969 So. 2d 1121 (Fla. 2d DCA 2007)	2
<i>Goff v. State Farm Fla. Ins. Co.</i> , 999 So. 2d 684 (Fla. 2d DCA 2008)	2, 7
<i>Hill v. State Farm Florida Ins. Co.</i> , 35 So. 3d 956 (Fla. 2d DCA 2010)	1, 4-10
<i>Holder v. State Farm Ins. Co.</i> , 994 So. 2d 521 (Fla. 3d DCA 2008)	3, 5
<i>Jerkins v. USF & G Specialty Ins. Co.</i> , 982 So. 2d 15 (Fla. 5th DCA 2008)	2, 3, 5, 6
<i>Lewis v. Universal Property and Cas. Ins. Co.</i> , 13 So. 3d 1079 (Fla. 4th DCA 2009)	1, 2
<i>Travelers Indem. Co. v. Chisholm</i> , 384 So. 2d 1360 (Fla. 2d DCA 1980)	3
<i>Travelers Indemnity Insurance Company of Illinois v. Meadows MRI, LLP</i> , 900 So. 2d 676 (Fla. 4th DCA 2005)	2

Statutes

§ 627.428, Florida Statutes	1, 3, 6
-----------------------------------	---------

STATEMENT OF THE CASE AND FACTS

State Farm relies on the facts set forth in the opinion of the Second District Court of Appeal's *Hill v. State Farm Florida Ins. Co.*, 35 So. 3d 956 (Fla. 2d DCA 2010).

SUMMARY OF ARGUMENT

The Second District's opinion in *Hill*, 35 So. 3d 956 conforms to a growing body of Florida case law that holds an insurer's payment of an appraisal award, after the policyholder has filed suit, does not *automatically* constitute a confession of judgment that would *automatically* entitle the policyholder to an award of attorneys' fees under § 627.428. "[W]hether suit is filed before or after the invocation of the appraisal process is not determinative of the insured's right to fees; rather, the right to fees turns upon whether the filing of the suit served a legitimate purpose." *Lewis v. Universal Property and Cas. Ins. Co.*, 13 So. 3d 1079, 1082 (Fla.4th DCA 2009). *Hill* cites to this *Lewis* case for the proposition that "the underlying rationale of awarding attorneys' fees under section 627.428 is the notion that the insureds filed suit 'to resolve a legitimate dispute' and not simply to collect attorneys' fees." In *Hill*, the Second District affirmed the judgment in part, and remanded the case to the trial court to determine whether Hill filed a legitimate suit to resolve an actual dispute with State Farm, or simply to collect attorneys' fees. *Hill*, 35 So. 3d at 960.

The Second District reasoned that, if a policyholder is forced to sue its property insurer to force compliance with the policy, or to force a payment that is due, then the policyholder may be entitled to a fee award – assuming the insurer makes further payment.¹ But what if the policyholder is not forced to file suit but “races to the courthouse” while the claim is being adjusted simply to try and trigger a fee award? When the insurer makes a further payment, a fee award is not justified.² The insurer was going to pay anyway. The suit was unrelated to, and unnecessary to prompt, the payment.

A fee award under § 627.428 is a statutory penalty and, as such, is strictly construed.³ If the policyholder’s suit serves no **legitimate purpose**, then payments made after suit is filed cannot be a confession of judgment.

¹ *Lewis*, 13 So. 3d 1079, 1081 cites to *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008), *Jerkins v. USF & G Specialty Ins. Co.*, 982 So. 2d 15 (Fla. 5th DCA 2008); and *First Floridian Auto & Home Ins. Co. v. Myrick*, 969 So. 2d 1121 (Fla. 2d DCA 2007) as examples of cases where the insured was justified in suing the insurer, and “[u]nderlying these decisions is the notion that the insureds . . . did not ‘race to the courthouse’ . . .”

² *Lewis*, 2009 13 So. 3d at 1079, 1081 cites to *Travelers Indemnity Insurance Company of Illinois v. Meadows MRI, LLP*, 900 So. 2d 676 (Fla. 4th DCA 2005) and *Federated National Insurance Co. v. Esposito*, 937 So. 2d 199 (Fla. 4th DCA 2006) stating: “The decisions in these cases plainly indicate that whether suit is filed before or after the invocation of the appraisal process is not determinative of the insured’s right to fees; rather, the right to fees turns upon whether the filing of the **suit served a legitimate purpose.**”

³ “In an action on an insurance policy, the jurisdiction of the trial court to require the insurer to pay a reasonable attorney’s fee for the insured exists only as

ARGUMENT

1. ***Hill* does not conflict with *Holder v. State Farm Ins. Co.*, 994 So. 2d 521 (Fla. 3d DCA 2008) or *Jenkins v. USF&G Specialty Ins. Co.*, 982 So. 2d 15 (Fla. 5th DCA 2008).**

Here, Hill says there is no requirement that a policyholder's suit serve any "legitimate purpose." Hill says that any payment after the policyholder files suit triggers a fee award. Hill claims, erroneously, that two Florida case opinions⁴ have established this as a bright-line rule. A trial court, says Hill, always must make the insurer pay the policyholder's attorneys' fees when:

- a policyholder makes a property claim to the insurer; and
- the policyholder then sues the insurer; and
- the insurer responds with a demand for appraisal; and
- the appraisal panel resolves the amount of loss and the insurer pays the sum as determined by the panel to the policyholder.

(Petition at pp. 4-5.) In other words, Hill says the insurer's payment of the appraisal award after the policyholder files suit is *always* a confession of judgment that *always* entitles the policyholder to an award of fees. Indeed, Hill asserts State Farm's payment

provided by statute. Such a fee award pursuant to statute is recognized as a penalty provision." *Travelers Indem. Co. v. Chisholm*, 384 So. 2d 1360, 1361 (Fla. 2d DCA 1980).

⁴ *Holder v. State Farm Ins. Co.*, 994 So. 2d 521 (Fla. 3d DCA 2008) and *Jenkins v. USF&G Specialty Ins. Co.*, 982 So. 2d 15 (Fla. 5th DCA 2008).

of the appraisal award in this case was a “classic confession of judgment.” (Petition at pp. 6-7.)

First, State Farm objects to the characterization of its payment of the appraisal award as a confession of judgment. The Second District’s opinion does not say State Farm’s payment was a confession of judgment.⁵ Indeed, the Second District doesn’t say Hill’s suit was needed to force State Farm to do anything. To the contrary, the Second District expressly stated this was the very question to be answered on remand:

From the record in this appeal, we question whether this lawsuit [i.e., Hill’s lawsuit] was filed to force State Farm to conduct an appraisal or whether it was merely a preemptive lawsuit intended to obtain attorneys’ fees for the usual efforts in negotiating an insurance claim.

Hill, 35 So. 3d at 961. This question is the very basis of the Second

District’s ruling:

Accordingly, we reverse the final summary judgment and remand the case for a renewed determination of whether Ms. Hill filed her lawsuit in good faith in order to force State Farm to adjust the claim or whether she filed suit merely as an effort to seek attorneys’ fees for the normal process of adjusting the claim. If she filed her lawsuit in good faith in order to force State Farm to adjust the claim, then she is entitled to attorney’s fees. If not, then State Farm is not liable for the attorney’s fees she incurred as a result of filing suit.

Hill, 35 So. 3d at 958.

⁵ In fact, it granted summary judgment to State Farm on Hill’s breach of contract claim, and that part of the trial court’s judgment has been affirmed. (“In all other respects we affirm the judgment on appeal.” *Hill*, 35 So. 3d at 961.)

Second, Hill's assertion that *Holder* and *Jerkins* established a bright-line rule about confessions of judgment is wrong. *Holder* and *Jerkins* are examples of cases in which the appellate court found the policyholder was justified in hiring a lawyer and suing the insurer; neither case says the policyholder is *always* justified in hiring a lawyer and suing the insurer.

Holder held the policyholder was entitled to an award of fees after the property insurer paid an appraisal award that was "obviously effected by the lawsuit." *Holder*, 994 So. 2d at 522. ("[I]t is obvious that the filing of the action directly resulted in the payment of over 500 times the amount previously offered.") By contrast, *Hill* contains no similar finding that Hill's lawsuit netted any additional recovery that would not have been adjusted and paid in the normal course of adjusting and settling the claim. The Second District expressly leaves open the question whether Hill's suit "was merely a preemptive lawsuit intended to obtain attorneys' fees" *Hill*, 35 So. 3d at 961.

And in *Jerkins*, the Fifth District ruled that the insurer's payment of the appraisal award acted as a "confession of judgment" entitling the policyholders to attorney fees, based on a finding that:

[the] Jerkinses did not 'race to the courthouse' to file a complaint against USF&G, as they waited nearly six months after USF&G's initial assessment [and subsequent non-payment] to file their complaint. USF&G's payment to the Jerkinses acted as a confession of judgment, such that the Jerkinses were entitled to attorney's fees under section 627.428, Florida Statutes.

Jerkins, 982 So. 2d at 18. The Fifth District explained the factual record of the case was thin.⁶ Apparently the only circumstances that were documented in that case – that the insurer said it would make no payment and the policyholder waited for six months – were sufficient to justify the policyholder’s hiring of a lawyer and suing USF&G.

Hill’s case could not be more different. The *Hill* opinion shows State Farm immediately responded to Hill’s claim, providing board-up services the day of the fire, and that it provided her with an initial estimate to repair the damages within one week. State Farm had paid over \$120,000 to Hill, and it was actively engaged with the policyholder’s public adjustor, working to resolve remaining items of the claim, when Hill filed suit. The opinion does not say State Farm ever denied coverage for any item of the claim, and this includes the \$455 chainlink fence item.

Was there a legitimate dispute that required Hill to sue State Farm? Did Hill’s suit serve a legitimate purpose, or was it merely a bid for attorneys’ fees?

⁶ “The parties provide different accounts of what happened between USF&G’s initial estimate of damages in September or October 2004 and when the Jerkines filed their complaint in April 2005. The Jerkines maintain that they contacted USF&G to inform it that they were dissatisfied with its estimate of their property damage, but were ‘ignored.’ After waiting nearly six months for a response from USF&G, the Jerkines filed suit. USF&G, on the other hand, claims that it did not learn that the Jerkines were dissatisfied until they filed suit. Unfortunately, no testimony or evidence was presented at the fee hearing, so the record is silent on the matter.” *Jerkins*, 982 So. 2d at 16.

The Second District said these are the questions to be answered on remand. *Hill*, 35 So. 3d at 961. Remand is necessary because the trial court's ruling was made before the Second District issued its more recent decisions on these important questions, *Goff* and *Clifton*.⁷

Although the trial court may very well have reached the correct outcome in this case, we conclude that its legal analysis is inconsistent with our more recent cases. Accordingly, we reverse the final summary judgment and remand the case for a renewed determination of whether Ms. Hill filed her lawsuit in good faith in order to force State Farm to adjust the claim or whether she filed suit merely as an effort to seek attorneys' fees for the normal process of adjusting the claim. If she filed her lawsuit in good faith in order to force State Farm to adjust the claim, then she is entitled to attorney's fees. If not, then State Farm is not liable for the attorney's fees she incurred as a result of filing suit.

Hill v. State Farm Florida Ins. Co., 35 So. 3d 956, 958 (Fla. 2d DCA 2010).

That ruling is consistent with the rulings of *Holder* and *Jerkins*. Thus there is no conflict, and so there is no jurisdiction to review this case.

2. *Hill* does not conflict with *Auto-Owners v. Anderson*, 756 So. 2d 29, 33 (Fla. 2000) (court may not rewrite policy provisions).

Hill does not impose appraisal as a pre-condition for a suit by the policyholder. Nothing of the sort can be found in, or can be reasonably inferred from, the *Hill* opinion. *Hill* said the policyholder is entitled to fees if the policyholder had "filed her lawsuit in good faith in order to force State Farm to

⁷ *Goff v. State Farm Florida Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008), and *Clifton v. United Casualty Ins. Co.*, 31 So. 3d 826 (Fla. 2d DCA 2010).

adjust the claim” *Hill*, 35 So. 3d at 958. Thus the Second District recognized the right of a policyholder to file suit without demanding appraisal. But the Second District also said, and reasonably so, that a suit filed for no legitimate purpose will yield no fees, even if the insurer makes additional payment. The Second District added that Hill’s entitlement to

fees should normally be limited to the work associated with filing the lawsuit after the insurance carrier has ceased to negotiate or has breached the contract and the additional legal work necessary and reasonable to resolve the breach of contract.

Hill, 35 So. 3d at 961.

Here the Second District said that if, on remand, Hill can prove she was forced to file suit to prompt payment, or make State Farm comply with its contractual duties, then she may be entitled to recover fees incurred for legal work that has *preceded* the appraisal process. Thus, the *Hill* opinion does not require completion of the appraisal process before the policyholder can sue the insurer. Hill’s argument that the opinion requires appraisal as a precondition to suit is erroneous; there has been no rewriting of the contract by the Second District; thus there is no conflict with *Anderson*, 756 So. 2d at 29.

3. This Court should not exercise its jurisdiction, if any, to review this case.

The body of case law developing on these issues, now also expressed in the *Hill* case, provides a level playing field and sensible guidance to policyholders,

insurers, and trial courts. If the insurer fails or refuses to execute its duties during the adjustment process, and the policyholder must hire counsel to force the insurer back into line with the contract, then the insurer can be made to pay a reasonable fee to reimburse the policyholder.

But if the policyholder simply races to the courthouse with a dubious or unprovable claim that it was necessary to force the insurer to pay the claim – payments that the insurer was already in the process of making – or if the insurer is sued without any foreknowledge of a dispute or disagreement – then the insurer should not be penalized and should not be made to pay fees the policyholder has incurred unnecessarily.

There is no rule that the insurer owes policyholder's fees, whether or not the insurer has done anything wrong. That is not, and obviously should not, be the law. The promise of an automatic fee award against insurance companies – the position that Hill champions – is the surest way to “usher in a new era of fee litigation.” (Petition at p. 8.) The current rule, as articulated and applied in *Hill*, is reasonable and balanced, and it should not be disturbed.

CONCLUSION

The petition should be denied.

**BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP**

LEE CRAIG, ESQ.
Florida Bar No.: 485985
ANTHONY J. RUSSO, ESQ.
Florida Bar No.: 0508608
777 S. Harbour Island Blvd., Suite 500
Tampa, Florida 33602
(813) 281-1900
Attorneys for State Farm Florida Insurance
Company

CERTIFICATE OF SERVICE

I CERTIFY that a copy of Respondent's Jurisdictional Brief has been furnished by regular U.S. Mail on August 6, 2010 to the following.

Raymond T. Elligett, Jr., Esquire
Buell & Elligett, P.A.
3003 West Azeele Street, Suite 100
Tampa, FL 33609

David J. Pettinato, Esquire
Merlin Law Group, P.A.
777 S. Harbour Island Blvd., Suite 950
Tampa, FL 33602

LEE CRAIG, ESQ.

CERTIFICATE OF COMPLIANCE

I certify that the type, size, and style utilized in this Brief is 14 point, Times New Roman.

LEE CRAIG, ESQ.